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COVID-19 & LAW IN INDIA & AUSTRALIA—LESSONS FROM THE PANDEMIC FOR THE COSTS & DELAYS OF LEGAL PROCESS

—Justice (Retd.) Michael Kirby*

Abstract — In this article, the author compares and contrasts the responses of the legal systems of India and Australia to the novel coronavirus (COVID-19) that struck both countries and the world in early 2020. The prompt introduction in both countries of lockdown, remote hearings, and audio-visual links ('AVL') to permit courts to maintain their functions in defending the rule of law, present many similarities. However, both countries are obliged to address the challenge presented by Professor Richard Susskind, who views AVL and remote hearings as a potential means of escape from universal reliance on actual courts and hearings, with the delays and costs they typically involve. By reference to developments in the law and legal practice in India and Australia, the limited capacity and willingness to address more fundamental changes is explained. Actual hearings and effective public access to courts have a value beyond familiarity and long standing practice. Constitutional practice involves constant evolution in the law. This imposes limits on any mechanical changes to legal process by automated decision-making according to impersonal algorithms. Justice has a human dimension which needs safeguarding.

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Barriers and the Protection of Privacy (1978-80).

This article draws on a presentation given at the launch of the Australian Society of Computers and the Law held (by Microsoft Teams, 14 July 2020); and at the webinar that followed led by Professor Richard Susskind OBE. It develops on ideas earlier published in Australia in MD Kirby, 'COVID-19, Remote Court Hearings and Access to Justice' (2020) 30 *Alternative Dispute Resolution Journal* 256.

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I. COVID-19 AND ITS IMPACT ON COURTS

The arrival of the novel coronavirus ('COVID-19') at the end of 2019 bore some similarities to the advent of the Human Immunodeficiency Virus ('HIV') in the 1980s, threatening the lives of millions of human beings with the acquired immunodeficiency syndrome ('AIDS'). I was appointed to the World Health Organisation ('WHO') Global Commission on AIDS (1988-92). Acting with commendable speed, and without a medical cure or a vaccine to rely on, WHO offered the world strategies to tackle AIDS, including urgent steps that nations should take to reduce the toll of HIV infections. Supported later by scientific advances and new therapeutics, the development in India of reengineered generic drugs and substantial multilateral funding, the HIV epidemic was turned around. Although there is still no vaccine or cure for HIV, Antiretroviral Therapy (ART) of great effectiveness was developed in the late 1990s. Viruses, the world learned, are tricky and difficult targets for medical science and technology.

As in the case of HIV, and in default of immediate therapies or effective vaccines, WHO and local health authorities focused their attention on the advice they could give for infection control, to reduce the spread of the COVID-19 virus. This led to a close study of the modes of transmission of the virus; the identification of especially vulnerable groups exposed to heightened risks of infection; and proposals for the precautions that should be taken to minimise the spread of the virus.

Groups especially vulnerable to HIV numbered people commonly stigmatised in their own environments. They included gay men, transgender women, sex workers, injecting drug users, prisoners, and other detainees. In the case of COVID-19, stigmatisation has not been so common. In the early months, some people of Chinese appearance sometimes suffered hostility and discrimination. Subsequently, experience showed that COVID-19 had more serious (often lethal) consequences for older persons who became infected.

It is not unusual, including in democratic countries that observe the rule of law, to see exceptional legal measures introduced to meet challenges in times of health crises. A common measure, dating back to the treatment of lepers and others in Biblical times, has been the introduction of isolation and quarantine (the most rigorous and widespread form of protective lockdown) and the imposition of obligations to warn people susceptible to infection of any known risk that a carrier might spread to them.

In Australia, and most other developed countries, lawyers and lawmakers have been active in developing responses to COVID-19. Remembering the continuity of governmental services during the challenges of earlier epidemics following the First and Second World Wars, most legislatures continued

to function with minimum modifications, as did the courts. In 2020, a number of laws have been enacted or brought into legal effect, following earlier enactment of emergency powers that dealt with a range of topics. These related to the impact of the epidemic on the conduct of court hearings and trials; the provision of bail; the early release from prison of some low-risk offenders; the operation of planning laws; and of mental health laws; a moratorium on some evictions; and related variations of judgment enforcement measures.¹

In India, the pandemic raised concerns relating to fundamental rights which could not be easily addressed on account of various difficulties. There were also reported concerns about stigma amongst some communities during COVID-19 (Muslims, migrant workers) who claimed difficulty in securing judicial relief.² There was a widespread migrant workers' crisis wherein the right to livelihood, food, and housing was violated. The delayed intervention of the Supreme Court, as well as the Government of India, raised a number of concerns.³ At the same time, marginalised communities like transgender persons, sex workers, and street vendors faced increased stigma, discrimination, and violence.⁴

There was also the challenge of alleged Executive overreach because certain laws were made without effective consultation.⁵ Widespread objection arose because of the number of laws and policies that were notified during the pandemic without significant consultation or parliamentary approval. Even the application of disaster and emergency response laws, such as the Epidemic Diseases Act, 1897 and the National Disaster Management Act, 2005, was brought into effect by executive orders.⁶ The committee to reform the crimi-

¹ (2020) 94 Australian Law Journal 315, 316.

² Madan B Lokur, 'Supreme Court Deserves an 'F' Grade For Its Handling of Migrants' (*The Wire*, 28 May 2020) <<https://thewire.in/law/after-humanitarian-law-died-a-million-deaths-the-supreme-court-has-finally-stirred-itself>> accessed 11 December 2020.

³ Jagdeep S Chhokar, 'Migrant Worker Crisis: The Supreme Court Has Abdicated All Responsibility' (*The Wire*, 19 May 2020) <<https://thewire.in/law/supreme-court-migrant-workers-crisis-abdicate-responsibility>> accessed 11 December 2020; India must follow Supreme Court orders to protect 100 million migrant workers: UN rights experts' (*UN News*, 4 June 2020) <<https://news.un.org/en/story/2020/06/1065662>> accessed 11 December 2020; *Problems and Miseries of Migrant Labourers, In re* (2020) 7 SCC 399.

⁴ Kenneth Rosario, 'COVID-19 lockdown: transgender community pushed further to the margin' *The Hindu* (6 April 2020) <<https://www.thehindu.com/news/cities/mumbai/covid-19-lockdown-transgender-community-pushed-further-to-the-margin/article31265535.ece>> accessed 11 December 2020; Mirror Now Digital, 'Tamil Nadu custodial deaths: Grounds to file case against police officials, says Madras High Court' *Times Now* (30 June 2020) <<https://www.timesnownews.com/mirror-now/in-focus/article/tamil-nadu-custodial-deaths-grounds-to-file-case-against-police-officials-says-madras-high-court/614021>> accessed 11 December 2020.

⁵ Gautam Bhatia, 'An Executive Emergency: India's Response to Covid-19' (*Verfassungsblog*, 13 April 2020) <<https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/>> accessed 11 December 2020.

⁶ Goutham Shivshankar, 'Debating the Applicability of India's Disaster Management Law to COVID-19' (*Admin Law Blog*, 19 May 2020) <<https://adminlawblog>.

nal laws,⁷ laws on Environmental Impact Assessment Notification,⁸ new labour codes,⁹ and parliamentary passage of agricultural reform bills were brought into effect with public and parliamentary deliberation, and participation that was criticised as insufficient.¹⁰

Most appellate courts in Australia and India have adapted quite rapidly to audio-visual links ('AVL') technology. Similarly, courts undertaking trials in civil jurisdiction before single judges, sitting alone, have also adapted. Most such trials are now proceeding remotely and, in Australia, some courts have restored actual hearings in place of virtual hearings by AVL. Problems have reportedly arisen: (1) from occasional interruptions to visual images; (2) from difficulties in access for interested persons and the public so as to uphold the principle of judicial openness; (3) from the viewpoint of prisoners having access, in some cases, whilst in custody; (4) from the availability on screen of the images of all of the judges participating in multimember courts; and (5) from the complaints of some advocates that remote hearings appear to diminish the impact of their oral persuasion and that participating by AVL technology adds noticeably to the fatigue normal to long periods of concentration in physical courtroom settings.

