

# Policy Watch

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*No. 14*

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## **The Supreme Court of India's Vision for e-Courts: The Need to Retain Justice as a Public Service**

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**THE HINDU CENTRE**

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Politics and Public Policy

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**Photo Caption:** A Division Bench of the Karnataka High Court comprising Justice B.V. Nagarathna and Justice Pradeep Singh Yerur hearing arguments of an advocate (on screen) through video conference in March 2020. **File photo:** Karnataka High Court's Computer Wing.

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## ABSTRACT

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**D**isruptions, at times, become catalysts for initiating change. Although India's journey to create digital infrastructure to deliver justice commenced before the outbreak of the Coronavirus disease (COVID-19), lockdowns imposed to curb the spread of the pandemic hastened the pace of the country's judicial system going online.

In this Policy Watch, legal researchers, **Siddharth Peter de Souza**, **Varsha Aithala** and **Srishti John**, discuss some fundamental issues that emerge from India's plans to move towards e-Courts. This digitalised mode of delivering justice enabled courts to function with some capacity during the multiple lockdowns in India since March 2020. While the authors recognise the value of e-Courts, they argue that unless the digitalisation efforts factor in considerations of equity and inclusion for users, the outcomes would remain hollow and divorced from India's socio-political reality.

The Supreme Court of India recently placed a draft of its Vision Document for e-Courts for public discussion until May 31, 2021. Drawing from this document, the authors critically evaluate India's approach towards electronic dispensation of justice, highlight conceptual issues relating to delivery of justice as a service that need to be addressed. They call for a fundamental rethink of the vision for e-Courts to ensure that the delivery of justice remains in the domain of public service.

The aim of this Policy Watch is to highlight the implications of widening the range of players involved in the process of justice delivery by commodifying it without adequate scrutiny or accountability. Understanding these implications is important to bring about corrective action that will ensure that the administration of justice remains equally accessible and accountable to all.

**Keywords:** *Judiciary, Supreme Court of India, e-Courts, Virtual Courts, Justice as a Public Service*

## I. INTRODUCTION

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**N**ational and State-specific lockdowns imposed in varying degrees to combat the COVID-19 pandemic since March 24, 2021, triggered a flurry of initiatives that reshaped the functioning of courts in India. The acute challenges of holding in-person hearings added a sense of immediacy to India's efforts towards digitalisation of its judiciary in conducting hearings and across other functions of courts such as scheduling, case registries and document circulation.

In 2004, the then Chief Justice of India (CJI), R.C. Lahoti, proposed to the Government of India to compose an e-Committee to assist him “in formulating a National Policy on computerization of Indian Judiciary and to advise on technological, communication and management related changes”. On December 28, 2004, the Ministry of Law and Justice constituted a committee under the chairmanship of G.C. Bharuka, a retired Judge of the High Court of Karnataka, with three other specialists.<sup>1</sup> This committee prepared the report on Strategic Plan for Implementation of Information and Communication Technology in Indian Judiciary which was submitted to the CJI on May 11, 2005.<sup>2</sup>

The e-Courts Mission Mode Project<sup>3</sup> was approved in February 2007, as a “national e-Governance project for ICT establishment of district/subordinate courts in India”, with the objective of providing “designated services to litigants, lawyers and the judiciary through the ICT enablement of courts.”<sup>4</sup> Phase I of the e-Courts project operated between 2007 and

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<sup>1</sup> **Bharuka, Justice G.C. nd.** [Implementation of Information and Communication Technology In Indian Judiciary](http://rajasthanjudicialacademy.nic.in/docs/2_s6.pdf), Rajasthan Judicial Academy [http://rajasthanjudicialacademy.nic.in/docs/2\_s6.pdf]. Last accessed on June 30, 2021.

<sup>2</sup> **E-Committee, Supreme Court of India. 2005.** [National Policy and Action Plan for Implementation of Information and Communication Technology \(ICT\) in the Indian Judiciary](https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf), New Delhi. August 1. [https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf]. Last accessed on June 5, 2021. pp. 4-5.

<sup>3</sup> According to the Ministry of Electronics & Information Technology, “A mission mode project (MMP) is an individual project within the National e-Governance Plan (NeGP) that focuses on one aspect of electronic governance, such as banking, land records or commercial taxes etc. Within NeGP, ‘mission mode’ implies that projects have clearly defined objectives, scopes, and implementation timelines and milestones, as well as measurable outcomes and service levels. NeGP comprises 31 MMPs, which are further classified as state, central or integrated projects.” The e-Courts project is classified as an “Integrated MMP.” [See Ministry of Electronics & Information Technology website at <https://www.meity.gov.in/content/mission-mode-projects>. Last accessed on June 21, 2021.]

<sup>4</sup> **Ministry of Law and Justice. 2015.** [Phase II of eCourts Mission Mode Project](https://doj.gov.in/sites/default/files/Order-for-eCourts-Phase-II.pdf), Department of Justice, Government of India. August 4. p1. [https://doj.gov.in/sites/default/files/Order-for-eCourts-Phase-II.pdf] Last accessed on June 18, 2021.

March 2015. During this phase, necessary hardware were installed, local area networks were created and Case Information Software (CIS) “developed and made available for deployment at all computerised courts”. Judicial officers across the country were trained in the use of CIS and courts began to launch websites that could be used by stakeholders. In 2013, the then CJI P. Sathasivam, launched the e-Courts national portal.<sup>5</sup> This digital gateway provided case status, cause lists and, from time to time, uploaded reportable judgements and orders.

Under Phase II of the e-Courts project (approved by the CJI on January 8, 2014, and sanctioned by the Government of India on August 4, 2015) additional hardware were installed, Free and Open Source Solutions (FOSS) were used to deploy the required software and all court complexes were connected to jails via desktop video conferencing. Information on court websites was made available in local languages, kiosks were set up in courts to assist in its usage and online payment gateways were introduced.<sup>6</sup> Phase I of the e-Courts vision project concluded by March 30, 2015. By 2019, 75.5 per cent of the objectives laid out in Phase II were reported as being accomplished.<sup>7</sup>

In the wake of the COVID-19 pandemic, courts shifted online and began using software such as Zoom and Webex for virtual hearings. Systems for e-filings, e-hearings and e-trials were introduced. The e-Committee’s vision and objectives have evolved since 2004, when it was constituted, to include interlinking of courts and the ICT enablement of the Indian judicial system. This was expected to enable courts to enhance judicial productivity, both qualitatively and quantitatively, and make the justice delivery system accessible, cost-effective, transparent and accountable.<sup>8</sup> As on June 30, 2021, data on 3,256 court complexes were available online and individual websites of 688 district courts were established under the e-Courts project.<sup>9</sup>

<sup>5</sup> **Ministry of Law and Justice. 2005.** [Brief of eCourts Project](https://doj.gov.in/sites/default/files/Brief-on-eCourts-Project-(Phase-I-%26-Phase-II)-30.09.2015.pdf). Department of Justice, Government of India. [https://doj.gov.in/sites/default/files/Brief-on-eCourts-Project-(Phase-I-%26-Phase-II)-30.09.2015.pdf]. Last accessed on June 5, 2021.

