

# Open Justice and Rule of Law: Indian Scenario

**Dr. Lalit Dadwal**  
Associate Professor  
Department of Laws,  
H. P. University,  
Shimla-5 (H.P.)

## Abstract

Open justice is a constitutional principle of the highest order. It is subject to the strictest exceptions. It can be disappplied only when the administration of justice is disserved by adherence to it. Freedom of expression is the chief vehicle by which open justice is realized. Bentham said it best: 'Publicity is the very soul of justice'. It plays a vital role in the rule of law. Publicity informs citizens of the law, as applied by the judiciary, so that they may moderate their behaviour accordingly. Open justice is a 'safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice'. Likewise, it performs a pivotal role in ensuring there is equality before the law. The principle of open justice is the cornerstone for ensuring that law fulfils this role, and does not become a tool for arbitrary power. Open justice exists in order to ensure that decisions in court are served properly and effectively. Exceptions to the rule of open justice represent those instances in which a completely open court would have undermined the purpose of the hearing. Nevertheless, when an application is made for a private hearing, the reasons for allowing it must be justified by the Court. This enables the confidentiality of information to be maintained, while ensuring that such exceptions are properly justified. This exception should be used sparingly and judiciously. The author in this article has tried to put light on the matter to acknowledge the two different aspect of justice that is open justice and closed courts.

**Key Words:** Open Justice , Rule of Law, Closed Courts.

## A. Introduction

**Mc Lachlin**, Chief Justice of Canada in her lecture "Is the open court principle sustainable in the 21st century? An examination of the open court principle as a component of the Rule of Law"<sup>1</sup>, said that the "open court principle" was rightly venerated as a key component of the rule of law, the core principle of which, as defined by **Lord Bingham** in his book, *The Rule of Law* <sup>2</sup>, was that: "all persons and authorities within the state, whether public or private, should be bound by and entitled to benefit from laws publicly made, taking effect (generally) in the future and publicly administered in the courts."

She also cited the philosopher **Jeremy Bentham's** dicta<sup>3</sup>: "Where there is no publicity there is no justice" and "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial." On the same theme, **Justice Brandeis** of the American Supreme Court had famously remarked that "Sunlight is the best disinfectant".

<sup>1</sup> Chief Justice of Canada, the Rt Hon Beverley McLachlin PC delivered lecture on 8<sup>th</sup> January 2014. The lecture was part of the Bar Council's series of Annual International Rule of Law lectures, London, U.K.

<sup>2</sup> (2010), Ch 1, p 8

<sup>3</sup> <sup>3</sup> John Bowring (ed), *The Works of Jeremy Bentham: Vol. VI* (London, 1843) 351–2. Also see, Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *Tasmanian Law Review* 25.

The open court principle meant in practice that (1) court proceedings including the evidence and documents disclosed in proceedings should be open to public scrutiny; and (2) juries and judges should give their decisions in public. (It did not require every aspect of the judicial process to be open, so that for example judges' deliberations could remain private, and some evidence might be protected by privilege.). When we talk about importance of open justice, it is supported for three reasons: First, it assisted in the search for truth and played an important role in informing and educating the public. Second, it enhanced accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done. The tradition of open justice had its origins in England before the Norman Conquest, when freemen in the community participated in the public dispensing of justice. The tradition had spread out from England, particularly to those parts of the world which had adopted and retained the common law heritage, but was also observed and respected in civil law societies. The open court principle had been affirmed in England in the strongest terms by the House of Lords in the case of *Scott v Scott*<sup>4</sup>, where **Lord Atkinson** had said:

“The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

Likewise, in the Canadian Supreme Court, in *Attorney General (Nova Scotia) v MacIntyre*<sup>5</sup>, Justice (later Chief Justice) Dickson had said:

“Many times it has been urged that the ‘privacy’ of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.”

In safeguarding public access to information about courts and their activities, open justice provides a set of principles that facilitate other liberal democratic values — the right to know the law and to understand its application, the salutary effects of permitting citizens to observe and evaluate the operation of government, and a repugnance for arbitrary power<sup>6</sup>. According to **Jaconelli**<sup>7</sup>, it is a procedural dimension of the right to a fair trial, requiring openness in the hearing phase; it is also a means to an end.<sup>8</sup>

Open justice also ensures that public may produce additional witness. The repercussion may also be that the public criticism shall send a message to the courts that the justice was not properly delivered<sup>9</sup>. In case of criminal trial human rights is the highest order that needs to be followed. The commission of crime is against whole community, which therefore has a legitimate interest in observing the event at which the question whether a transgression has taken place is determined authoritatively. The guilty should be

<sup>4</sup> [1913] AC 417, 463

<sup>5</sup> [1982] 1 SCR 175, 185

<sup>6</sup> David M Paciocco, 'When Open Courts Meet Closed Government' (2005) 29 *Supreme Court Law Review* (2d) 385, 389–90

<sup>7</sup> Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press, 2002)353

<sup>8</sup> *Id.*, 353–55

<sup>9</sup> In *Tukaram vs. State of Maharashtra*, AIR 1979 SC 185, (popularly known as Mathura's case), where the character of the victim was questioned public raised their eyebrow to criticize that the trial was of rape and character of the accused was not to be questioned. Only matter to be decided was the rape was committed in police station by public servants and in the said matter, to decide the responsibility of the government servants

‘publicly condemned’, the innocent ‘publicly acquitted’ and ‘freed from suspicion’. In the words of Jeremy Bentham, ‘by publicity, the temple of justice is converted into a school of the first order, where the most important branches of morality are enforced, the most impressive means...’<sup>10</sup> In essence, then, the open conduct of trials furnishes a means of instruction as are embodied in the criminal law.