In this paper, I intend to lay out the various challenges and considerations that are important with regard to the adoption of virtual mode of justice delivery in Australia and India during the COVID-19 crisis. Continuing the discussion on COVID-19 in this section, the second section focusses on the impact of COVID on judicial hearings in Australia. The third section focusses on the situation in the Indian courts. The fourth section compares the justice delivery scenarios in both jurisdictions primarily from the standpoint of judicial

org/2020/05/19/goutham-shivshankar-debating-the-applicability-of-indias-disaster-management-law-to-covid-19/> accessed 11 December 2020.

⁷ Veera Mahuli, 'Why is the Home Ministry's Committee on Criminal Law Reform Functioning in Secrecy?' (*The Wire*, 9 October 2020) <<https://thewire.in/law/criminal-law-reform-committee-transparency>>

⁸ PTI, 'Draft EIA 2020 Anti-Democratic, Fascist in Nature, Says Congress Leader Jairam Ramesh' *Financial Express* (14 August 2020) <<https://www.financialexpress.com/india-news/draft-eia-2020-anti-democratic-fascist-in-nature-says-congress-leader-jairam-ramesh/2054759/>> accessed 11 December 2020.

⁹ Special Correspondent, 'Passage of labour codes | Central trade unions plan protests' *The Hindu* (22 September 2020) <<https://www.thehindu.com/news/national/passage-of-labour-codes-central-trade-unions-plan-protests/article32671936.ece>> accessed 11 December 2020.

¹⁰ Amal Sethi and Prannv Dhawan, 'Abusing Parliamentary Procedures: Partisan Presiding Officers in India's Parliament and What Can be Done About Them' (*Verfassungsblog*, 9 October, 2020) <<https://verfassungsblog.de/abusing-parliamentary-procedures/>> accessed 11 December 2020; Ajoy Ashirwad Mahaprashasta, 'RSTV Footage, MPs' Accounts of Farm Bills Debate Paint Picture of RS Rules Violation' (*The Wire*, 27 September 2020) <<https://thewire.in/government/rajya-sabha-farm-bills-rules-violation-speaker>> accessed 11 December 2020; Express Web Desk, 'Farmers' Protest Live Updates: Farmers threaten to Block Railway Tracks; Ready for Further Talks, Says Tomar' *Indian Express* (10 December 2020) <<https://indianexpress.com/article/india/farmers-protest-live-updates-delhi-punjab-haryana-amit-shah-7097391/>> accessed 11 December 2020.

efficiency. The fifth section briefly notes the impact of tribunalisation on judicial efficiency in India, while the sixth section discusses the challenge of open justice and judicial transparency. The seventh section analyses the impact of technology on justice delivery and access to justice by foregrounding the imperative of judicial dissent and independence. The eighth section briefly outlines the challenges faced by the Alternate Dispute Resolution processes during COVID. The final section concludes by outlining the way forward for the common methodology of gainfully incorporating efficiency-enhancing technology into the judicial process.

II. IMPACT ON JUDICIAL HEARINGS IN AUSTRALIA

A. Historical antecedents

So far as widespread epidemics are concerned, courts in countries such as India and Australia have institutional memories about earlier times when a serious influenza-like pandemic had widespread consequences for liberty and the conduct of legal and parliamentary proceedings. For example, in Australia the ‘Spanish Flu’ arrived in 1919. This followed soon after the conclusion of the First World War. According to newspaper reports at the time,¹¹ the Minister for Health in New South Wales criticised the State Supreme Court judges for participating in full court hearings in the Banco Court in Sydney without wearing face masks. The Minister reportedly declared that he was “amazed at judges taking upon themselves to disobey the masking law”. The Chief Justice of the State at the time, Sir William Cullen, promptly alerted the Minister to the fact that he had received a communication from the Attorney-General declaring that the judges, whilst sitting in court, were exempt from wearing masks. What authority the Attorney-General had to carve out this judicial immunity was not revealed. Thus, advocates, when unmasked in court, were to keep a “reasonable distance from each other”. The 1919 instance in Australia demonstrates the capacity of history to repeat itself in such matters. In 2020, members of the public were frequently criticised for failing to wear face masks in public places, despite the evidence that masks afforded protection against the spread of droplets containing the virus, propelled by sneezing and coughing, especially in confined and crowded places.

After COVID-19 arrived in Australia in 2020, all of the courts (from the High Court of Australia to Local and Magistrates Courts) have introduced procedural changes to reduce the number of conventional hearings involving judicial officers, lawyers, parties, and witnesses gathering together in a traditional courtroom. New procedures were introduced for hearings to be conducted by AVL. Some courts and trials proceedings were adjourned generally for the

¹¹ *Sydney Morning Herald* (19 February 2019) 11; *Armidale Chronicle* (19 February 1919) 4.

duration of the epidemic. However, when this lasted longer than expected, gradually the recommencement of actual hearings was restored.

B. High Court of Australia

After March 2020, Australia's highest court conducted all hearings using AVL technology. The Justices have generally appeared sitting in their courtrooms in their home States, linked together by AVL. Participating lawyers have appeared on screen, broadcast from a designated courtroom, their chambers, or their homes. In April, May, and most of June 2020, there were no physical Full-Court hearings of the High Court save for *Cumberland v. The Queen*.¹² At the time the decision in the last-mentioned case was announced, it was probably expected that physical sittings would recommence after the High Court's mid-year Winter recess. However, when it became evident that this would not be possible, the Court started hearing Full-Court matters again from June 30, 2020 by AVL. Since that time, it has used AVL to conduct all hearings.

The AVL procedure was not unfamiliar to practitioners appearing before the High Court of Australia. Nor was it unfamiliar to the Justices. For decades, reaching back to before my appointment in 1996, the High Court of Australia has regularly conducted special leave hearings, receiving oral submissions by AVL, beamed to federal court facilities in Brisbane, Adelaide, Perth, Hobart, Darwin, and occasionally Melbourne and Sydney. In the case of applications for special leave to appeal, deemed to require an oral hearing or matters listed before a single Justice of the court in 2020, the High Court of Australia has continued using AVL technology. A protocol governing such video hearings has been published.¹³

C. Federal Court of Australia

Similar arrangements for court hearings during COVID-19 have been adopted by the Federal Court of Australia. It already had excellent video conference facilities used for occasional hearings and also for the frequent internal conferences involving the judges *inter se*. In mid-March 2020, in response to the COVID-19 pandemic, the Federal Court of Australia started conducting hearings remotely using the technology of *Microsoft Teams*. On March 31, 2020, Chief Justice Allsop published a *Special Measures Information Note*, outlining the Court's response to COVID-19 and specifying the ways in which the Court had modified its practices and procedures in order to minimise

¹² (2020) 94 ALJR 656. Heard 15 April 2020. Decided 3 June 2020.

¹³ High Court of Australia HCA, 'Video Connection Hearings – Protocol' <https://cdn.hcourt.gov.au/assets/registry/information/VC_Hearings_Protocol.pdf> accessed 11 December 2020.

in-person attendance at court premises.¹⁴ That strategy was adopted so as to reduce the risks of cross infection.

The Federal Court of Australia also published a *National Practitioners' and Litigants' Guide* to online hearings using *Microsoft Teams* technology in order to provide guidance for the legal profession and self-represented litigants appearing in hearings conducted in this manner.¹⁵

Although the *Microsoft Teams* platform has advantages for video hearings, there have been some challenges. A significant hurdle was to find a way to secure a reliable transcript of a matter heard over *Teams*. This necessitated an upgrade of the video conferencing-enabled courtrooms and IT infrastructure. As well, it required developing ways for members of the public to access video hearings using *Teams*. Such hearings have presented other challenges. At present, the telephone dial-in contact details for each hearing in the Federal Court of Australia are published in the daily court list of the Court. Members of the public who wish to witness, or join, the hearing over the internet (as opposed to access by telephone) are invited to contact the presiding Judge's associate (clerk) or the registry of the Federal Court in order to obtain approval for an online link for that purpose.