<sup>6</sup> **Supreme Court of India. E- Committee. 2021.** [Visions and Objectives](https://ecommitteesci.gov.in/about-department/vision-objectives/). [https://ecommitteesci.gov.in/about-department/vision-objectives/]. Last accessed on June 5, 2021.

<sup>7</sup> **E-Committee, Supreme Court of India. 2019.** [eCourts Project, Phase II Objectives Accomplishment Report](https://ecourts.gov.in/ecourts_home/static/manuals/Objective%20Accomplishment%20Report-2019.pdf). [https://ecourts.gov.in/ecourts\_home/static/manuals/Objective%20Accomplishment%20Report-2019.pdf]. Last accessed on June 25, 2021.

<sup>8</sup> **E-Committee, Supreme Court of India. 2021a.** [Digital Courts – Vision and Roadmap - Phase III of the eCourts Project \(Draft\)](https://cdnbbsr.s3waas.gov.in/s388ef51f0bf911e452e8dbb1d807a81ab/uploads/2021/04/2021040344.pdf), p.2. [https://cdnbbsr.s3waas.gov.in/s388ef51f0bf911e452e8dbb1d807a81ab/uploads/2021/04/2021040344.pdf]. Last accessed on July 1, 2021.

<sup>9</sup> **E-Committee, Supreme Court of India. 2021.** [About e-Committee](https://ecommitteesci.gov.in/significant-achievements/). [https://ecommitteesci.gov.in/significant-achievements/]. Last accessed on June 30, 2021.

## Draft Vision Document

In April 2021, the e-Committee came out with a draft Vision Document for Phase III of the e-Courts project, *(Draft) Digital Courts: Vision & Roadmap - Phase III of the eCourts Project*.<sup>10</sup> The objective of the draft Vision Document is to “conceptualise a futuristic judiciary that facilitates better access to justice.” It calls for the use of technology to address challenges of access to justice. Supporting the draft Vision Document, the CEO of Niti Aayog, expressing his personal views, believes that this vision enhances ‘efficiency, equity and ease’.<sup>11</sup>

The draft Vision Document speaks of the need to, among other things, put in place a ‘smart’ system that sees the administration of justice as an evolutionary process in which it moves to become a service’ to meet the diverse needs of users in India, and to incorporate developments in technology.

“Given the large, diverse and constantly evolving needs of different users and the constant evolution of technology, administration of justice **must not just remain as a sovereign function, but evolve as a service**: to mitigate, contain and resolve disputes by the courts and a range of public, private and citizen sector actors.”<sup>12</sup> (Emphasis added.)

This Policy Watch seeks to critically evaluate the role of e-Courts vis-à-vis the idea of ‘justice as a service’. The authors recognise digitalisation of justice delivery as an inevitable step in the evolution of the Indian judiciary, as it has been for judiciaries elsewhere. Courts, and particularly the Supreme Court of India, have experienced several waves of transformation from a purely adjudicatory body to being recognised and respected as the protector of rights, as ‘the last resort for the oppressed and the bewildered’<sup>13</sup>. Against this backdrop, the aim of this Policy Watch is to highlight the consequences of increasing the range of players capable of delivering justice by commodifying it without adequate scrutiny or accountability. As court digitalisation is a departure from the traditional notion of justice delivered through courts that

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<sup>10</sup> E- Committee, Supreme Court of India. 2021. [Draft Vision Document for Phase III of eCourts Project](https://ecommitteesci.gov.in/inviting-suggestions-on-the-draft-vision-document-for-phase-iii-of-eCourts-project/), April 20. [https://ecommitteesci.gov.in/inviting-suggestions-on-the-draft-vision-document-for-phase-iii-of-eCourts-project/]. Last accessed on June 7, 2021.

<sup>11</sup> Kant, A. and Sekhri, D.G. 2021. [E-Courts: Supreme Court’s Digitalisation Vision Will Ease Access to Justice](https://www.financialexpress.com/opinion/e-courts-supreme-courts-digitalisation-vision-will-ease-access-to-justice/2258945/), *The Financial Express*, May 26. [https://www.financialexpress.com/opinion/e-courts-supreme-courts-digitalisation-vision-will-ease-access-to-justice/2258945/]. Last accessed on May 27, 2021.

<sup>12</sup> E- Committee, Supreme Court of India. 2021. *Op Cit*. p 5.

<sup>13</sup> Baxi, U. 1979. [The Indian Supreme Court and Politics](http://upendrabaxi.in/documents/The%20indian%20supreme%20court%20and%20politics.pdf), Lucknow: Eastern Book Company, November 14. [http://upendrabaxi.in/documents/The%20indian%20supreme%20court%20and%20politics.pdf]. Last accessed on June 14, 2021.

are open and freely accessible to the willing public eye, this Policy Watch additionally analyses the implications of such imagination and identifies conceptual challenges that would have to be overcome to ensure India's courts remain equitable and accountable.

The next chapter provides a context to the draft Vision Document and some key underpinning ideas. The third chapter outlines the idea of justice as a service. The implications of this approach are discussed in the fourth chapter. Finally, some conclusions are offered and a possible way forward for the future of justice delivery for India is suggested.

## e-Courts in India – A Brief Timeline

**2005:** *National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005* submitted by e-Committee, Supreme Court of India.

**2007:** Phase I of the e-Courts project begins; installation of hardware, LAN & Case Information Software (CIS); courts launch websites; Judicial officers trained in the use of CIS.

**2013:** The Chief Justice of India, P. Sathasivam, launches the e-Courts national portal, [ecourts.gov.in](http://ecourts.gov.in); 2,852 districts and taluka courts secure presence on the portal and provide case status, cause lists; uploading of orders and judgments follows in due course.

**2015:** Phase II of the e-Courts project sanctioned; additional hardware; Free and Open Source Solutions (FOSS); all court complexes connected to jails via desktop-based video conferencing; information available in local languages on court websites; kiosks provided in courts and online payment gateway introduced.

**2020:** The pandemic-lockdown; courts begin using online tools such as 'Zoom' for virtual hearings; systems for e-Filings, e-Hearings, e-Trials introduced.

**2021:** Draft Vision Document for Phase III released for public response (**April**); Rules for live streaming of court proceedings released and feedback from stakeholders invited (**May and June**).

*Source: Compiled by authors from the websites of the Ministry of Law & Justice, (<https://doj.gov.in/>), Supreme Court's e-Committee (<https://ecommitteesci.gov.in>) and e-Courts ([www.ecourts.gov.in](http://www.ecourts.gov.in))*

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## II. THE SUPREME COURT'S VISION FOR E-COURTS

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Computerisation of some elements of the Indian judicial processes has been going on since the 1990s<sup>14</sup> – decades before the setting up of the e-Committee. Before the outbreak of the COVID-19 pandemic, however, fully functional e-Courts seemed distant. A select few countries such as the United Kingdom and Singapore had moved to an e-Courts system for particular disputes although none had completed the shift to electronic mode of delivering justice.<sup>15</sup>

In March 2020, when the first pandemic-induced lockdown was enforced across the country, the Supreme Court of India quickly stepped up its efforts to keep the judiciary functional, albeit at reduced capacity.<sup>16</sup> Almost immediately, the judiciary had to plan and implement a strategy to move online. Policies and courts systems needed to be assessed and procedural rules issued, vendor contracts had to be executed and software purchased to ease the transition. High Courts prepared standard operating procedures (SOPs) to be implemented to make the transition to virtual courts, modelled along the Supreme Court's guidelines for virtual courts. These SOPs, which included the procedures to be followed for e-platforms, e-filing information, step by step guides, and video conferencing rules, became the basic guidelines as the e-Courts system was introduced.