As J. **Woolf** wrote, an open justice means ‘A principle of the common law that proceedings ought to be open to the public, including the contents of court files and public viewing of trials’.<sup>11</sup> A trial is required to be held in ‘open court’. The words open court means, ‘a court which the public have a right to be admitted’.<sup>12</sup> Article 6(1) of the **European Convention on Human Rights** provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The open court principle had also now been recognized by Indian Law and Judiciary. However, the open court principle so long recognized by the court now found itself challenged in the early 21<sup>st</sup> century, by two forces in particular. One was the increasing emphasis on privacy, and the idea of privacy as a right guaranteed to and enjoyed by citizens, and protected by the law.. Privacy also justified the exclusion of the public gaze from proceedings involving rape victims, children and vulnerable adults etc. The other was national security, and the requirement that certain kinds of proceeding be held in secret for that reason..

Indian Constitution says ‘that the judgments of the Supreme Court of India shall be delivered only in open court’.<sup>13</sup> The stress to open justice can be seen in order 18 Rule 4 of Civil Procedure Code,<sup>14</sup> 1908 which proves thus, "The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge." Section 153B of Civil Procedure Code<sup>15</sup>, 1976, ‘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.’<sup>16</sup> The same principle stressed in criminal law also.<sup>17</sup> Indian constitution guarantees freedom of speech and expression with certain restriction.<sup>18</sup> Freedom of speech includes freedom of press. Also that the trial should be heard by the public, the accused has the right to know for what he is tried for. It should be in the language known and understood by the public and the accused. It ensures that the trial was conducted by judge is fair and the judge is not biased. Every rule has exceptions, so the principle of open justice also has certain exceptions like conducting trial in-camera, prohibiting media reporting of the cases, Prohibiting disclosing the identity of witnesses and accused.

<sup>10</sup> J. Bentham, ‘Draught of a Code for the Organization of the Judicial Establishment in France’, in John. Bowring (ed.), ‘The Works of Jeremy Bentham’, Edinburgh, U.K. vol. IV, 1843, p. 317

<sup>11</sup> In R v Legal Aid, [1999], QB 966.

<sup>12</sup> R v. Lewes Prison (Governor), ex p Doyle, [1917]2 KB 254

<sup>13</sup> Article 143(4), Constitution of India, 1950.

<sup>14</sup> 21 Act No. 5 of 1908.

<sup>15</sup> 22 Act No. 104 of 1976.

<sup>16</sup> Section 153B, Code of Civil Procedure, 1908

<sup>17</sup> Section 327, Code of Criminal Procedure, 1973

<sup>18</sup> Romesh Thapar v. State of Madras, AIR 1950 SC 124

In *Naresh vs. State of Maharashtra*,<sup>19</sup> J. **Bachawat** elaborated on open justice as follows-

“Long ago Plato observed in his laws that the citizen should attend and listen attentively to the trials. Hegel in his Philosophy of Right maintained that judicial proceedings must be public since the aim of the Court is justice, which is a universal belonging to all save in exceptional cases, the proceedings of a Court of justice should be opened to the public.”

The first challenge to the open court principle in the 21st century has been an increasing emphasis on privacy rights. The right to privacy is the handmaid to several interests worth protecting. In certain criminal cases it is worth protection the right to privacy especially in sexual abuse case and case where a child is a victim or accused. Right to privacy is also emphasized in Convention on Human Rights, which states, everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. When courts recognize reporters' rights to attend proceedings or review court documents, the rights are rarely absolute. Instead, the courts usually apply a balancing test to determine whether the interest in disclosure outweighs any asserted counterbalancing interest in confidentiality.

The standard the courts use in striking that balance depends on the source of the right. The general principle is that an exception can only be justified if it is necessary in the interests of the proper administration of justice. In exceptional situations the proceedings are carried in-camera. In the words of House of Lords<sup>20</sup> – the exceptions are themselves the outcome of a yet more fundamental principle that the chief objective of courts of justice must be to secure that justice is done...As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace this application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration...I think that to justify an order for a hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

Sir **Jack Jacob** recognized two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings “in chambers”, at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof “in camera”, where the court or the trial judge orders that the court should be closed be cleared and the public and press excluded.<sup>21</sup>

At times the presence of the public and the press at the trial will often result in increased stress for the accused, the invasion of his privacy, and damage to his reputation. The accused under such circumstances does not wish the trial to be conducted in open court. And among the exception to open justice, a witness may be ordered to withdraw lest he may trim the evidence by hearing the evidence of others.

**Sarkar J.** speaking about the power of High Court to conduct the trial in camera stated, “The High Court has inherent power to prevent publication of the proceedings of a trial. The power to prevent publication of proceedings is a facet of the power to hold, a trial in camera The Code of Civil Procedure

---

<sup>19</sup> AIR 1967 SC 1

<sup>20</sup> [1913] AC 476.

<sup>21</sup> Sir Jack I. H. Jacob, *The Fabric of English Civil Justice*, Eastern Law House Private Ltd., New Delhi, 1987, p. 22.

contains no express provision authorizing the to hold its proceedings in camera, but if 745 excessive publicity itself operates as an instrument of injustice, the Court has inherent jurisdiction to pass an order excluding the public when the nature of the case necessitates such a course to be adopted An order made by a court in the course of a proceeding which it has jurisdiction to entertain whether the order relates to the substance of the dispute between the parties or to the procedure, or to the rights of other persons, is not without jurisdiction, merely because it is erroneous.”<sup>22</sup> Substantiating in-camera proceedings, it was held in *Ujjam Bai v. State of U.P.*<sup>23</sup> that

‘The power to prohibit publication of proceedings is essentially the same as the power to hold a trial in camera and the law empowering a trial in camera is a valid law and does not violate the fundamental right in regard to liberty of speech.’ Further, it was held that, Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. While emphasizing the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it.<sup>24</sup>

In cases where young offenders are involved, in-camera proceedings are common. Under **Juvenile Justice (Care and Protection) Act<sup>25</sup>, 2000** young offenders are tried in before Juvenile Board.<sup>26</sup> It cannot be tried before normal courts. The Board consists of a chairperson who is designated Chief Judicial Magistrate of the normal courts and two social workers are members. Hence, though the law does not state the proceedings are to be in-camera, the gist of the law suggests that it should not be tried in normal courts. When we watch the proceedings, the board rooms are small and cannot accommodate people from public.