From mid-April 2020, the Federal Court of Australia operated at 80% of its normal courtroom capacity. This has largely been possible by its adoption of *Microsoft Teams* technology for judicial hearings. The only matters that are not presently proceeding by *Microsoft Teams* before the Federal Court are those involving self-represented litigants who indicate that they are unable to use *Microsoft Teams* or certain matters which are deemed to involve security risks that must be heard in person. For litigants held in immigration detention, the prospect of conducting online hearings by remote access technology presented particular challenges. The Federal Court of Australia has worked with national and state bar associations in order to arrange pro bono referrals to nominated lawyers where a litigant in such a matter does not have their own representation.

During my service on the High Court of Australia, a similar problem arose in relation to the representation of prisoners seeking to argue in support of the grant of special leave to appeal to that Court, who were not able, or willing, to

¹⁴ Federal Court of Australia, 'Special Measures in Response to COVID-19 (SMIN-1) Special Measures Information Note' (*Federal Court of Australia*, 31 March 2020) <<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes>> accessed 16 December 2020.

¹⁵ Federal Court of Australia, 'National Practitioners/Litigants Guide to Online Hearings and Microsoft Teams' (*Federal Court of Australia*, 02 April 2020) <<https://www.fedcourt.gov.au/online-services/online-hearings>> accessed 16 December 2020.

secure their own lawyer for that purpose.¹⁶ The initiatives taken by the Federal Court of Australia indicate the attention that the court has given to the special needs of particular litigants not represented by lawyers and the general needs and entitlements of the public at large to view and/or hear court proceedings in accordance with the Australian common law requirement of open hearings, as applicable where the matter is heard using AVL technology.

D. State Courts of Appeal

In the highest courts of the States and Territories of Australia, similar arrangements have been made for remote hearings. For example, cases before the NSW Court of Appeal have generally been heard by a bench comprising three Judges of Appeal. The presiding judge sits alone in a courtroom. The second judge typically participates from chambers or at home. The two judges participating remotely from the court have typically been dressed in lounge suits.

By contrast, criminal appeals before the NSW Court of Criminal Appeal have typically occurred from the Sydney Banco Court. All three participating judges participated in full judicial dress in the same courtroom. Barristers on both sides appear remotely using AVL technology, linked to the Banco Court. Like the judges, the advocates appeared wigged and gowned as in physical courtrooms. In one sentencing appeal, the Court of Criminal Appeal invited victims in a fraud case to have access to a special dial-in contact so that they could both watch and hear the appeal proceedings by AVL if they so wished.

Impressions of the lawyers about these arrangements report that submissions were generally completed in a shorter time than was normal in a traditional format. However, at least one advocate suggested that, as with the shift to electronic proceedings on special leave applications to the High Court of Australia, the absence of face-to-face proceedings appeared to diminish the impact of advocacy and the prospects of success.¹⁷ Certainly, the numbers of leave orders granted following the shift to proceeding ‘on the papers’ reportedly declined. In November 2020, the NSW Court of Criminal Appeal reintroduced actual court hearings for all proceedings in light of the radical drop in the numbers of COVID-19 infections and deaths in Australia

¹⁶ *Muir v The Queen* (2004) 78 ALJR 780; [2004] HCA 21, see per Kirby J (dissenting). A majority declined to order facilities to be made available in custodial institutions and directed that prisoner applications be decided on the basis of written submissions.

¹⁷ Anecdotal evidence based on a report provided by experienced counsel in the possession of the author.

III. VIRTUAL COURTS AND ONLINE HEARINGS IN INDIA

The Supreme Court of India passed an order on April 6, 2020, taking *suo motu* cognizance of the issue of access to justice during the COVID-19 pandemic. It ordered that the Supreme Court and the High Court take measures to ensure that the judicial system could function through video-conferencing measures.¹⁸ When Indian courts switched to online hearings, they initially commenced proceedings on the *Zoom* app.¹⁹ Some courts also used *Cisco* or *Vidyo*.²⁰ There was some initial apprehension about security issues on *Zoom*.²¹ Some courts shifted to *Microsoft Teams*.²² *Zoom* then later reached out to the Government of India and engaged in a series of talks to address security issues and make the app safe for use in India.²³ The links for the virtual hearings are available on the websites of the High Courts and are also accessible to the public.

India's trial courts were closed for a long time, and were not equipped with infrastructure comparable to that available in the High Courts and the Supreme Courts to function online. This limited functioning was partially due to cyber-security issues. A petition was filed in May 2020 in the Supreme Court of India expressing concerns about online hearings.²⁴ This process was based on the argument that the applications currently used, primarily *Zoom* and *Vidyo Mobile*, "are owned by foreign companies and pose a data security risk". This petition in the Supreme Court argued that the flow of data pertaining to the judiciary and government outside India posed a threat to national security and violated 'the Public Records Act, 1993, the Official Secrets Act, 1923, the Email Policy, as well as Policy for usage of IT Resources of the Government of

¹⁸ *Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic, In re*, 2020 SCC OnLine SC 355 [Supreme Court of India].

¹⁹ 'Hearing Through Video-Conferencing Successful, Says SC, Allows HCs to Decide on Virtual Proceedings' *The New Indian Express* (New Delhi, 26 October 2020) <<https://www.newindianexpress.com/nation/2020/oct/26/hearing-through-video-conferencing-successful-says-sc-allows-hcs-to-decide-on-virtual-proceedings-2215325.html>> accessed 11 December 2020.

²⁰ *ibid*.

²¹ Cyber Coordination Centre, 'Advisory on Secure Use of Zoom Meeting Platform by Private Individuals (not for use by government offices/officials for official purpose)' (12 April 2020) <[http://164.100.117.97/WriteReadData/userfiles/comprehensive-advisory-Zoom-%20meeting%20plattom-20200412-\(2\).pdf](http://164.100.117.97/WriteReadData/userfiles/comprehensive-advisory-Zoom-%20meeting%20plattom-20200412-(2).pdf)> accessed 11 December 2020; *Harsh Chugh v Union of India*. <https://images.assettype.com/barandbench/2020-05/e89cd36d-fcaf-449b-9a21-c8f4ab476ad5/Harsh_Chugh_vs_UOI_petition__Zoom_app_.pdf>.

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²⁴ Record of proceedings, Writ Petition (Civil) Diary No(s). 10980/2020 [Supreme Court of India].

India.²⁵ Without concluding this issue, the expressed concern has resulted in change including the fixing of security issues in such apps.

A. Access to Justice

In April 2020, a Bench of the Supreme Court of India issued a direction in *Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic, In re*.²⁶ These guidelines were issued by invoking Article 142 of the Constitution of India—to do complete justice.²⁷ In the Court's order, the District Courts were directed to function virtually through the mode prescribed by the relevant High Court. They were also ordered to ensure that video conferencing facilities would be available for litigants who lacked the resources to attend online hearings. However, court proceedings were quite restricting and inefficient. This can be seen from the fact that “while India's Supreme Court normally disposes of as many as 3,500 cases per month, from March 23 to April 24, 2020, it only completed 215 cases”.²⁸

District Courts in India have been profoundly affected by the pandemic. The lockdown related restrictions have been periodically extended in the case of District Courts where only urgent matters are being taken up by AVL.²⁹ Even when an option of starting a physical hearing was provided, most lawyers opted out of using this facility.³⁰

This has especially taken a toll on survivors of domestic violence. The protection officers appointed under the ‘Protection of Women from Domestic Violence’ statute were not able to function as they do normally.³¹ However, the High Court of Delhi issued guidelines for effective implementation.³² Family Courts all over India started functioning virtually only after a long gap. Even

²⁵ Blake Candler, ‘Court Adaptations during COVID-19 in the World's Two Largest Democracies’ Candler, (May 24, 2020) <<https://ssrn.com/abstract=3609521>> accessed 11 December 2020.