In June 2020, the Supreme Court's e-Committee, chaired by D.Y. Chandrachud, Judge of the Supreme Court, appointed a subcommittee of experts from three organisations – Agami, Daksh and the Vidhi Centre for Legal Policy – 'to envision Phase III of the eCourts project'. A draft of the Vision Document was released on April 3, 2021, which was open for public comments until May 31, 2021.<sup>17</sup> This Policy Watch is written to critically engage with the draft

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<sup>14</sup> Bharuka, Justice G.C. *Op. Cit.*

<sup>15</sup> State Courts of Singapore. nd. [Do More Online: Why, What, How?](#)

[[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/761378/SINGAPORE.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761378/SINGAPORE.pdf)]. Also [e-Court: the Online Justice System](#). [<http://www.ecourt.co.uk/aboutus.php>]. Last accessed on June 7, 2021. See generally for details on remote courts models across the globe, [Remote Courts](#), June 2021. [<https://remotecourts.org/>]. Last accessed on November 15, 2020.

<sup>16</sup> Dixit, M. 2020. [Justice in the Time of Corona](#), *India Today*, April 2. [<https://www.indiatoday.in/india-today-insight/story/justice-in-the-time-of-covid-19-1662330-2020-04-01>]. Last accessed on June 3, 2021.

<sup>17</sup> Department of Justice, Government of India. 2021. [Extension of Last date for receipts of inputs for Draft Vision document for Phase-III](#), May 21.

[<https://doj.gov.in/news/extension-last-date-receipts-inputs-draft-vision-document-phase-iii>]. Last accessed on June 5, 2021.

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Vision Document and its implications for justice delivery remaining within the realm of 'public service' which is discussed in detail in Chapter III.

The key aspects of the Vision can be outlined in three parts as the 'ecosystem' approach:

1. To simplify procedures by revamping pre-digital era mechanisms and using technology to increase efficiency through redesigning processes.
2. To create foundational digital infrastructure, which can handle different services such as a digital case registry, intelligent scheduling systems, and an interoperable criminal system where data can be shared between prisons, the police and legal aid authorities. This infrastructure is to be developed to allow for electronic filing, summons delivery, virtual hearings, virtual courtrooms to name a few. This system will be built on user-feedback received and will utilise new technologies as it advances.
3. To set up a long term National Judicial Technology Council that will be responsible for developing protocols and standards for the implementation of the services provided using the digital infrastructure.

The draft Vision Document also outlines the challenges that may come up at the implementation stage, including access to relevant hardware, creation of digital infrastructure and access to critical services. It argues that these challenges can be overcome through the adoption of the ecosystem approach discussed above, which focuses on scale, speed and sustainability. It further suggests that:

“...rather than focus on developing all the solutions itself, Phase III will curate the right environment and infrastructure for solutions to emerge rapidly from the ecosystem to create a multiplier effect for change. It can achieve greater adoption and impact by leveraging the collective strength of the ecosystem.”<sup>18</sup>

The draft Vision Document expands the traditional view of the administration of justice as a sovereign function to a service provided by courts along with public, private and citizen actors in a justice ecosystem—starting from dispute prevention to containment and final resolution.<sup>19</sup> In practice, this means that the judicial system need not provide all the services itself and can

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<sup>18</sup> **E-Committee. Supreme Court of India. 2021a.** *Op Cit.* p. 5

<sup>19</sup> **Ibid.** p. 22

leverage the capabilities and solutions provided by the other players in the ecosystem by disaggregating tasks into specific functions, such as scheduling or payments.

Richard Susskind, the IT adviser to the Lord Chief Justice of England and Wales, has argued in favour of the idea of courts as a service, questioning whether we actually need to all be in the same place in order to resolve legal differences,<sup>20</sup> emphasising that technology is not meant to merely automate old ways of working but rather to transform how we think of court services to begin with. In the Indian context, Justice Chandrachud had earlier remarked that there was a need to “look upon dispute resolution not as relating to a place, namely a court, where justice is ‘administered’, but as a service that is availed of.”<sup>21</sup> In this regard, Online Dispute Resolution is seen as a “market solution to dispute resolution and comes with certain advantages – simpler rules and procedures, limited bureaucracy, infinite capacity – that enables it to resolve disputes in a short time frame and at a low cost.”<sup>22</sup>

### Concerns over technocratic justice

In our view, the ideas proposed in the draft Vision Document are technocratic in nature and this raises serious concerns. For instance, it recommends that an agile ‘micro service architecture’ is to be created, where the design of the enabling technology constantly evolves based on ‘iterative development’. This is expected to occur in a decentralised and organic manner based on stakeholder demands, without the need for systemic overhaul. Solutions are expected to emerge through collaborations among teams.

To create the required digital infrastructure for this ecosystem, however, private players would need access to data on its constituent parts: courts, registry, judges, police and prisons. This entails substantial communication between courts and private actors. The services and solutions built by private players will be used to build governance frameworks and evaluate the system’s accountability. Further, open-source application process interfaces will enable

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<sup>20</sup> Susskind, R. 2020. [The Future of Courts](https://thepractice.law.harvard.edu/article/the-future-of-courts/), *The Practice*, July/August 2020. [https://thepractice.law.harvard.edu/article/the-future-of-courts/]. Last accessed on August 15, 2020.

<sup>21</sup> Kant, A. and Sekhri, D. G. 2020. [Take Online Route for Better Justice Delivery](https://www.thehindubusinessline.com/opinion/take-online-route-for-better-justice-delivery/article32261376.ece), *The Hindu Business Line*, August 3. [https://www.thehindubusinessline.com/opinion/take-online-route-for-better-justice-delivery/article32261376.ece]. Last accessed on June 2, 2021.

<sup>22</sup> Visweswariah, B and Musthafa, T. 2020. [Justice-as-a-Service: India’s Online Dispute Resolution Movement at an Inflection Point](https://www.omidyarnetwork.in/blog/justice-as-a-service-indias-online-dispute-resolution-movement-at-an-inflection-point), Omidyar Network India, August 11. [https://www.omidyarnetwork.in/blog/justice-as-a-service-indias-online-dispute-resolution-movement-at-an-inflection-point]. Last accessed on June 2, 2021.

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private actors to interact with the justice system and exchange data but this can open up highly sensitive judicial, prison and other justice systems data to them.