Secondly, in matters concerning Arbitration and Conciliation escapes the norm of open court and publication. The matter is settled through Arbitration and Conciliation is a civil matter and is based on contract between the disputing parties. However, on certain matters the reference can be made to court.<sup>27</sup>

In matrimonial cases there are instincts where the trial is carried in-camera as the matters that are referred concerns to judicial separation, restitution of conjugal rights and divorce the common grounds pleaded are cruelty, desertion, impotency, adultery, virulent and incurable form of leprosy, communicable form of venereal disease etc. Section 2 of **Dissolution of Muslim Marriages Act<sup>28</sup> 1939** and other like Acts recognize the said grounds in matrimonial disputes. They are directly linked with the reputation of the party in proceeding. In such cases evidence is likely to be of revolting character and may injure the finer instinct of the party and may affect such reputation directly in the eye of general public. It may deter the aggrieved to seek relief in courts.<sup>29</sup> And also that it exposes the secrets of marital life. It also discourages the weaker section to tell the truth for fear of being propagated and misunderstood in society.

Section 11 of the **Family Courts Act<sup>30</sup>, 1984**, states "In every suit or proceedings to which this Act applies the proceedings may be held in-camera<sup>31</sup> if the family court so desires and shall be so held if either party so desires." So also giving exception to section 153B of Civil Procedure Code<sup>32</sup>, 1976 which states, ‘Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any

<sup>22</sup> Naresh Shridhar Mirajkar And Ors v. State Of Maharashtra And Anr, AIR 1967 SC 1.

<sup>23</sup> [1963] 1 S.C.R. 778.

<sup>24</sup> Superintendent & Remembrancer v. Satyen Bhowmick And Ors, AIR1981 SC 917.

<sup>25</sup> No. 56 of 2000

<sup>26</sup> Section 4 of Juvenile Justice (Care and Protection) Act.

<sup>27</sup> On the matters concerning interim orders, arbitrators fees, etc.

<sup>28</sup> Act No. 8 of 1939.

<sup>29</sup> Azizur Rahman, "Proceedings-in-Camera", *Judicial Training & Research Institute Journal*, December 2012.

<sup>30</sup> Act No. 66 of 1984.

<sup>31</sup> In camera proceedings means the public is not allowed to view the proceedings. In legal term it means ‘in private.’

<sup>32</sup> Section 153B of Civil Procedure Code, 1908

particular case, that the public generally or any particular person, shall not have access to, or be or remain in, the room or building used by Court.’ The exception by its very nature requires exercise of due care and caution before the court directs trial of a suit out of the public gaze.<sup>33</sup>

The exercise to conduct or not to conduct the matrimonial cases in-camera continued for a long time till the Marriage Laws Amendment Act<sup>34</sup>, 1976 was introduced. Section 22(1) of the legislation states, “Every proceeding under this Act shall be conducted in- Camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.” The law provides sanction to enforce its implementation.<sup>35</sup>

In case of criminal cases the rule is the trial should be conducted in open court, but at times it is excused. Under Indian law Section 327(3) **Criminal Procedure Code**,<sup>36</sup> 1973 provides as follows, ‘Where any proceedings are held under Sub-section (2) it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.’<sup>37</sup> The breach of the provision in criminal cases has been made punishable U/S-228 of the Indian Penal Code<sup>38</sup>, 1860 which states, ‘disclosure of identity of the victim of certain offences viz; rape, or printing or publication of a proceeding without prior permission of the Court has been made punishable with Imprisonment for two years and fine U/S-228- A of the Indian Penal Code. This is true where the trial is conducted in rape cases. In a case involving rape, trial "shall" be held in camera.<sup>39</sup> Simultaneously, it confers jurisdiction on the Court to either, on its own, or on an application of parties, allow access to any particular person of their choice. In *Estate Corporation Limited and Ors. v. Securities and Exchange Board of India and Anr*,<sup>40</sup> the Court was required to balance the two competing rights, that is, the right of the public to know and have access to Court trials as against right of the victim’s family and that of the accused to confidentiality. In the instant case, neither the family of the victim nor the accused had sought in-camera trial, instead, in camera trial, was sought by the State. And this was confirmed and an order was issued to the same stating the name of the accused should not be published by any media as well as by the parties.<sup>41</sup> The need for in-camera trial can also be seen in **Unlawful Activities (Prevention) Act**,<sup>42</sup> 1967. Section 44 of the Act states, ‘This section, ostensibly for the purpose of protecting witnesses, permits the court to hold proceedings in camera and take any other measures for keeping the identity and address of the witness secret, including passing an order that “all or any of the proceedings pending before such a court shall not be published in any manner”. It also makes violation of such measures or orders a criminal offence.’

## B. Open Justice : Indian Scenario

<sup>33</sup> Janaki Ballav v. Bennet Coleman and Co. Ltd, AIR 1989 Orissa 225.

<sup>34</sup> Act 68 of 1976.

<sup>35</sup> 41 Section 22(2) of the Marriage Laws Amendment Act, 1976, which states that if a person violates courts order and publish any proceeding held in-camera than he shall be punishable with fine which may extend to one thousand rupees."