²⁶ *Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic, In re*, (n 19).

²⁷ Constitution of India 1950, art 142.

²⁸ Candler (n 26).

²⁹ ‘Circular on Lockdown Due to Covid-19’ (*E-Courts Mission Mode Project*) <<https://districts.ecourts.gov.in/circular-lockdown-due-covid-19-0>> accessed 11 December 2020; Sruthisagar Yamunan, ‘If malls can open, why not courts?': Lawyers are divided about restarting physical hearings’ (*Scroll*, 8 September 2020) <<https://scroll.in/article/972363/as-covid-19-numbers-rise-lawyers-and-officials-are-divided-about-resuming-physical-court-hearings>> accessed 11 December 2020.

³⁰ Abhinav Garg, ‘Delhi: Covid Rising, 94% HC Lawyers Opt Out of Physical Hearings’ *The Times of India* (13 September 2020) <<https://timesofindia.indiatimes.com/city/delhi/delhi-covid-rising-94-hc-lawyers-opt-out-of-physical-hearings/articleshow/78084522.cms>> accessed 11 December 2020.

³¹ Protection of Women from Domestic Violence Act 2005.

³² PTI, ‘Effectively Implement Domestic Violence Act During COVID-19 Lockdown: HC to Centre, AAP Govt’ (*Business Insider*, 26 April 2020) <<https://www.businessinsider.in/india/>

then, they took up only urgent applications.³³ In assessing this contrast between the situation in courts in Australia and those in India, regard must be had to the huge population of India; the dense concentration of population in most cities and the comparative rate of COVID-19 infections. By late 2020, the rate of infection with COVID-19 in India reportedly reached the second highest rate globally—after the United States of America.

B. E-Filing and Video Conference Hearing

By late 2020 the hearing of arguments in virtually all courts of India was being undertaken by video conferencing. The courts in India have incorporated e-courts through the Integrated Mission Mode Project ('E-Courts Project') as part of the National eGovernance Plan ('NeGP') formulated by the Government of India.³⁴ The filing of documents for online court hearings also happens online on the government 'E-Courts Services' website.³⁵ Advocates can enter the details of their cases, and can access the applications and documents filed by the opposing counsel on the same website. The court fee applicable to the case is also paid through this website. Police stations can also file documents and other information which relate to criminal matters through e-filing. The Indian Law and Information Technology Minister, Ravi Shankar Prasad, has stated that, "The e-filing process in the Supreme Court has made it easy to file cases. During the lockdown period, 640 advocates on record have registered for e-filing cases in Supreme Court. This is a move towards digitisation of the judicial process".³⁶

Even though this process is relatively easier and manageable in the Supreme Court and the High Courts, which are located in metropolitan cities with good digital infrastructure, accessing court services online becomes an obstacle in many of India's courts located in interior areas or areas which are under-developed, or areas which may not have good connectivity due to their geographical location.³⁷ Many court files are still only hard copies and are yet to be converted into digital documents. Until then, courts find it difficult to

news/effectively-implement-domestic-violence-act-during-covid-19-lockdown-hc-to-centre-aap-govt/articleshow/75391821.cms> accessed 11 December 2020.

³³ PTI, 'Covid-19 Lockdown: Family Courts in Delhi will See Graded Reopening' *India Today* (1 May 2020) <<https://www.indiatoday.in/india/story/covid-19-lockdown-family-courts-in-delhi-will-see-graded-reopening-1673066-2020-05-01>> accessed 11 December 2020.

³⁴ *Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic, In re*, (n 19).

³⁵ Dr. Karnika Seth, *E-Filing Procedure User Manual for High Courts & District Courts in India* (eCommittee Supreme Court of India 2018) <https://ecourts.gov.in/ecourts_home/static/manuals/efiling-User-manual.pdf> accessed 11 December 2020.

³⁶ Japnam Bindra and Shreya Nandi, 'Digitization of Judicial Process Gets Big Push Amid Pandemic, Says Govt' (*Live Mint*, 17 July 2020) <<https://www.livemint.com/news/india/digitization-of-judicial-process-gets-big-push-amid-pandemic-says-govt-11594950575437.html>> accessed 11 December 2020.

³⁷ Candler (n 26).

reference old documents while hearing a case online. Digitisation takes up a lot of time—for example, in 2019, the Calcutta High Court, India's oldest High Court, undertook a three-year project to digitise 860 million pages of case records.³⁸ The Indian judiciary still has a backlog of 30 million cases and therefore, digitising these documents and generally expediting all procedural requirements for the filing of documents and the hearing of cases is crucial for the future.³⁹

There are both pros and cons to digital court hearings and e-filing. Digitising documents and records, and virtual hearings themselves will improve the efficiency of the Indian legal system. Even other resources, such as time, money, and paper are saved in this process.⁴⁰

The other side of online court hearings is access to technology. This system requires a robust digital infrastructure for the use of judges, lawyers, and clients. Internet issues, broadband issues, and server maintenance could be barriers to digital courts.⁴¹ Thus, the twin issues of access to enabling infrastructure and smooth adaptation of technological processes require substantial consideration. Both are short-term issues that could frustrate access to timely justice.⁴² Therefore, a system dependent on internet connectivity requires a workable alternative for those without access or technologically handicapped in other ways.⁴³ This is especially true for those in rural areas and those courts that have jurisdiction over such areas. Income inequalities and caste-gender inequalities can also determine who may have access to the internet and who may not.

There are also the issues of data protection and privacy. Since a lot of documents also contain sensitive information, it is important to have a secure data protection framework and invest in the same.⁴⁴ The security of data in official public records should be protected along with the status of applications, documents filed being updated frequently.⁴⁵

³⁸ Sovon Manna, 'Calcutta HC to Digitize 80cr Pages of Records in 3 Years' *The Times of India* (14 January 2019) <<https://timesofindia.indiatimes.com/city/kolkata/calcutta-hc-to-digitize-80cr-pages-of-records-in-3-years/articleshow/67519175.cms>> accessed 11 December 2020.

³⁹ Candler (n 26).

⁴⁰ G Mahibha and P Balasubramanian, 'A Critical Analysis of the Significance of the eCourts Information Systems in Indian Courts, Legal Information Management (2020) 20 Cambridge University Press 47-53.

⁴¹ *ibid.*

⁴² Saniya Siddiqui, 'Virtual Courts and the Technologically Handicapped' (*The Leaflet*, 18 May 2020) <<https://www.theleaflet.in/virtual-courts-and-the-technologically-handicapped/#>> accessed 11 December 2020.

⁴³ *ibid.*

⁴⁴ Mahibha and Balasubramanian (n 41).

⁴⁵ Candler (n 26).

During the inauguration ceremony of the e-filing module of the Supreme Court, concerns were raised about access to internet, electricity, and data, and about the capacity of the system to function online. Some members of the Bar felt that online courts were not in a position to act as a viable replacement to physical courts and filing. Lawyers also felt that other challenges were faced with the issues of logging in, the timely sharing of links, connectivity, recording, etc. Even the Chief Justice of India Hon'ble Justice Bobde conceded that he was not very well equipped with the operation of online courts and virtual hearings. He said that judges faced additional problems with making case notes and the marking of documents. He also commented that technology could not be capable of replacing physical courts and making the justice delivery system accessible to most users.⁴⁶

Many judges and lawyers are uncomfortable arguing and speaking in front of a camera screen. The technology involved can be quite a challenge to them.⁴⁷ The facial expressions, the tone of the voice, the gestures, and body language of both the lawyers and the judges are a well-established and important part of judicial hearings and give strength to the contentions made.⁴⁸ Online courts have a completely different atmosphere and both judges and lawyers will require some time to get adjusted to that.