The draft Vision Document refers to the requirement of standards and certifications to act as 'guardrails' for the services proposed to be provided by private players. It explains that the prior publication of open standards would 'level the playing field' for all parties and that "standards and specifications enable increased interoperability between solutions and systems and reduce the barriers to participation by ecosystem actors."<sup>23</sup> It also suggests that private players who develop solutions would be certified. Although such certification could, in theory, improve public trust and accountability of the process; little is provided in the draft Vision Document on how this will be implemented.

An added concern is that the dangers of surveillance, that come with creating a centralised system for data, are not considered. On the contrary, they seem to be encouraged.<sup>24</sup> Moreover, some critical questions are also thrown open: what are the safeguards proposed in regard to the technology being developed, and what are the mechanisms for the review of algorithmic decisions?<sup>25</sup> What are the protections against caste and ethnicity-based biases in data?<sup>26</sup> What are the regulatory protections in place to ensure that there is scrutiny of the functioning of private actors? All these raise fundamental equity issues at the heart of the Supreme Court's vision.

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<sup>23</sup> **E-Committee, Supreme Court of India. 2021a.** *Op Cit.* pp. 34.

<sup>24</sup> **Article 21 Trust. 2021.** [Response to the Draft Vision Document on Phase III of the E-Courts Project](https://drive.google.com/file/d/1re-RysqdVtwIVKXtu8ZfHHSOESQb-h7V_/view), May 31. [https://drive.google.com/file/d/1re-RysqdVtwIVKXtu8ZfHHSOESQb-h7V\_/view]. Last accessed on June 2, 2021.

<sup>25</sup> **Internet Freedom Foundation. 2021.** [Ensuring Equity, Accessibility and Transparency in Court: Our Comments on the Supreme Court's Draft Vision Document](https://internetfreedom.in/ensuring-equity-accessibility-and-transparency-in-court-our-comments-on-the-supreme-courts-draft-vision-document/), *Internet Freedom Foundation*, May 13. [https://internetfreedom.in/ensuring-equity-accessibility-and-transparency-in-court-our-comments-on-the-supreme-courts-draft-vision-document/]. Last accessed on June 2, 2021.

<sup>26</sup> **Sonawane, N, Bej, S, et. al., 2021.** [The Dangers of a Centralised Database for Justice System](https://indianexpress.com/article/opinion/columns/the-dangers-of-a-centralised-database-for-justice-system-7333252/), *The Indian Express*, May 28. [https://indianexpress.com/article/opinion/columns/the-dangers-of-a-centralised-database-for-justice-system-7333252/]. Last accessed on June 2, 2021.

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### III. JUSTICE AS A SERVICE: COMMODIFICATION AT THE COST OF PUBLIC SCRUTINY?

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The draft Vision Document speaks of the lifecycle of justice in terms of dispute mitigation, dispute containment and dispute resolution. Along the lines of Marc Galanter, Professor Emeritus, Law School, University of Wisconsin-Madison, who ponders: “Where is the justice we want to admit people to? Where does it reside?”<sup>27</sup> the following questions need to be asked at each step of this lifecycle: “Why are we building this technology? Who are we building it for? And what are we building in terms of services?”

#### Justice and Society

The justice system, described often as ‘a pillar of democracy’, is fundamental to liberty and civic life.<sup>28</sup> Justice is intertwined with essential values of a society, such as respect for the rule of law, fairness and accountability. Hazel Genn, Professor of Socio-Legal Studies, Faculty of Laws, University College London, points out that

“civil justice has important and extensive social functions that go beyond settling disputes...and to this extent, must be regarded as a public rather than a private benefit”.<sup>29</sup>

She explains that it has functions in relation to social justice, economic stability and social order. Courts serve an important social function by providing authoritative, binding and impartial decisions that protect people’s rights, and enjoy the power of sanction. In a 1985 article on social action litigation, Upendra Baxi, legal scholar, cites from two Supreme Court judgments to point out how the “apex constitutional court” transformed itself from ‘an arena of legal quibbling for men with long purses’ to be identified by “justices as well as the people”

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<sup>27</sup> Galanter, M. 1981. [Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law](https://www.tandfonline.com/doi/abs/10.1080/07329113.1981.10756257), *The Journal of Legal Pluralism and Unofficial Law*, Vol. 13, Issue. 19. [https://www.tandfonline.com/doi/abs/10.1080/07329113.1981.10756257].

<sup>28</sup> Lord Thomas of Cwmgiedd, CJ. 2015. [The Centrality of Justice: Its Contribution to Society, and its Delivery, The Lord Williams of Mostyn Memorial Lecture](https://www.judiciary.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf), The Lord Williams of Mostyn Memorial Lecture, London, November 10. [https://www.judiciary.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf]. Last accessed on May 24, 2021.

<sup>29</sup> Genn, H. 2009. *Judging Civil Justice, (The Hamlyn Lectures)*. Cambridge: Cambridge University Press. p. 17.

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as the 'last resort for the oppressed and the bewildered'.<sup>30</sup> This transformation – which Baxi describes as a “transition from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility” – was on account of the Court's commitment to the fundamental ethos of the Indian Constitution and its emancipatory potential.

In a recent article on justice and rights in times of a crisis, Kalpana Kannabiran, Professor and Director, Council for Social Development, Hyderabad, writes about the importance of the court in upholding the idea of a commons that the Constitution imagines:

“...any action, state or judicial, must be based on *empathy* and a deep *ethical commitment* to constitutional morality, not on the assertion of prerogative and the distribution of largesse. We all inhabit the constitutional commons equally and have an equal stake in it—from the dispossessed worker to the Chief Justice and President of India.”<sup>31</sup> (Emphases original)

This idea of the commons is critical to the understanding of adjudication in its broader context. Owen Fiss, Professor Emeritus, Yale Law School, argues that:

“Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”<sup>32</sup>

These values of respect for the rule of law, equality of all before the law and equal access to courts, brought in by the utilisation of public resources and officials working for the common good, play a particularly crucial role in justice delivery.

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<sup>30</sup> Baxi, U. 1985. [Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India](#), *Third World Legal Studies*, Vol. 4, Article. 6, p. 107, June 1.

[<https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1125&context=twls>]. Last accessed on June 5, 2021.

<sup>31</sup> Kannabiran, K. 2020. [Justice and Rights In Viral Contexts In India](#), *The India Forum*, May 2.

[<https://www.theindiaforum.in/article/justice-and-rights-viral-contexts-india>]. Last accessed on June 4, 2021.

<sup>32</sup> Fiss, O. M. 1984. [Against Settlement](#), *The Yale Law Journal*, Vol. 93: 1073.

[[https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2206&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2206&context=fss_papers)]. Last accessed on June 7, 2021.

## Justice and the characteristics of courts

A critical aspect to consider is the public nature of justice and the value attached to the court's civic space. As a public good, justice has to be “fair and accessible, open and transparent, effective and efficient, independent and impartial and delivered at proportionate cost to the taxpayer.”<sup>33</sup> Fairness operates at both procedural and substantive levels. Procedurally, this means “the opportunity to be heard and to influence the decision maker, even-handedness of the decision maker, and being treated with courtesy and respect”.<sup>34</sup>

Genn points out how procedural fairness leads to substantively correct decisions and influences user perception of the fairness of the process. The question to ponder is: if in the digital version of Indian courts that the e-Committee has envisioned, will fairness in treatment by courts become peripheral to the seamlessness of services that courts provide?