<sup>36</sup> Act No. 2 of 1974

<sup>37</sup> 43 Section 327 (2) states ‘Notwithstanding anything contained in sub- section (1), he inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.’

<sup>38</sup> Act No 45 of 1860.

<sup>39</sup> Section 327 of the Criminal Procedure Code

<sup>40</sup> (2012) 10 SCC 603.

<sup>41</sup> This Ratio was also confirmed in Sakshi v. Union of India and Ors, 2004 (5) SCC 518.

<sup>42</sup> Act No. 37 of 1967

## (a) General

The judicial branch of the State is the compass to measure the democratic values of a State. It is the firmest pillar of the government, a protector of the Constitution and a watchdog of the people's fundamental rights and basic liberties. Like other organs of the State it is to be accountable towards people and should be free from fear and favour. Judiciary, for this reason, should be transparent in its operation. People expect information regarding their judicial administration. They can participate in judicial functioning through regular information disseminated by the mechanism of the judiciary itself and other means of communication. They can observe trial, demand a copy of judgement and decrees, inspect files, ask for other judicial information and finally share the judicial information.

## (b) The Concept of Open Justice

The concept of open justice comprises various elements. It consists, in the first place, the provision of adequate facilities for the attendance of members of the public at trial. Secondly, there is a derivative aspect which guarantees the representative of the media – to report the proceedings to those who either could not gain admission to the trial or were simply not inclined to attend. This aspect find expression in the freedom to recount aspects of the trial proceedings without running the risk of incurring the various forms of liability – most usually defamation or contempt of court – that might otherwise be incurred in this activity. Thirdly, when documents have come into existence for the purpose of the trial by way of pleadings these should presumptively be available for inspection by any member of the public. Fourthly, the names should be openly available of the personnel of the trial, that is, the accused (in a criminal case), the parties (in a civil case), judge, court and witnesses.<sup>43</sup>

All of the above elements of "open justice" are aspects of the right of the public to be informed and are almost guaranteed in various Statutes and the Constitution of India. In the light of these aspects the concept of open justice in India may be examined as under:

## (c) Access to Courts

One of the remarkable achievements of democracy in India has been the establishment of an independent judiciary.<sup>44</sup> The judiciary is free from the executive and the legislature as it is required to be independent.<sup>45</sup> The Constitution makes the judiciary a responsible organ by providing the power of judicial review thereby checking the executive and the legislative branch to go beyond the limits of the Constitution.<sup>46</sup> It is because the Constitution is based on the premise of popular sovereignty which states that the sovereignty of India is vested with the people.<sup>47</sup>

---

<sup>43</sup> Joseph Jaconelli, *Open Justice*, 2002, pp.2-4.

<sup>44</sup> Subhash C. Kashyap, *The Citizen and Judicial Reforms*, 2003, p.179.

<sup>45</sup> Article 51.

<sup>46</sup> Article 13(1)(2).

<sup>47</sup> Preamble to the Indian Constitution. Also see, J.S. Verma, *New Dimensions of Justice*, 2000, p.143.

In a Constitutional system, where popular sovereignty has been recognized, the judiciary determines the question of constitutionality and finally interprets the law. While liberally interpreting the Constitution and thus expanding the rights of the people, the Court also changed the laws regarding *locus standi* and public participation in the judicial process. The liberalized rules of locus standi has changed the entire nature of judicial process. The process became more participatory and democratic. Not only were the rules of locus standi liberalized but the concept of justiciability underwent a metamorphosis, thereby including within the court's purview several matters of governance that would not have been the court's concern under traditional notion of justiciability.<sup>48</sup> In recent years accountability of public authorities and probity in public life has been achieved through the medium of Public Interest Litigation. In this manner, the recent phase of judicial activism has advanced the cause of justice, attempted to achieve the Constitutional purpose in accordance with the Constitutional scheme and thereby ensured implementation of the rule of law.<sup>49</sup>

### (d) Open Trials

In our country, we practice openness in Court proceedings as fundamental to our democracy and system of justice. It is the idea of the British system that all trials are held *Ostis apertis* that is, with open doors, and we have adopted this salutary principle.<sup>50</sup> The concept of open trial<sup>51</sup> is rooted in the common law background which underlines a defendant's right to a speedy and public trial. In common law the practice of open judicial proceedings was established during seventeenth century. In 1612 A.D., **Lord Coke**, emphasized the great importance of the principle that all causes ought to be heard, ordered and determined openly.<sup>52</sup> **Bentham** and **Blackstone** both acknowledged the traditions and salutary aspects of publicity.<sup>53</sup>

The open trial system helps to deter judicial arbitrariness and ensures the accused a right to a fair trial. As **Bentham** observes<sup>54</sup> "the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power". It also reduces the possibility of a witness's perjury. Moreover, it helps to encourage the individuals having possession of relevant information to come forth and testify. Similarly, open trials serve important public interests. Publicity educates people about the operation of the judiciary and provides an opportunity for members of the public to scrutinize the administration of justice.

Trial in open court is an indispensable attribute of fair trial.<sup>55</sup> Text books on criminal law generally define crime as a wrong against community in contradiction to tort which is a

<sup>48</sup> S.P. Sathe, *Judicial Activism in India*, 2002, p.17.

<sup>49</sup> J.S. Verma, *New Dimensions of Justice*, 2000, p.44.

<sup>50</sup> Nilay v. Anjaria, "Interaction between press Freedom and Accused's Rights : A Developing Jurisprudence of Fair Trial", *Cr.L.J.*, 2003, *Journal Section*, p.34.

<sup>51</sup> For detailed analysis of the concept of open trial and access to judicial proceedings. See, Harold L. Cross, *The People's Right to Know*, 1953, pp.155-175.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Quoted in Harold L. Cross, *op.cit.*, pp.155-175.