However, one benefit of online hearings is accessibility—of lawyers to litigants. Before, facts like distance, time, language, and physical presence of the advocates could be barriers to securing legal aid for litigants.⁴⁹ But now that everything is online, the process of contacting and communicating with lawyers has become simplified (especially for those in vulnerable and restricted spaces like prisons).

IV. PRE AND POST COVID-19 EFFICIENCY: COSTS AND DELAY

Judicial procedures are constantly under professional and public scrutiny. This is a desirable characteristic that public hearings are supposed to encourage. This scrutiny did not begin with COVID-19. However, some of the innovations introduced to permit virtual hearings seem bound to continue and indeed to expand as a result of COVID-19 adaptations.

⁴⁶ Siddiqui (n 43).

⁴⁷ Madan B Lokur, 'Social Distancing is Here to Stay, will Profoundly Change the Way in Which Justice is Delivered' *The Indian Express* (8 May 2020) <<https://indianexpress.com/article/opinion/columns/coronavirus-covid-19-courts-social-distancing-lockdown-6399012/>> accessed 11 December 2020.

⁴⁸ *ibid.*

⁴⁹ Alithea Stephanie Mounika, 'Lockdown Aggravates Lack of Access to Justice in Bengaluru' *The News Minute* (5 August 2020) <<https://www.thenewsminute.com/article/lockdown-aggravates-lack-access-justice-bengaluru-130103>> accessed 11 December 2020.

A. Hayne Critique in Australia

Before AVL technology came to be available, a knowledgeable critic and former Justice of the High Court of Australia, Hon. Kenneth Hayne, published a critical article enumerating what he saw as the causes fundamental for widespread dissatisfaction with the Australian judicial system.⁵⁰ He identified “time and cost” as lying at the heart of dissatisfaction with the present judicial system. Yet far from the system having adjusted to eliminate these well-identified challenges, court litigation—civil and criminal trials and appeals—were reportedly taking increased time in recent years when compared with earlier arrangements. Furthermore, the costs of litigation “seem always to be rising”.⁵¹ Justice Hayne conceded that there was no single cause, nor any single solution, that would solve these problems. As well, when particular problems are solved, new difficulties commonly emerge leading to a conclusion that some challenges in judicial administration can never be wholly eliminated.

An enduring cause for this phenomenon is the arguability of the exercise of most judicial discretions and the complexity of over-detailed legislation enacted in this way in the hope of reducing the ambit of judicial discretion.⁵² Lengthy trials; costly new procedures; complexity and increase in the use of expert evidence; the operation of market forces on ever-higher legal costs; the over-lengthy reservation of reasons for judgment, sometimes expanding to an intolerable duration; the increasing numbers of contested interlocutory orders; and the addition and supplementation of arbitration/mediation have all changed the “litigation culture”.

Justice Hayne propounded a number of changes to judicial practice that might save time and cost: (1) the encouragement of judges writing shorter reasons for judgment; (2) the restoration of judicial primacy for bringing disputes to trial and determination rather than to ‘judicial management’; (3) limiting discovery orders for the production of huge masses of often undigitised and unanalysed photocopies or electronic material; (4) limiting the tender of expert evidence; (5) fixing or capping some legal costs; (6) and deterring or penalising the ever increasing attitude to ‘leave no stone unturned’. This attitude adds greatly to the size, duration, and costs of contemporary litigation at a marginal cost that often far exceeds the marginal utility.⁵³ In all probability the list of defects and problems identified in the context of Australian courts probably applies with equal frequency in India.

⁵⁰ KM Hayne, ‘The Australian Judicial System: Causes for Dissatisfaction’ (2018) 92 Australian Law Journal 32.

⁵¹ *ibid* 33.

⁵² Hayne (n 51) 34.

⁵³ Hayne (n 51) 44-46.

It is a mark of the necessity imposed by COVID-19's requirement for social distancing that the prospects of thinking more radically about the necessities and utility of video technology and audio/visual links were not included in Justice Hayne's list, although it was composed only two years earlier.

B. Susskind Critique in the UK

A leading proponent of turning the post-COVID-19 hearing process into a new model for future litigation in the United Kingdom is Professor Richard Susskind OBE. He is the chief advisor on technology to the judiciary of the United Kingdom. He draws on an unequalled familiarity with the relevant technology now available to the courts as he is President of the Society of Computers and the Law of the United Kingdom. He detects a greater willingness amongst judges, lawyers, officials, and court-users to undertake judicial and court work in ways very different when compared to the ways of the past.

In a detailed article on remote courts, Professor Susskind identifies three long-standing challenges, presented by the traditional way that litigation has been conducted in common law countries. He also examines challenges arising out of the nature of the COVID-19 virus.⁵⁴ The first challenge, immediately presented by the pandemic, was to maintain a sufficient level of service to the legal profession and the public whilst the traditional court facilities were closed because of the need for social distancing. The second challenge was to find new ways to tackle the backlog accumulating before and during the pandemic because of limited acceptable facilities. The third challenge was, as he puts it:⁵⁵

... The longstanding one [which] flows from an alarming truth —that even in justice systems that we regard as the most advanced, dispute resolution in the public courts generally takes too long, costs too much and the process is unintelligible to all but lawyers... [This is] the “access to justice problem”.

C. Delay and Cost in India

The lockdown affected the working of the Indian court system and the hearing of cases. The Bar Council of India ('BCI') wrote to Hon'ble Justice Bobde, Chief Justice of India, requesting the Supreme Court to continue hearings physically from June 2020.⁵⁶ They discussed the issue of lawyers being unable to secure professional work and having issues of access to virtual

⁵⁴ R Susskind, 'The Future of Courts'(2020) 6(5) The Practice 3.

⁵⁵ *ibid* 3.

⁵⁶ Legal Correspondent, 'Resume physical courts from June 1, Bar Council urges CJI' *The Hindu* (27 May 2020) <<https://www.thehindu.com/news/national/resume-physical-courts-from-june-1-bar-council-urges-cji/article31689599.ece>> accessed 11 December 2020.

hearings. The letter stated that only very few privileged advocates were benefitting from the system of virtual hearings.⁵⁷ The other issue is that only ‘urgent’ category cases were listed, and there was a hierarchy even amongst those cases. Most cases in the trial courts, which comprise 80% of the Indian judiciary’s workload went unheard.⁵⁸ A lot of unheard cases related to fundamental rights infringement and the Court did not consider a lot of these cases to be a priority.⁵⁹

The backlog in the hearing of cases is a major problem in India. The National Judicial Data Grid published a report that stated that pendency has increased at every level of the judiciary.⁶⁰ There has been an increase of 22% in the overall pendency of cases in the last fifteen years. A total of around 3.5 crore cases are pending before all the courts.⁶¹ It is commonly accepted that the foregoing backlogs in India cannot be cleared simply by the Supreme Court and High Courts working through the summer vacation. This is so because the number of cases being heard by those courts is, in aggregate, comparatively few. Only very privileged litigants can approach these courts for relief. The lower courts, sessions courts, magistrate courts, city civil courts, family courts, etc.—which hear the great bulk of cases before India’s courts and which are the most accessible for socio-economically disadvantaged litigants, have been closed in consequence of COVID-19. Most of them do not function online. They have been slowly opening up for physical hearings during recent months. But these developments are slow and patchy.