A court is a space that is meant to be non-exclusive, accessible, sociable; and one that allows for interactions. Justice Albie Sachs, who sat at South Africa's post-Apartheid Constitutional Court, shows how courts are civic spaces:

“We have lots of public functions ... book launches, exhibitions ... debates and discussions on important public holidays, theatrical and dance performances, films. So, it really is a public place, used by the public in all sorts of ways.”<sup>35</sup>

While an exclusive physical space may not be necessary, in its design and working, courts reinforce the idea of a ‘special’ place, in terms of their decisions, authority and legitimacy. Justice, an all-party law reform and human rights organisation working to strengthen the justice system in the United Kingdom brought out its “Understanding Courts” report in 2019. The report identifies that the use of language, dress and ritual by legal and court professionals enhances the sense of expertise that courts convey.<sup>36</sup> In Kenya, when the COVID-19

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<sup>33</sup> Marks, A. 2016. *What is a Court?*, London: JUSTICE. [https://files.justice.org.uk/wp-content/uploads/2016/05/06170726/JUSTICE-What-is-a-Court-Report-2016.pdf].

<sup>34</sup> Genn. 2009. *Op Cit.* pp. 14-15.

<sup>35</sup> Levy, K, Kent, F., et. al., 2009. *Reinventing the Courthouse*, *Project for Public Spaces*, January 2. [https://www.pps.org/article/courts-in-a-new-paradigm-of-place]. Last accessed on June 2, 2021.

<sup>36</sup> Blake, N. 2019. *Understanding Courts*, London: JUSTICE. [https://files.justice.org.uk/wp-content/uploads/2019/01/06170235/Understanding-Courts.pdf]. Last accessed on June 2, 2021.

pandemic hit, after experimenting with online courts and considering the importance of the court as a public space, the judiciary decided to switch to open air hearings.<sup>37</sup> Kenya, like India, struggles with uneven electricity and internet access across regions. Further, litigants, particularly those self-represented, found the e-filing platform challenging to access. The symbolism of the courtroom materialises justice and gives it meaning. Resnik and Curtis suggest that the “open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.”<sup>38</sup> They allow for justice to be delivered ‘in the co-presence of those who exercise power and those who are subject to it’. Kenya’s open-air courts therefore serve as an illustration for a fully participative court.

### **The question of equity**

In thinking about questions of efficiency, equity and ease, as outlined in the draft Vision Document, the following question needs to be posed: how far does the question of equity become secondary to efficiency and ease of use? This is an important consideration especially if India is embarking upon what Evgeny Morozov, a scholar on technology and politics, identifies as ‘technological solutionism’: the idea that the right code, robots or algorithms can remove all imperfections, and create ‘seamless’ processes.<sup>39</sup> Morozov argues that adopting such an approach does not consider wider social relations at play, as well as social awareness of the interdependence between creating digital solutions with how they engage with material realities.<sup>40</sup>

For instance, video conferencing for criminal trials has several processual merits, in terms of reducing costs as there is no requirement of armed escorts to accompany the person for every hearing. However, it may not be able to ensure a fair trial with fundamental guarantees against custodial torture or inhuman treatment. A magistrate may not be able to determine the

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<sup>37</sup> **Waita, E. 2020.** [Kenya’s High Court Holds Open Air Hearings to Slow Spread of Coronavirus](https://www.reuters.com/article/us-health-coronavirus-kenya-courts-idUSKBN2172RH), *Reuters*, March 20. [https://www.reuters.com/article/us-health-coronavirus-kenya-courts-idUSKBN2172RH]. Last accessed on November 15, 2020.

<sup>38</sup> **Resnik, J. and Curtis, D. 2011.** [Representing justice: invention, controversy, and rights in city-states and democratic courtrooms](https://searchworks.stanford.edu/view/8832068), New Haven: Yale University Press. [https://searchworks.stanford.edu/view/8832068].

<sup>39</sup> **Schull, N. D. 2013.** [The Folly of Technological Solutionism: An Interview with Evgeny Morozov](https://www.publicbooks.org/the-folly-of-technological-solutionism-an-interview-with-evgeny-morozov/), *Public Books*, September 9. [https://www.publicbooks.org/the-folly-of-technological-solutionism-an-interview-with-evgeny-morozov/]. Last accessed on June 2, 2021.

<sup>40</sup> **Mcdonald, S. 2020.** [Technology Theatre](https://www.cigionline.org/articles/technology-theatre/), *Centre for International Governance Innovation*, July 13. [https://www.cigionline.org/articles/technology-theatre/]. Last accessed on June 2, 2021; **de Souza, S.P. and Spohr, M. 2020.** *Technology, Innovation and Access to Justice: Dialogues on the Future of Law*, Edinburgh: Edinburgh University Press.

detained person's actual physical condition as accurately in an online hearing. Carolyn McKay, Lecturer at the University of Sydney Law School, describes the impact of remote hearings on procedural justice, particularly the 'reduced possibility for interaction between legal counsel and defendants'. She shows how video-conferencing undermines a defendant's rights to a public hearing and to confront witnesses.<sup>41</sup>

Practically, access refers to an "[e]qual opportunity to seek and receive remedies for alleged violation of one's legal rights by public or private actors before courts and other conflict resolution mechanisms."<sup>42</sup> Equal access to justice and legal empowerment, inclusive development, good governance and the rule of law, are intrinsic goals emphasised by the United Nations Sustainable Development Agenda.<sup>43</sup> These are closely intertwined with the notion of 'open' justice which means that every citizen has access to data on cases and can develop an informed view of the workload and outputs of courts and leads to transparency, where justice is 'seen to be done' by not excluding the public and press.<sup>44</sup> This recognises the intrinsic value of justice, for, "Justice is seen as both a right and a vital public service that upholds laws, defends human rights and supports institutions in a manner consistent with human rights, such as the right to equality and non-discrimination".<sup>45</sup>

In order to ensure open justice, Nicolas Vermeys, Professor at the Université de Montréal's Law Faculty, emphasises that privacy should be taken even more seriously when the court records can be accessed online. One of the main arguments in support of e-Courts is that they permit easy access to court records, eliminating the inconvenience of trying to obtain physical records. Vermeys, however, points out that this could erode the 'practical obscurity that worked informally to protect sensitive information in court documents from widespread

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<sup>41</sup> McKay, C. 2018. [Video Links from Prison: Court "Appearance" within Carceral Space](https://journals.sagepub.com/doi/abs/10.1177/1743872115608350) *Law, Culture and the Humanities*, The Association for The Study of Law, Culture and the Humanities. Volume 14, Issue 2, pp.242-262. [https://journals.sagepub.com/doi/abs/10.1177/1743872115608350].