<sup>55</sup> *Kartar Singh v. State of Punjab*, 1994, *Cr.L.J.*, 3129, SC.

private wrong.<sup>56</sup> A crime is, in other words, a wrong that shocks the conscience of a community. It is in the community nature of its consequences that justifies the intervention of the State on behalf of the victim. Consequently, community must have an interest in the manner in which a trial is conducted against an alleged offender. The characteristics of open trial also flows from the 'therapeutic value' to the public of seeing its criminal law in operation, purging the society of the sense of outrage felt at the commission of crimes.

Public trial as a procedural principle of criminal trial embodies the value of fairness for the offender also. Community participation during trial ensures a check on the possibility of judicial excess, or worse, of any connivance between the prosecution and the judicial authority. Public trial provides the alleged criminal with an air of confidence that his right to personal liberty shall not be deprived without the due process of law. The right of the public to participate in the trial process ensures that the process is carried on in a fair and just manner. A court room is a temple of justice and everybody has a right of access to it.<sup>57</sup> The principle of public trial has found statutory recognition under section 327<sup>58</sup> of Criminal Procedure Code, 1898.

The right to an open trial, however, is not an absolute one. Section 327(2) provides that the inquiry into and trial of an offence under Section 376, Section 376 A, Section 376 B, C and D of the Indian Penal Code shall be conducted in camera. There are occasions when the right of accused is supplanted by an overriding public interest. In *Vineet Narain v. Union of India*,<sup>59</sup> accepting the submission of the Solicitor General that a part of the proceedings be held in camera, **Verma C.J.** observed that "it is settled that the requirement of a public hearing in a court of law for fair trial is subject to the need of proceedings being held in camera to the extent necessary in public interest and to avoid prejudice to the accused". Echoing similar sentiments, the Court in *Naresh v. State of Maharashtra*,<sup>60</sup> while emphasizing the importance of public trial suggested that the court cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. Therefore, if the principle that all trials before the courts be held in public is treated as universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principles, justice itself may be defeated.<sup>61</sup>

Similarly section 22(1) of the Hindu Marriage Act, 1955 says that proceedings under the Act shall be held in camera if either party so desires. The proviso to section 352 of the Code of Criminal Procedure, 1988 provides that the Judge or Magistrate may in the facts of a particular case order that the press and public shall not have access to the proceedings. Section 14 of the Indian Official Secrets Act, 1923 also contains such provisions. But, these are merely the exceptions to the general principle of open access to judicial proceedings, civil as well as criminal, in India.

<sup>56</sup> Micheal Jefferson, *Criminal Law*, 2001, Chapter I.

<sup>57</sup> *Chhatisgarh Mukti Morcha v. State of M.P.*, 1996, Cr.L.J., 2239 (Madh Pra).

<sup>58</sup> Section 327(1), Criminal Procedure Code provides : 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.

<sup>59</sup> 1998 Cr.L.J. 1208, AIR 1998 SC 889.

<sup>60</sup> AIR 1967 SC 1.

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

## (e) Access to Court Records

### (i) Court Statistics

Judicial information comes from judicial statistics. Without scientific statistics, information cannot be collected in time and in simple manner. How do people measure the judicial functioning in the absence of proper data ? The judiciary needs to be accountable to the people. To be accountable, it needs proper data to show its performance. Unless it produces proper statistics to the people, the people might misjudge the judiciary which would result in an untoward situation for democracy. The judicial function is needed to be carried out transparently so that it may win the people's faith. Transparency is possible only if proper data regarding the operation of judicial system is accessible to public scrutiny.

In India the Supreme Court publishes its annual report. It includes a number of things about the operation of all courts. It publishes the name, age, qualification, period of working and leave records of judges and officers of the Court. Likewise, the Annual Report includes the number of cases registered, classified subject matter of the cases so registered, comparative chart of the cases of preceding years, backlog of the cases and a clear picture of the cases pending and decided in High Courts and subordinate courts. Through this report general public may know about how many cases are pending in the courts and for what periods those judgements have been pending, how many petitions the courts entertain every year, etc. These are some matters that the public is entitled to know in order to enforce the accountability of the judiciary.

### (ii) Court Files

The judiciary discharges its functions in the open court. Any member of the public can have free access to the court room and watch its proceedings. The parties to a case or their legal representatives or any other interested person can ask for a copy of relevant documents on payment of prescribed fee. Likewise interested persons related with the case file are entitled to have an inspection of the case file on payment of prescribed fee.<sup>62</sup>

### (iii) Discovery, Inspection and Admissions

The **Code of Civil Procedure** give a limited right of access to information under the provisions dealing with discovery/inspection<sup>63</sup> and admissions.<sup>64</sup>

Any action in a court of law deals with disputed facts or facts in issue as they are known in legal parlance. Basically, information can be obtained by any of the parties in a civil suit which pertain to facts in issue. These are known as relevant facts. Sections 8 to 16 of the Evidence Act deal with what are relevant facts. Once an action

<sup>62</sup> Order 11 Rule 8 Code of Civil Procedure, 1908.

<sup>63</sup> *Id.*, Order XI.

<sup>64</sup> *Id.*, Order XII.

is filed in court, information either in the form of answers to questions or documents can be obtained through the procedure of discovery. Information and documents can be obtained from the other party only to – (i) know the nature of the opponent's case, or (ii) prove one's own case. However, a party to the action is not entitled to information which constitutes exclusively the case of the opponent.