Access to justice depends in India, as in Australia and other countries, on a number of state organs—police as well as the judiciary. Many who lack access to the police cannot report various crimes that have taken place. Many examples of cases involving various forms of domestic violence are in point. Police activity is reportedly vigorous in certain areas of activity—such as criticism of officials for corrupt acts and complaints about lack of official transparency. Family courts have could not operate online after COVID in a lot of states—which meant that there was no way to address urgent issues regarding the safety of women and children in private spaces. Whilst many arrests by police continue reports suggest that legal protection has been less evident and access to the courts to complain about this has been restricted. In short, COVID-19

⁵⁷ *ibid.*

⁵⁸ Samanwaya Rautray, ‘Bar Council urges Supreme Court to open physical courts from June 1’ *Economic Times* (28 May 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/bar-council-urges-sc-to-open-physical-courts-from-june-1/articleshow/76048522.cms?from=mdr>> accessed 11 December 2020.

⁵⁹ Candler (n 26).

⁶⁰ <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard>

⁶¹ The Wire Staff, ‘Over 3.5 Crore Cases Pending Across Courts in India, Little Change in Numbers Since 2014’ (*The Wire*, 27 November 2019) <<https://thewire.in/law/pending-court-cases>> accessed 11 December 2020.

has reduced the effective availability of legal protection for many citizens and in many spheres of life.

Against this background some observers of the adventitious appearance of virtual hearings in the contest of COVID-19 have begun to suggest that the possibility of enhancing real access to courts and independent decision-makers may grow out of the experience of the coronavirus and the discovery that a lot can be done to enhance access to justice without necessarily having to secure access to a court or tribunal institution, officials, lawyers, and others in a defined physical place such as court or tribunal hearing.

Drawing on available statistics in the United Kingdom, Professor Susskind suggests that the kinds of difficulties earlier identified by Justice Hayne were effectively deterring access by ordinary people to the courts and removing the reality of “[life] under protection of the law”.⁶² According to the Organisation of Economic Cooperation and Development (‘OECD’), “only 46% of human beings live under the protection of the law”.⁶³ If this is even partly correct, it presents, according to Susskind, a problem of which “lawyers everywhere should be ashamed”.⁶⁴ It needs “transformation in our courts”. It is to that end that Professor Susskind has written an analysis and update of the suggestions he has been making about these problems for almost forty years, in favour of change and in answer to the hesitations of legal traditionalists.

A basic question that Professor Susskind has asked is:

Do we really need on all occasions to congregate physically to settle our legal differences? In a digital society, in which it is commonplace to receive and provide all manner of services online, is it such a leap to imagine the delivery of online court services? There is one way, I suggest, that we might be able to deliver an affordable, swift understanding and proportionate service.⁶⁵

To deliver a more speedy accessible, understandable, and inexpensive access to justice, Richard Susskind urges: (1) permanent adoption of remote courts in as many circumstances as possible; (2) availability of video hearings, times, and places outside the hours of 10AM to 4 PM usual for most conventional courts; (3) improvement of the AVL technology to ensure uninterrupted, congenial, accessible and multi-image visuals to bring satisfaction to all engaged in the new process; and (4) introduction of the broader concept of online courts

⁶² Susskind (n 55) 3.

⁶³ Susskind (n 55) 3.

⁶⁴ Susskind (n 55) 3. The report of the OECD is referred to in R Susskind, *Online Courts and the Future of Justice* (November 2019).

⁶⁵ Susskind (n 55) 4.

with radically simplified “decision trees” and “diagnostic systems” that can help court users, especially those who are self-represented, to understand their entitlements and obligations. He believes that these initiatives will help parties to formulate their arguments, and, where appropriate, settle their differences, not as a “private sector offering but as an integral part of the public court service.”⁶⁶

Professor Susskind suggests the need to re-arrange the present court system (Magistrates Court; Family Court; District Court; Superior Court; Appeal Courts) which currently has three or four tiers (organised substantially by reference to the size, complexity and deemed importance of the relevant jurisdiction in the current hierarchy). He advocates instead a three-tier system, only the third of which would be similar to the “court system” that common law countries like India and Australia have inherited from the past.

Professor Susskind suggests that, post-COVID-19, the minds of judges and lawyers, as well as policy-makers, will have been opened to the idea of non-physical hearings conducted with the aid of the recently available AVL technology. In order to save costs; to inject readily trained expertise into the system; and to reduce delays, he envisages that the bottom two tiers of the revamped court system may be organised within the executive government, not the judiciary. The judiciary would instead be confined to more complex matters or those not suitable to more informal online procedures that, he suggests, should become the more economical and user-friendly first ports of call for resolving legal contests.

Professor Susskind is not unaware that his ideas, advocating such radical reforms, would quickly attract powerful opponents. In effect, he suggests (as Jeremy Bentham did in the early 19th Century when he advocated replacement of the common law made by the judges by greater legislative codification of law so that it could be available to, and understandable by, the ordinary people) that this could be sunk by “Judge & Co”.⁶⁷ He says:⁶⁸

The door has opened [following COVID-19] if only slightly at this stage, to very different ways of resolving disputes. But the winds of conservatism blow briskly through the legal world, and I am aware that many judges and litigators are quietly hunkering... down until the viral storm passes, while hankering after a complete return to physical courts. The

⁶⁶ *ibid* 11.

⁶⁷ HLA Hart, ‘Bentham, Jeremy’, in AWB Simpson (ed) *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 44, 45. The reference was to the conservative judiciary and legal profession.

⁶⁸ Susskind (n 55) 15-16. CF. Pamela Stewart and Anita Stuhmcke, ‘Judicial Analytics and Australian Courts: A Call for National Ethical Guidelines’ (2020) 45 *Alternative Law Journal* 82.

reactionaries should, however, recall the scale and implications of the three challenges that I outlined at the start: maintaining court services whilst the virus is at large, coping with the backlog of cases that is accumulating, and tackling once and for all the access-to-justice problem. I do not believe that clinging to the wreckage of our current system is the answer to these challenges. The status quo may serve the wealthy well enough; but it is lamentably inaccessible to the majority of individuals and organisations. Remember too that the current system is not an evidence-based option that we have consciously chosen. It is simply where we are. We can choose to be elsewhere.

V. EFFICIENCY AND TRIBUNALISATION IN INDIA

The Forty Second Amendment to the Constitution of India brought radical changes to a variety of matters arguably anticipating, and designed to address, the endemic defects identified later by Professor Susskind. Articles 323A and 323B were added to the Indian Constitution and introduced the concept of tribunalisation. The jurisdiction of civil courts and High Courts are excluded and specific matters would be adjudicated by tribunals.⁶⁹ The important purpose of this constitutional amendment was to ensure that there would be a more efficient and less costly way to resolve disputes in India, as compared to the courts.

The Supreme Court had considered the possibility of a separate administrative agency of the Indian Judiciary.⁷⁰ In *L Chandra Kumar v. Union of India*, the Supreme Court recommended reforms to tribunals in India. The Supreme Court felt that until an agency to oversee the administration of tribunals was established, these tribunals should be under the wing of a nodal Ministry, which can appoint a supervisory body for the working of such tribunals.⁷¹

Other, later, cases have explored this idea further in the Indian context. It seems compatible with the suggestion advocated by Professor Susskind in the United Kingdom. It might be a reform that would fall foul of the concepts of exclusive power reserved to the judiciary in the United States and Australian Constitutions.⁷² But it may well be feasible under the Constitution of India, where it is arguably more urgently needed.⁷³

⁶⁹ RC Saksena, 'Adjudication by Tribunal in India: Landmark in Field of Natural Justice' (1995) 37(2) *Journal of the Indian Law Institute* 222.

⁷⁰ Pratik Dutta and others, 'How to Modernise the Working of Courts and Tribunals in India' (2019) National Institute of Public Finance and Policy Working Paper No. 258 <https://www.nipfp.org.in/media/medialibrary/2019/03/WP_2019_258.pdf> accessed 11 December 2020.

⁷¹ *L Chandra Kumar v Union of India* (1997) 3 SCC 261.

⁷² Pratik Dutta and others (n 71).

⁷³ Pratik Dutta and others (n 71).