<sup>42</sup> Reiling, D, Hamnergren, L., et. al., 2007. [Justice Sector Assessments: A Handbook](https://documents1.worldbank.org/curated/en/803711468338346161/pdf/437070WP0Box3210March0200701PUBLIC1.pdf), Washington: The World Bank. p.66. [https://documents1.worldbank.org/curated/en/803711468338346161/pdf/437070WP0Box3210March0200701PUBLIC1.pdf].

<sup>43</sup> United Nations. 2020. [The Sustainable Development Goals Report 2020](https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf), United Nations Publications: New York. [https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf]. Last accessed on July 6, 2021; and Narasappa, H. and Vidyasagar, S. (eds), *State of the Indian Judiciary: A Report by Daksh* (Eastern Book Company 2016).

<sup>44</sup> Article 21 Trust. *Op Cit.* p.9-10.

<sup>45</sup> Organisation for Economic Cooperation and Development. 2019. [Equal Access for Inclusive Growth: Putting People at the Centre](https://www.oecd.org/governance/equal-access-to-justice-for-inclusive-growth-597f5b7f-en.htm), OECD: Paris, March 28. [https://www.oecd.org/governance/equal-access-to-justice-for-inclusive-growth-597f5b7f-en.htm]. Last accessed on July 6, 2021.

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disclosure' and, hence, gives importance to imposing strong restrictions on online access to court records.<sup>46</sup>

Susskind speaks of seven elements of justice – ‘substantive justice (fair decisions), procedural justice (fair process), open justice (transparency), distributive justice (accessibility), proportionate justice (appropriate balance), enforceable justice (backing by the state), and sustainable justice (sufficient resources)’ – and argues that ensuring open justice and procedural justice are two of the biggest concerns that have emerged.<sup>47</sup>

In the draft Vision Document, the deliberative process of engagement between a citizen and a justice institution is sought to be replaced by a transactional process, where justice as a service is supplied by many providers. It offers a commodification of otherwise public services, with the lack of a stringent accountability framework to determine whether it meets the public values which are critical for a justice institution.

A public service, as Léon Duguit points out in ‘The Concept of Public Service’, is an activity of such importance to societal life that it cannot be interrupted even for a single moment. He suggests that the delivery of justice is one of three ‘only’ public services and that those in authority have the obligation to organise this service as well as insure its operation according to the law of such service. Consequently, those governed should have recourse which guarantees the performance of this double obligation.<sup>48</sup> Therefore, a movement away from this public nature of justice, as the draft Vision Document envisages, represents a dilution of its importance.

The e-Committee’s intention is to facilitate creation of a number of additional services and solutions to be provided by different actors of the ‘ecosystem’ and ‘improve the efficiency and intelligence of the justice system’. Such focus on efficiency measures leave out, as Giampiero Lupo, a researcher at the Research Institute on Judicial Systems, National Research Council, Italy, points out, fundamental values of the justice system ‘essential to creating trust in and access to justice systems’ and ‘that are essential to ensuring that justice systems contribute

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<sup>46</sup> **Vermeys, N. 2016.** Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values in *e-Access to Justice* (Eds. Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell and Fabien Gélinas) University of Ottawa Press. pp. 126-128.

<sup>47</sup> **Richard Susskind.** *Op Cit.* p. 73.

<sup>48</sup> **Duguit, L. 1923.** [The Concept of Public Service](https://digitalcommons.law.yale.edu/ylj/vol32/iss5/1/), 32 *Yale Law Journal*. 425 at 432. [https://digitalcommons.law.yale.edu/ylj/vol32/iss5/1/]

meaningfully to well-functioning democracy'. He lists out seven key justice values: independence, accountability, impartiality, equal access, transparency, privacy and legal validity.<sup>49</sup>

### Early learnings from e-Courts during the pandemic

Since last year, courts around the world have shifted to virtual justice rapidly, with no time for reflection. This fine balancing of public health concerns and the obligation to uphold the rule of law at all times has perhaps come at the cost of the institution's social responsibility. The Indian judiciary is no exception.

According to the Union Ministry of Law and Justice, between April 2020 and January 2021, courts in India heard around 66,85,000 matters using video conferencing facilities, the Supreme Court leading with 52,353 matters.<sup>50</sup> However, a report based on data from the National Judicial Data Grid points to the increasing pendency in courts during the same period. In the Supreme Court, case pendency has risen by 10.3 per cent, at High Courts it is around 20.4 per cent and at district courts, around 18.4 per cent.<sup>51</sup> This in itself demonstrates the inefficacy of technological fixes without addressing underlying systemic challenges including the lack of clear processes and resources.<sup>52</sup>

The pandemic has deepened the digital divide for all stakeholders, particularly lawyers and litigants. As a recent Daksh study shows,<sup>53</sup>

“[a]lthough the idea behind online hearings was to allow lawyers to join remotely to avoid overcrowding in courts, in several districts, lawyers did not have the necessary infrastructure (computers or smartphones) and faced severe internet connectivity issues”.

<sup>49</sup> **Lupo, G. 2016.** *Evaluating e-Justice: The Design of an Assessment Framework for e-Justice Systems*, in *e-Access to Justice* (Eds. Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell and Fabien Gélinas) University of Ottawa Press. p. 57.

<sup>50</sup> **Thakur, P. 2021.** [SC is global leader in virtual hearings says law ministry](https://timesofindia.indiatimes.com/india/sc-is-global-leader-in-virtual-hearings/articleshow/81070044.cms), *The Times of India*, February 17. [https://timesofindia.indiatimes.com/india/sc-is-global-leader-in-virtual-hearings/articleshow/81070044.cms]. Last accessed on June 5, 2021.

<sup>51</sup> **Vishwanath, A. 2021.** [Pandemic Impact: Record Pendency of Cases at All Levels of Judiciary](https://indianexpress.com/article/india/pandemic-impact-record-pendency-of-cases-at-all-levels-of-judiciary-7247271/), *The Indian Express*, March 27. [https://indianexpress.com/article/india/pandemic-impact-record-pendency-of-cases-at-all-levels-of-judiciary-7247271/]. Last accessed on June 6, 2021.

<sup>52</sup> **Sarna, S. 2021.** [A Ticking Bomb: The Pendency Problem of Indian Courts](https://indianexpress.com/article/opinion/columns/coronavirus-pandemic-virtual-hearing-india-courts-judiciary-system-7328862/), *The Indian Express*, May 25. [https://indianexpress.com/article/opinion/columns/coronavirus-pandemic-virtual-hearing-india-courts-judiciary-system-7328862/]. Last accessed on June 6, 2021.

<sup>53</sup> **Verghese, L, Naik, S., et. al., 2020.** [Lawyers Experiences during the COVID-19 pandemic](https://dakshindia.org/wp-content/uploads/2021/01/Laywer-Survey_06.pdf), *Daksh*, December. [https://dakshindia.org/wp-content/uploads/2021/01/Laywer-Survey\_06.pdf]. Last accessed on June 5, 2021.