Under the **Code of Civil Procedure** discovery can be carried out by different methods, like interrogatories, production and inspection of documents, admissions, better particulars etc. which are outlined below :

Interrogatories are a series of written questions which are directed to the opponent to be answered on affidavit. An order of the Court is required to administer interrogatories to the opponent. If the opponent omits to answer or answer insufficiently, the party seeking discovery through interrogatories, can apply to the court, to direct the opponent party to answer further, either through an affidavit or oral examination.<sup>65</sup>

Discovery can also be done through production and inspection of documents. The party seeking discovery can file an application for a direction that the other party to file an affidavit of documents, i.e., affidavit stating the documents in his possession. On the basis of such affidavit documents can be inspected as well. However, a party against whom discovery is sought can refuse to produce and give for inspection documents on three grounds:<sup>66</sup>

- a) if the documents relate exclusively to the evidence of the party against whom discovery is sought ;
- b) if the document contains any confidential communication which is protected from disclosure on the doctrine of privilege, such as the communication between the party and his lawyer; or
- c) if it is injurious to public interest, such as those documents which injure the interests of the State and are protected from disclosure under Section 123 and 124 of the Evidence Act.

A party failing to disclose documents on affidavit after an order of the court, runs a risk of the court drawing an adverse inference against it. The procedure mentioned above is not dependent upon the documents being referred to and relied upon in pleadings. Documents referred to and relied upon in pleadings have to be produced for inspection at any time when the other party asks for them. Failure to produce for inspection of documents on proper notice entitles the party seeking inspection to move the court and get the desired orders.<sup>67</sup> Non-compliance with the order to answer interrogatories or for discovery or inspection of documents renders the parties liable

---

<sup>65</sup> *Id.*, Order XII, Rule 1 to 11.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Id.*, Order XI, Rule 15-18.

to, in case of plaintiff, having the suit dismissed and, in case of a defendant, having the defence struck out.<sup>68</sup>

Admissions allow a party to the action to give notice to the other side to admit either whole or part of the case of the party giving notice. The notice can be for admission of documents or facts. If the notice to admit documents is not denied, either specifically or by implication, the document is deemed to be admitted.<sup>69</sup> Similarly, parties to an action are also entitled to further and better particulars either of the claim or the defence.<sup>70</sup>

### (f) Right to be Informed of Grounds

Right to be informed of the grounds of arrest and detention enshrined by Article 22(1)<sup>71</sup> of the Constitution of India is an inviolable right of a person accused of an offence and it enables the accused to make an application for bail or for the writ of habeas corpus and it also enables the accused to prepare for his defence. In every case of arrest with or without a warrant the person arresting shall communicate to the arrested person without delay the grounds of his arrest. Every police officer arresting without a warrant any person other than a person accused of a non-bailable offence, is required to inform the person arrested that he is entitled to be released on bail and that he may arrange for surities on his behalf.<sup>72</sup> The information should be sufficient to enable the arrested person to understand why he has been arrested; the grounds of arrest should be similar to the charge framed by the court for the trial of the case.<sup>73</sup> In *Madhu Limaye v. State*,<sup>74</sup> it was held that the arrest of a person by merely informing him of the sections of the certain penal provisions contravenes Article 22(1).

Under section 173(4) of Criminal Procedure Code, the police are bound to furnish to the accused, the copies of charge sheet, FIR and other relevant documents on which the prosecution proposes to rely. The furnishing of the documentary data helps him to know beforehand the material which he has to meet so that he may prepare his defence.

### (g) Official Publication of Court Decisions

The Constitution of India provides<sup>75</sup> that any interpretation given to a law or any legal principle laid down by the Supreme Court in the course of hearing of a case shall be binding on all the courts in India. Since, judicial decisions are placed at par with law, so these decisions are needed to be published for general circulation.

---

<sup>68</sup> *Id.*, Order XI, Rule 21.

<sup>69</sup> *Id.*, Order XII, Rule 1-4.

<sup>70</sup> *Id.*, Order VI, Rule 5.

<sup>71</sup> Article 22(1) : No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

<sup>72</sup> Section 50, Cr.P.C., 1973.

<sup>73</sup> *Vimal Kishore v. State of U.P.*, 1956 2 All 527.

<sup>74</sup> 1959 AIR Punj 506.

<sup>75</sup> Article 141 "The law declared by the Supreme Court shall be binding on all Courts within the territory of India".

The Supreme Court of India publishes its major decisions through its monthly publication : the Supreme Court Reports (S.C.R.) and State High Courts publish Indian Law Reports (I.L.R.). The decisions of the lower courts are not officially published because such decisions have no value of precedent. But concerned parties and their representatives have a right to obtain a copy of reasoned judgement or decree.

### (h) Private Publication of A Judicial Proceedings

Publication of a fair and accurate report of the proceeding is lawful under the **Contempt of Courts Act, 1971**<sup>76</sup> and is a defence to a prosecution for contempt. A person cannot be guilty of the offence of defamation for publishing a true report of the judicial proceedings of a court of justice or any stage thereof, unless the publication is prohibited by specific law or by an order of the Court.<sup>77</sup> However, if the publication is forbidden by any enactment, then such publication amounts to contempt.<sup>78</sup>

### C. E-Judiciary

India has an independent judiciary. Indian judiciary comprises the Supreme Court at the apex level, followed by the High Courts, District Courts, the Sub-District / Session Courts and the lower Judiciary. The National Informatics Centre (NIC) has played a unique role in developing e-judiciary applications at various levels of the judiciary in the country. e-judiciary is a term used to indicate IT applications in judiciary. In this case study, some of the successful e-judiciary applications have been explained. In India, a project named COURTIS (Court Information System) was launched in 1990 for the benefit of the entire legal community. This project was commissioned for streamlining registries of various courts. Subsequently, all the High courts have been computerized and web-enabled both locally and nationally through NICNET. The following applications have been successfully implemented at the Supreme Court level and also in the 18 High Courts in the country.