VI. EFFICIENCY, LIVE STREAM, AND OPEN JUSTICE

There was some apprehension that video conferencing is not an effective substitute to open court hearings because they violate the fundamental principle of justice that courts should be open to the public.⁷⁴ Article 145(4) of the Constitution of India states that “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”. Section 327 of the Criminal Procedure Code states that “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.” and Section 153-B of Civil Procedure Code states that “The place in which any Civil Court is held for the purpose of trying any suit 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.” An open court from these definitions may be understood as being a court where there is a right for the public to attend hearings.

Lord Chief Justice Hewart of the English Courts formulated this concept with the reasoning that justice should not only be done, but should also be seen to be done.⁷⁵

In the case of *Naresh Shridhar Mirajkar v. State of Maharashtra*, a nine-judge bench of the Supreme Court of India held that a well-settled and universal principle is that of open courts—all cases, whether civil, criminal, or of any other type, must necessarily be heard in open court.⁷⁶ This is necessary for the fair administration of justice as public scrutiny hold the courts accountable and also inspires public confidence.

In 2018, the Supreme Court, in *Swapnil Tripathi v. Supreme Court of India*, was deciding a matter on the question of live streaming proceedings. The Court held that access to justice means the litigant should be able to hear, see and understand the court proceedings first hand.⁷⁷ The Court referred to the fact that open courts constituted a principle accepted by Indian courts and this principle would have to be factored in while making rules for the live streaming of court proceedings.

⁷⁴ Yash Agarwal, ‘Challenges in Setting up Virtual and Online Courts in India’ (*The Leaflet*, 23 October 2020) <<https://www.theleaflet.in/challenges-in-setting-up-virtual-and-online-courts-in-india/#>> accessed 11 December 2020.

⁷⁵ *King v Sussex Justices* (1924) 1 KB 256.

⁷⁶ *Naresh Shridhar Mirajkar v State of Maharashtra* AIR 1967 SC 1 : 1966 SCR (3) 744.

⁷⁷ *Swapnil Tripathi v Supreme Court of India* (2018) 10 SCC 639.

In Australia, the High Court of Australia (the highest court) permits live streaming and the broadcast of ceremonial sittings.⁷⁸ All hearings are filmed and sound recorded. As well a daily transcript of every sitting of the court or of a Justice of the Court is produced and uploaded for access by lawyers, litigants, and the public. However, so far, the Justices have not agreed to the broadcast, under whatever conditions, of the film of the court proceedings. In this, the court differs from the Parliament of Australia, whose proceedings have long been broadcast. The Supreme Court of Canada has permitted both sound and visual broadcasting of all proceedings.⁷⁹ The Supreme Court of the United States, as in Australia, retains a sound recording for archival access; but does not permit live streaming of the visual images of proceedings.⁸⁰

The advent of the COVID-19 pandemic has necessitated an enquiry into the foregoing principles expressed by the Supreme Court of India in the context of a viral pandemic threatening human life and well being. In observations made in 2020, the Supreme Court of India reflected on the compatibility of the openness doctrine and the technology of virtual hearings by AVL techniques. It advocates the co-existence of the virtual mode of hearings with physical hearings, a note released by the Supreme Court in May 2020 made it clear that “video conferencing as a means of hearing is here to stay and that contentions about how the system is not open to the public are misplaced”.⁸¹ It also clarified that courts of law are different from other public places and cannot provide unregulated access. Thus, open court hearings, being a medium to secure access to justice and transparency, are not an absolute right in rigid terms. Hence, the Supreme Court emphasized the duties of the litigants and advocates to act responsibly in the difficult circumstances.⁸²

VII. EFFICIENCY, DISSENT, AND ADJUSTMENT IN COURTS

Another principle of the courts of the common law tradition is the right and duty of judges, in particular circumstances, to express their dissent from the opinions of others about the content of the law or about the facts or evidence

⁷⁸ Jamshed Mistry, ‘Why Live Streaming of Crucial Supreme Court proceedings is a milestone for Indian judiciary’ (*The Leaflet*, 20 October 2018) <<https://www.theleaflet.in/why-live-streaming-of-crucial-supreme-court-proceedings-is-a-milestone-for-indian-judiciary/#>> accessed 11 December 2020.

⁷⁹ *ibid.*

⁸⁰ Mistry (n 79).

⁸¹ PTI, ‘Supreme Court to Continue Hearing of Matters Through Video-Conferencing’ *The Print* (5 July 2020) <<https://theprint.in/judiciary/supreme-court-to-continue-hearing-of-matters-through-video-conferencing/455110/>> accessed 11 December 2020.

⁸² NH Web Desk, ‘Virtual Hearings Here to Stay, Courts of Law are not Public Parks: Supreme Court’ *National Herald* (4 May 2020) <<https://www.nationalheraldindia.com/india/virtual-hearings-here-to-stay-courts-of-law-are-not-public-parks-supreme-court>> accessed 11 December 2020.

that they are called upon to apply. This is not a universal feature of civil law systems. There, the usual notion is that a judge is merely '*la bouche de la loi*'.⁸³ This implies that, for every legal problem, there is but one legally correct solution. This theory excludes the exposition of differing views about the content of the law. Only the majority view will be stated because minority views will only serve to confuse or unsettle those who use them.

The common law, certainly in recent times, has acknowledged that differences in decision-making sometimes produce multiple legitimate outcomes in a particular legal dispute. These differences arise because of what the distinguished Australian scholar, Professor Julius Stone, described as the "leeways for [judicial] choice". Such 'leeways' arise as a result of ambiguity in the relevant legal language and disputes over the judicial role.⁸⁴ Some Australian judges are not very welcoming to this idea or to what they see as the destabilising effect of judicial dissent.⁸⁵ Judges in most civil law countries do not enjoy the individual right to record their dissent. Most of them, raised in that system, do not feel the need to express disagreement. They see it as time-consuming and unsettling to the public and the legal profession. But for most judges raised in the common law tradition, the right and duty to express and explain dissenting views is an essential part of the judicial tradition. It is viewed as a guarantee of judicial integrity; a contribution to the evolution of legal doctrine; a hallmark of judicial honesty and integrity, and a candid acknowledgement of the ambiguity and arguability of many legal problems.

As a result of available technology and algorithms, it is now possible to submit judicial reasons, decisions, and other writings by judges to relatively cheap and available analysis that will automatically identify considerations that might influence, or have influenced, the decisions of particular judges in particular cases. Such considerations may be as large and serious as evidencing a clash of important values or disagreement as to the nature of a constitutional or legal problem and to attitudes about its resolution. Or they may be as trivial and apparently insignificant as the time of day that the judge made the relevant decision; the identity of fellow decision-makers or parties; or even the availability of a 'snack break' prior to reaching the decision.

In France, adhering to its view that law is ultimately objective and certain and that dissent is unacceptable because it implies the legitimacy of the

⁸³ Literally, 'the judge is the mouth of the law' (French language).

⁸⁴ Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9(2) UNSW Law Journal 26.

⁸⁵ S Kiefel, 'The Individual Judge' (2014) 88 Australian Law Journal 554; see also AR Blackshield, "Jurimetrics" in AR Blackshield, M Coper and G Williams (eds) *The Oxford Companion to the High Court of Australia* 381 referring to the research of Glendon Schubert, *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (1965); G Schubert, 'Political Ideology on the High Court', (1968) 3 Politics 21; AR Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964-69' (1972) 3 Law Asia 1.

influence of individual judicial opinions, the legislature has recently forbidden publication of any such analysis of trends in the decisions of particular judges.⁸⁶ By way of contrast, this form of analysis of judicial writings is quite well established in many common law countries. It is a reasonably common methodology of investigation. It is considered, at least sometimes, as a respectable subject of academic scrutiny even when its use to predict future decision-making is denied or doubted.⁸⁷

The right and duty of individual judges to express their individual decision is deeply entrenched in the common law tradition. Efficiency is important. So is predictability, as viewed by litigants' legal advisers and academics. However, these considerations must not undermine the independence of the judge. This includes independence from colleagues, i.e., from one another. In re-ordering a nation's court system, it is important for reformers to remember that courtrooms are more than factories that turn out large numbers of cheap, efficient, and predictable decisions. To the extent that decisions affect universal human rights, there must be space for contrary opinions, human evaluation, and the emergence of new ideas that question the approaches of earlier legal doctrine, particularly as it may affect minorities or the impact of science and technology on society.