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“A majority of the respondents ... found it difficult to connect and navigate online hearings. This was not a factor of location. These responses were spread across the less urbanised districts ...and the more urban district ... which is also the state capital. Respondents... complained about the poor quality of video transmission in VIDYO. Some of them stated that they could not see the judge at all and were unable to ascertain if their arguments were audible to the judge. Respondents ... stated that they regularly used WhatsApp calling for online hearings as they often faced difficulties in joining the videoconferencing link that was sent to them”.<sup>54</sup>

In practical terms, therefore, the absence of open court played out in terms of difficulties in internet connectivity, access to hardware devices, as well as chronic problems such as legal illiteracy and procedural complexity.<sup>55</sup>

Additionally, tangible measures need to be put in place to ensure that the open court principle, which has been in much debate during the last year, is maintained. This is crucial as Indian courts seek to make virtual hearings secure without the breach of privacy.<sup>56</sup> With calls for virtual court proceedings to continue to operate even beyond the pandemic growing stronger,<sup>57</sup> such an analysis is required at this critical moment in Indian judicial history.

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<sup>54</sup> *Ibid.* p. 14.

<sup>55</sup> **Verghese, L. 2021.** [Ensure Access to Justice in a Post-Covid World](https://www.hindustantimes.com/analysis/ensure-access-to-justice-in-a-post-covid-world/story-o4OLC4wEa40hSLCJFww0HJ.html), *Hindustan Times*, January 7. [https://www.hindustantimes.com/analysis/ensure-access-to-justice-in-a-post-covid-world/story-o4OLC4wEa40hSLCJFww0HJ.html]. Last accessed on June 7, 2021.

<sup>56</sup> **Agarwal, Y. 2020.** [Challenges in setting up virtual and online courts in India](https://www.theleaflet.in/challenges-in-setting-up-virtual-and-online-courts-in-india/), *The Leaflet*, October 23. [https://www.theleaflet.in/challenges-in-setting-up-virtual-and-online-courts-in-india/]. Last accessed on June 6, 2021.

<sup>57</sup> **Parliament of India. 2020.** Press Note: [A court is more a service than a place, says Parliamentary Committee](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/Press_ReleaseFile/OTHER/1/327P_2020_9_9.pdf), Rajya Sabha Secretariat. September 11. [https://rajyasabha.nic.in/rsnew/Committee\_site/Committee\_File/Press\_ReleaseFile/OTHER/1/327P\_2020\_9\_9.pdf]. Last accessed on June 5, 2021.

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## IV. A PROBLEMATIC APPROACH

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“Our quest for technology should not be oblivious to the country's real problems: social exclusion, impoverishment, and marginalization...Dignity and rights of individuals cannot be based on algorithms or probabilities...”

- Justice D.Y. Chandrachud <sup>58</sup>

**A**n underlying argument for the need for technical solutions is that the traditional model of justice delivery, with physical courtrooms occupying the centre stage, has been unresponsive to the demand for narrowing the access to justice gap. It has been argued that technology will bring speed, scale and efficiency. This has triggered the demand for fundamental transformation in its working using creative, future-proofed means. To achieve a modern, efficient court, existing structures are being reconfigured by harnessing the power of technology. The dispute resolution system itself has undergone fundamental changes. One aspect of this is the digitisation of courts, namely, the movement from a paper-based to the online system. So far, however, this appears to be a grafting exercise, where a modern system is laid upon the traditional processes, and as successive phases of the e-Courts project have shown, the results have been limited.<sup>59</sup>

An argument in favour of ‘online courts’ as a service is that it is “cheaper, more intelligible, less combative and forbidding and convenient from the user perspective—all in all, a superior offering to traditional courts”.<sup>60</sup> In the longer term, Susskind imagines ‘online courts’ as an interim measure, when court services will be ‘a seamless blend of online services and conventional courtroom activity’.<sup>61</sup>

One of the approaches – being promoted by justice sector organisations, researchers and civil society groups – is an alternative model termed ‘justice spaces’. Unlike traditional courts, these involve physical and virtual elements, respond to the requirements of the specific matters in

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<sup>58</sup> **Supreme Court of India. 2018.** *Justice K.S. Puttaswamy (Retd) vs Union Of India*, *Indiakanoon.org*. September 26. [<https://indiankanoon.org/doc/127517806/>]. Last accessed on June 30, 2021.

<sup>59</sup> **de Souza, S.P. and Aithala, V. 2018.** *Can Technology Finally Deliver on India's Legal Aid Promise?* *Stanford Social Innovation Review*, July 27. [[https://ssir.org/articles/entry/can\\_technology\\_finally\\_deliver\\_on\\_indias\\_legal\\_aid\\_promise](https://ssir.org/articles/entry/can_technology_finally_deliver_on_indias_legal_aid_promise)]. Last accessed on August 1, 2019.

<sup>60</sup> **Susskind, R. 2019.** *Online Courts and the Future of Justice*, Oxford: Oxford University Press, p.190.

<sup>61</sup> **Ibid.** p.63

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dispute that are dealt within them and adapt to the needs of its users.<sup>62</sup> This would not be a 'one size fits all' approach but one that is attuned to the contexts within which the courts operate. Users (litigants as well as court staff) are intuitively able to interact with the system using tools they otherwise utilise in their everyday lives and necessary technical support is provided for non-digital users to remove entry barriers.

In its most expansive form, justice delivery as a service is envisioned as an 'extended court' providing facilities beyond dispute resolution through partnerships between the judiciary, executive, civil society and the public. Thus, dispute avoidance is no longer an exclusive preserve of the state. For courts, this includes providing guidance to litigants on their rights, helping court users prepare for hearings, offering dispute management support, including mediation, negotiation, early neutral evaluation.<sup>63</sup> This approach is problematic for several reasons. Such extension of the court's powers beyond prescribed authority may impinge on the separation of powers between the executive and judiciary and threaten judicial independence.<sup>64</sup>

An alternative suggested by Susskind is for legal advice and guidance to be provided by members of the bar and law firms, *pro bono* or using volunteers.<sup>65</sup> This is envisaged as a collaborative effort, with some tools provided by the state and others by voluntary providers, private sector, students, scholars, law firms and alternative service providers such as mediators and negotiators. This is not a novel approach. Similar experiments have been piloted at different points of time in India. However, the efficacy and applicability of such an approach across India, given the country's diverse and often competing interests, remain to be tested. A case in point is the provision of *pro bono* legal services by private parties, where the approach has been piecemeal and ad hoc and dependent on incentives for such private providers. India's experience with *pro bono* legal services should serve as a warning that when justice is commodified—and separated from its public function—competing interests of parties who are service delivery agents have the potential to sideline the intentions of ensuring fair, equitable and transparent justice.<sup>66</sup>

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<sup>62</sup> Alexandra Marks *Op Cit.* p. 22.

<sup>63</sup> Richard Susskind *Op Cit.* pp. 228-229.

<sup>64</sup> Article 21 Trust *Op Cit.* p. 3-4

<sup>65</sup> Richard Susskind *Op Cit.* p. 130.

<sup>66</sup> Aithala, V and de Souza, S.P. 2018. "[Lending A Hand](https://law.asia/lending-a-hand-2/)", *India Business Law Journal*, October 15. [https://law.asia/lending-a-hand-2/]. Last accessed on May 30, 2021.