**Case Status:** This web site provides Supreme Court's pending and disposed case status information to litigants /advocates on the internet. Case-status gives the latest information with respect to the status of a case which could stand as disposed / adjourned, lower court details, party and advocate names, waiting position etc. Pending case status can be accessed through case number, title, advocate names and lower court details. The litigants can maintain their own case files by downloading all orders pertaining to a case. An advocate can download all his/her cases pending and disposed of, and maintain his/her own cases database.

**Judgement Information System (JUDIS):** This is the Judgement Information System on CD-ROM consisting of complete texts of all reported judgements of the Supreme Court of India from 1950 to 2000. The judgements of 2001 onwards are available on the Internet. NIC Services Incorporated (NICS) is marketing JUDIS CD on a membership basis. The judgements are available on the website within 24 hours of their delivery in the court. The judgements of Delhi High Court since 1999, the High Court of Andhra Pradesh since 1999, the High Court of Jammu and Kashmir since 2001 and the High Court of Orissa since 1985 are available on the Web

<sup>76</sup> Section 4, Contempt of Courts Act, 1971.

<sup>77</sup> Section 499, 4<sup>th</sup> Exception, Indian Penal Code, 1860.

<sup>78</sup> Sections 4 and 7 of Contempt of Courts Act, 1971.

**Causelists on Internet:** Cause lists are schedules of cases to be heard by the courts the following day. These lists of Supreme Court and all High Courts are available on NIC web servers. Prior to this package, the courts used to take a lot of time for generation and supply of the cause lists to the advocates at their offices or residences. This process costs each High Court lakhs of rupees every year. By making the cause lists available on the internet, no High Court is incurring any expenditure for this purpose. This software application has received huge response from the advocates and litigant public.

**Daily Orders on Internet:** The daily orders of Supreme Court and the Delhi High Court are available on the internet. As soon as the orders are signed by the Judges, they are made available on the internet. This is the easiest way for litigants to get a copy of the latest order delivered in the court from their residences /offices. The free text based search enables the user to access relevant orders of the court on the same subject. It also helps the users in accessing orders without knowing the case number, or party name. The end result of e-judiciary applications has been convenience, improvement and speed of legal services for everybody associated with the judicial system – the judges, advocates, the litigants, the media, and the law students and scholars.

## D. Live Streaming of Court Cases

Very recently the Hon'ble Supreme Court<sup>79</sup> declared its support for the live streaming of its cases, in two PILs filed by Senior Advocate **Indira Jaising** and **Swapnil Tripathi** (a law student from NLU Jodhpur) . The bench of Chief Justice **Dipak Misra**, Justice **AM Khanwilkar** and Justice **DY Chandrachud** should be praised for a great step towards initiating a move for transparency and openness in the Indian legal system. Bench has clearly and convincingly held that the Court proceedings shall be live-streamed in the larger public interest. The Bench has said categorically that appropriate Rules in that regard will be framed soon under Article 145 of the Constitution of India. It held in no uncertain terms that, "Sunlight is the best disinfectant" while also observing that live streaming of court proceedings will effectuate the "public right to know" and bring in more transparency in judicial proceedings.

In an environment where fake news on social media is like chaff in the newly-cut grain, news anchors are the primary source of entertainment, and election fever is already on, wouldn't it only be appropriate for the people of this country to hear first hand of what transpires in a court-room in some of the most important cases that concerns them. Perhaps a video clip of seeing Senior Advocate Harish Salve roaringly present India's standpoint before the International Court of Justice (ICJ) against Pakistan created much more awareness about the international legal system and the working of the ICJ than all combined work on International Law for decades. Therefore, bringing technology in courtrooms is only a much-awaited move that will open the doors of the halls of justice for common people to see and comment on. One may be skeptical that allowing cameras in courtrooms would mean that people can see which lawyer has argued what in which case. But this begs a million questions. First, why fear people and public scrutiny in a democracy? Does having a Lok Sabha or a Rajya Sabha channel in any way interferes with the political system of this country or does it help by showing what exactly our elected representatives are upto? One

<sup>79</sup> In Writ Petition (Civil) No. 1232 of 2017 along with Writ Petition (Civil) No. 66 of 2018 and Writ Petition (Civil) No. 861 of 2018 and Writ Petition (Civil) No. 892 of 2018 , delivered on September 26, 2018.

may not be convinced and continue to argue that the legal profession is a holy cow and that justice delivery mechanism is too sensitive to warrant interference. This argument smells of a certain indigestible elitism which says that only a few people are intellectual enough to understand, comment and witness the biggest matters in the SC. Although the SC, like all courts in India, is an 'open court', lack of usage of mics by judges and lawyers alike, the lack of regulation on numbers of people who can be in any court on any given day, lack of space for members of public in courtrooms means that it remains so only in theory. In commercial matters, where clients literally pay a bomb to engage lawyers, not knowing what is argued in the courts, one can also argue for live-streaming. But in constitutional matters or matters involving grave public interest, there is no iota of doubt that their live streaming will help in legal awareness, legal education and direct first-hand legal information to the people. As for feasibility, arguing for lack of infrastructure in the SC to prevent the implementation of live-streaming is nothing but shocking, given that India's IT professionals practically run the Silicon Valley in America. At a practical level, it shouldn't be very difficult to set up a channel, on the lines of Lok Sabha or Rajya Sabha, as also supported by the Attorney General, Mr. KK Venugopal. In the interim, however, as Plan B, with the help of an audio-video recording team, cases can be recorded and released on a YouTube dedicated channel. This can be a relatively low budget thing to manage. If that also sounds time-consuming, then as Plan C, at the bare minimum, at least the SC can give directions for recordings to take place in selected matters, to be released when the infrastructure is ready. For e.g., in the Babri Masjid-Ayodhya dispute that is currently being argued before the 3-judge bench led by CJI Dipak Misra, several volumes have been filed as case record. Given that the SC is the court of last resort, it is unacceptable to rely purely on human memory and written records (which have a tendency to be lost or are subject to being washed away, destroyed etc.) to keep a track of a case of this proportion. Allowing for recording will ensure that irrespective of which way the judgment goes, its proceedings are safe in the SC's institutional memory, later available for one and all. Given that the Supreme Court is numero uno, it is only fair that this revolution towards openness and transparency begins with live-telecast of its cases, before taking it to the high courts and the lower courts