In India, the Supreme Court and High Courts have maintained the principle of judicial independence, which extends to judges being independent from one another. This principle is recognised in Art 145(5) of the Constitution of India. This provision preserves the right of dissent in judicial decision-making. On the other hand, the Supreme Court of India has a comparatively low level of dissenting opinions,⁸⁸ certainly when compared with the Supreme Court of the United States or even the High Court of Australia.

Nevertheless, legal doctrine in India and Australia has progressively evolved because of the quintessentially humane imperative of justice, i.e., dissent. Thus, the imperative of efficiency in judicial decision-making is desirably tempered with this imperative. If algorithms dictated court decisions in a mechanical way, it would doubtless be relatively easy to programme computers or other machines to churn out huge numbers of decisions with lightning speed and efficiency. However, the judicial system of India, Australia, and other like

⁸⁶ J McGill and A Salyzyn, 'Judging by Numbers: How will Judicial Analysis Impact the Justice System and its Stakeholders?' (2021) 44:1 Dalhousie LJ (forthcoming). The French law is LOI no. 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice, [Law number 2019-222 of the 23 March 2019 [of the French Republic] on the Syllabus (2018-2022) on the reform of justice, article 33].

⁸⁷ Blackshield above.

⁸⁸ A statistical analysis of the Indian Supreme Court's Constitution Bench verdicts between 1993 and 2016 showed that decision of the Court was not unanimous in 16.7% of these cases. Krithika Ashok, 'Disinclined to Dissent? A study of the Supreme Court of India' (2017) 1(1) Indian Law Review 7.

countries assigns a high value to the capacity of human justice to correct itself where past precedents lead the courts to outcomes that impress a later generation as being unlawful and unjust when measured against the national constitution or later perceptions of justice and basic fairness. This is what the High Court of Australia did in 1992 in *Mabo v. Queensland [No.2]*⁸⁹ a case that belatedly recognised the entitlement of Australia's Aboriginal people to enjoy and enforce their traditional land rights. It is what the Supreme Court of India did in 2018 in *Navtej Singh Johar v. Union of India*,⁹⁰ a case that belatedly struck down criminal laws against sexual minorities. No machines could have produced either decision. Somehow, it is essential to promote efficiency, reduce costs and hasten the speed of judicial decision-making whilst retaining the scrutiny of decisions against human standards that apply standards of human justice even though these standards are contestable. Even at the price of diverse opinions, a measure of unpredictability and the exposure of different notions of justice and basic human rights amongst decision-makers, may be precious to a given legal system. In some areas of human decision-making, diversity may be a badge of freedom. In any moves towards automated decision-making, so as to make greater accessibility to decision-making more real for individual litigants, it is arguably important, depending on the subject matter of the dispute, to allow room for the human variables such as empathy, competing values, and the availability of mercy in extenuating circumstances.

VIII. EFFICIENCY AND A FUTURE FOR ADR

In recent decades in Australia, private arbitration and mediation have sprung up, including as an adjunct to traditional litigation.⁹¹ Professor Susskind's idea for the lower non-appellate tiers of the courts being folded into executive government, might threaten this growth industry or at least radically reposition it. However, the constitutional and historic barriers to the introduction of Professor Susskind's ideas for change to improve access to justice, mean that there is a continuing future for ADR, particularly mediation and arbitration, provided the outcomes are constitutionally valid, timely, and cost-effective.

In consequence of the COVID-19 pandemic, the mandate of arbitral tribunals in India has been expanded.⁹² The development of online dispute resolution mechanisms is still at a nascent stage. Hence, the restrictions and disruptions relating to the pandemic have caused significant delay in the

⁸⁹ (1992) 175 CLR 1 (HCA).

⁹⁰ (2018) 10 SCC 1.

⁹¹ P Parkinson and B Knox, 'Can There Ever Be Affordable Family Law?' (2018) 92 Australian Law Journal 458, 464-465.

⁹² Puneet Taneja, 'Impact of COVID-19 on the Time-Limit for Arbitral Award' (*SCC Online*, 3 April 2020) <<https://www.sconline.com/blog/post/2020/04/03/impact-of-covid-19-on-the-time-limit-for-arbitral-award/>> accessed 11 December 2020.

processes of arbitration.⁹³ This has occurred as the legislature of India has expressed its concern about delay in arbitration and mediation. This is because some of the same defects that have blighted the process of decision-making in judicially determined litigations are being copied. It underscores the need for effective coordination between the judiciary and arbitration institutions to streamline the work-flow and minimise pendency.⁹⁴

Some have emphasised the importance of leveraging technology so as to keep the best of past practices whilst at the same time avoiding the errors of the Luddites. They need to seize the advantages of digital technology to address the twin principal defects of our shared legal tradition: cost and delay.⁹⁵ In this context, the advice of senior Indian advocate and mediator, Sriram Panchu, about the need for institutionalising online mediation should be considered. However, the institutional architecture should provide sufficient safeguards and mechanisms for weaker parties which might be bereft of the access to internet communication.⁹⁶ But at the same time, they need to preserve the facility of striving for justice and realising that the content of that expression will vary over time.

IX. A COMMON METHODOLOGY FOR REFORM

The COVID-19 pandemic has been a grim and frightening time for India, Australia, and the wider world. The only substantial ray of sunlight, so far, has been the demonstrated capacity of most judges and lawyers in both countries to adapt to the new technology and to utilise virtual hearings. By doing so, they have enhanced access to justice, at least to some degree.

Judges, lawyers, and policy/decision-makers need to learn a lesson from their recent experience about the way ahead in improving the delivery of justice in our societies. They need to explain continuously the nature of the challenges we are confronting; describing transparently the science and technology that are available to tackle the problems as efficiently and as successfully as possible. They need to flesh out the understanding of the complexities of the

⁹³ 'Alternative Dispute Resolution: The future of justice in India' *ETCFO* (11 July 2020) <<https://cfo.economicstimes.indiatimes.com/news/alternative-dispute-resolution-the-future-of-justice-in-india/76317279>> accessed 11 December 2020.

⁹⁴ Deepika Kinhal and Tarika Jain, 'Indian Courts will have to Prepare for a Different Kind of a Covid Crisis' *The Print* (11 June 2020) <<https://theprint.in/opinion/indian-courts-prepare-different-kind-covid-crisis/410164/>> accessed 11 December 2020.

For instance, the Bombay HC extended the mandate of the arbitrator for over a year in *Gleg Engineers (P) Ltd v Union of India ARBPL 431 of 2020*.

⁹⁵ Sanjna Pramod, 'Covid-19 and the Rise of Online Dispute Resolution' *Deccan Herald* (14 July 2020) <<https://www.deccanherald.com/opinion/panorama/covid-19-and-the-rise-of-online-dispute-resolution-861291.html>> accessed 11 December 2020.

⁹⁶ Sriram Panchu, 'Mediation in the Age of COVID-19' *The Hindu* (June 19 2020) <<https://www.thehindu.com/opinion/lead/mediation-in-the-age-of-covid-19/article31863358.ece>> accessed 11 December 2020.

problems to be resolved; admitting to mistakes and responding with adaptability to the human dimensions of reform. Above all, they need to keep their eyes on the wider objectives of preserving human rights and human dignity, including in the administration of justice for all. Efficiency and access are themselves attributes of justice. But justice is not a mechanical element in law. Ultimately, it answers to human assessment and empathy, and the dear values we share because we are human beings.