The social costs of loss of ‘real time’ transparency in the working of e-Courts are high. These include the inability of the public to scrutinise the operation of courts and its decisions, lack of information on its procedures, processes and outputs, and restrictions on the media for reporting proceedings. With the use of technology that is arguably proprietary, what are the standards of scrutiny that will be applied and what are the standards of algorithmic accountability?<sup>67</sup> How effective is the protection from the potential of this technology being used for other purposes such as the expanding web of ‘mandatory’ linkages (despite judgments to the contrary) reminiscent of Aadhaar.<sup>68</sup> What are the safeguards when technology is used to further biases in actors who are using it?<sup>69</sup> These are some questions that need to be resolved to ensure that e-Courts work effectively and win popular confidence.

Finally, meaningful participation in court processes is an ‘essential prerequisite for the legitimate authority of action guiding legal norms’.<sup>70</sup> The Supreme Court’s e-Committee has released the *Draft Model Rules for Live-Streaming and Recording of Court Proceedings*<sup>71</sup> that can make judicial proceedings subject to public scrutiny and democratic discussions and invited ‘suggestions and inputs’.<sup>72</sup> The e-Committee is guided by the objectives of imbibing ‘greater transparency, inclusivity and fostering access to justice’ in formulating these rules.<sup>73</sup> These rules will need to be critically examined to ensure that access to courts continues to remain a social good, not only available to those of means in terms of the requisite knowledge and resources required to understand and participate effectively in the process.

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<sup>67</sup> **Busuioc, M. 2020.** [Accountable Artificial Intelligence: Holding Algorithms to Account](https://onlinelibrary.wiley.com/doi/full/10.1111/puar.13293), *Public Administration Review*, August 15. [https://onlinelibrary.wiley.com/doi/full/10.1111/puar.13293]. Last accessed on May 30, 2021.

**de Souza, S.P. 2018.** [Unpacking the Black Box: Addressing the ‘Social’ to Make Construction of AI-Powered Legal Technologies More Transparent and Unbiased](https://joxcs.files.wordpress.com/2018/06/issue-1_2018-unpacking-the-black-box1.pdf), *Journal of the Oxford Centre for Socio-Legal Studies*. [https://joxcs.files.wordpress.com/2018/06/issue-1\_2018-unpacking-the-black-box1.pdf]. Last accessed on March 20, 2019.

<sup>68</sup> **Ramanathan, U. 2017.** [The Function Creep That Is Aadhaar](https://thewire.in/government/aadhaar-function-creep-uid), *The Wire*, April 25. [https://thewire.in/government/aadhaar-function-creep-uid]. Last accessed on May 30, 2021.

<sup>69</sup> **Bokil, A, Khare, A., et. al. 2021.** [Settled Habits, New Tricks: Casteist Policing Meets Big Tech in India](https://longreads.tni.org/stateofpower/settled-habits-new-tricks-casteist-policing-meets-big-tech-in-india), *TNI Longreads*, May 2021 show in the State of Power 2021 report how casteist tendencies are being amplified with technological props. [https://longreads.tni.org/stateofpower/settled-habits-new-tricks-casteist-policing-meets-big-tech-in-india]. Last accessed on May 30, 2021.

<sup>70</sup> **Solum, L.B. 2004.** *Procedural Justice*, *Southern California Review*, Vol. 78 No. 1 at 181.

<sup>71</sup> **e-Committee, Supreme Court of India. 2021b.** [Draft Model Rules for Live-Streaming and Recording of Court Proceedings](https://ecommitteesci.gov.in/document/draft-model-rules-for-live-streaming-and-recording-of-court-proceedings/). May 28. [https://ecommitteesci.gov.in/document/draft-model-rules-for-live-streaming-and-recording-of-court-proceedings/] Last accessed on June 17, 2021.

<sup>72</sup> **The Leaflet. 2021.** [SC’s e-committee releases draft rules for live-streaming of court proceedings: invites inputs from stakeholders](https://www.theleaflet.in/scs-e-committee-releases-draft-rules-for-live-streaming-of-court-proceedings-invites-inputs-from-stakeholders/). June 7. [https://www.theleaflet.in/scs-e-committee-releases-draft-rules-for-live-streaming-of-court-proceedings-invites-inputs-from-stakeholders/]. Last accessed on June 17, 2021.

<sup>73</sup> **e-Committee, Supreme Court of India. 2021b.** *Op. Cit.*

## V. CONCLUSION AND WAY FORWARD

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This Policy Watch has sought to examine why the Supreme Court of India's vision for digitalisation needs to be fundamentally rethought on its implications for justice as a service. This aspect has been emphasised because the current push towards technology enabled commodification without examining its consequences on the public character of the judiciary will directly affect fundamental liberal values of fairness and equity. This is intricately connected with accountability that should inevitably accompany the exercise of judicial power and the institution of courts. This critique has also aimed to show the impact of the exclusions that could be fuelled by a technocratic approach in terms of widening the digital divide, algorithmic bias, and surveillance.

In its current form, the draft Vision Document gives precedence to disaggregating justice delivery into tasks that can either be automated, or can be outsourced—be it document review, scheduling or creating virtual forums for discussions. Each of these services are governed by interests of scale and efficiency and do not appear to be concerned about the publicness of the function, which requires it to be accessible, equitable and fair for all.<sup>74</sup> There needs to be a shift where technology and digitalisation are not seen as goals in themselves. In contrast, such transition should be coupled with an examination of how this translates into material infrastructure, literacy and development of legal capabilities, to ensure that it works for the collective pursuit of social good.

So, what does a future court look like? Courts need to continue to be civic spaces for deliberative discussions, where there is opportunity for public scrutiny not just of processes but also of substantive decisions. If courts are to expand digitally, they also need to account for the digital rights of their users, which are in relation to access, privacy, security, anti-discrimination and equality.<sup>75</sup> This will ensure that the digitisation process does not play a role in further exacerbating exclusions because its design does not account for the ways in which

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<sup>74</sup> Baxi, U. 2007. [The Rule of Law in India](http://socialsciences.scielo.org/scielo.php?script=sci_abstract&pid=S1806-64452007000100001&lng=en&nrm=iso&tlng=en) *Sur* [Online]. [http://socialsciences.scielo.org/scielo.php?script=sci\_abstract&pid=S1806-64452007000100001&lng=en&nrm=iso&tlng=en]. Last accessed on June 2, 2021.

<sup>75</sup> Digital Freedom Fund. 2020. [Digital Rights are Human Rights](https://digitalfreedomfund.org/wp-content/uploads/2020/12/Human-Rights_V3.pdf), December 10. [https://digitalfreedomfund.org/wp-content/uploads/2020/12/Human-Rights\_V3.pdf]. Last accessed on July 1, 2021.

communities and people engage with it. Therefore, e-Courts need to be conceptualised and implemented in a manner that foregrounds respect for the basic rights of various stakeholders.

Embedding the basic premise of equity in the vision for a digitalised judicial process is a prerequisite to ensure that India's march towards technical expertise is in tune with the social and political realities within which people access justice in India.

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