Indira Jaising while stoutly advocating live-streaming had highlighted the need to include safeguards to prohibit unauthorized reproduction of broadcasts. She rightly urged that, "The proceedings will be aired live and hence, it may be open for people to make clippings and create their own copies. Your Lordships must prohibit such production of clips, no matter how big or small, without the authorisation of the court." She had also urged that there may not be any commercial exploitation of the exercise of broadcasting.

The then CJI **Dipak Misra** had asked the petitioner intern Swapnil Tripathi to submit guidelines to the Attorney General KK Venugopal regarding creation of a live streaming room in the Apex Court premises exclusively for law interns and law students. Venugopal had himself suggested that the live telecast of the Apex Court proceedings should be done in only constitutional matters on an experimental basis. He had also submitted that, "My recommendation is that (the live streaming of hearings) may be initially restricted to only cases involving constitutional issues, which the Chief Justice decides, and no other matters, to see the reactions and the responses. Then a decision may be taken one way or the other."

To start with, Justice **AM Khanwilkar** who authored the judgment for himself and the then CJI Dipak Misra begins in para 1 of the judgment by noting that, "The petitioners and interventionists, claiming to be public spirited persons, have sought a declaration that Supreme Court case proceedings of "constitutional importance having an impact on the public at large or a large number of people" should be live streamed in a manner that is easily accessible for public viewing. Further direction is sought to frame guidelines to enable the determination of exceptional cases that qualify for life streaming and to place those guidelines before the Full Court of this Court. To buttress these prayers, reliance has been placed on the dictum of a

nine-Judge Bench of this Court in *Naresh Shridhar Mirajkar and Ors. Vs. State of Maharashtra and Ors.*, (1966) 3 SCR 744 which has had an occasion to inter alia consider the arguments of journalists that they had a fundamental right to carry on their occupation under Article 19(1)(g) of the Constitution; that they also had a right to attend the proceedings in court under Article 19(1)(d); and that their right to freedom of speech and expression guaranteed under Article 19(1)(a) included their right to publish a faithful report of the proceedings which they had witnessed and heard in Court as journalists. The Court whilst considering the said argument went on to emphasise about the efficacy of open trials for upholding the legitimacy and effectiveness of the Courts and for enhancement of public confidence and support. It would be apposite to reproduce the relevant extract from the said decision propounding about the efficacy of hearing of cases in open courts, in the following words:

"20.. It is well-settled that in general, all cases brought before the Courts, whether civil, criminal, or others, must be heard in open Court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, courts must generally hear causes in open and must permit the public admission to the court room. As Bentham has observed: "In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity'. (*Scott v. Scott* [(1911) All. E.R. 1,30])"

Going forward, it is then noted in para 2 that, "Indeed, the right of access to justice flowing from Article 21 of the Constitution or be it the concept of justice at the doorstep, would be meaningful only if the public gets access to the proceedings as it would unfold before the Courts and in particular, opportunity to witness live proceedings in respect of matters having an impact on the public at large or on section of people. This would educate them about the issues which come up for consideration before the Court on real time basis."

Similarly in para 6, it stipulates that, "Indisputably, open trials and access to the public during hearing of cases before the Court is an accepted proposition. As regards the pronouncement of judgments by the Supreme Court, there is an express stipulation in Article 145(4) of the Constitution that such pronouncements shall be made in open Court. Indeed, no such express provision is found in the Constitution regarding "'open Court hearing" before the Supreme Court, but that can be traced to provisions such as Section 327 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and Section 153-B of the Code of Civil Procedure, 1908 (C.P.C.)."

While highlighting the importance of live streaming of court proceedings, it is pointed out in para 8 that, "Undoubtedly, live streaming of Court proceedings has the potential of throwing up an option to the public to witness live court proceedings which they otherwise could not have due to logistical issues and infrastructural restrictions of Courts; and would also provide them with a more direct sense of what has transpired. Thus, technological solutions can be a tool to facilitate actualization of the right of access to justice bestowed on all and the litigants in particular, to provide them virtual entry in the Court precincts and more particularly in Court rooms. In the process, a large segment of persons, be it entrants in the legal profession, journalists, civil society activists, academicians or students of law will be able to view live

proceedings in propria persona on real time basis. There is unanimity between all the protagonists that live streaming of Supreme Court proceedings at least in respect of cases of Constitutional and national importance, having an impact on the public at large or on a large number of people in India, may be a good beginning, as is suggested across the Bar."

Further, it is also pointed out in para 9 that, "Live streaming of Court proceedings is feasible due to the advent of technology and, in fact, has been adopted in other jurisdictions across the world. Live streaming of Court proceedings, in one sense, with the use of technology is to "virtually" expand the Court room area beyond the physical four walls of the Court rooms. Technology is evolving with increasing swiftness whereas the law and the courts are evolving at a much more measured pace. This Court cannot be oblivious to the reality that technology has the potential to usher in tangible and intangible benefits which can consummate the aspirations of the stakeholders and litigants in particular. It can epitomize transparency, good governance and accountability, and more importantly, open the vista of the court rooms, transcending the four walls of the rooms to accommodate a large number of viewers to witness the live Court proceedings. Introducing and integrating such technology into the courtrooms would give the viewing public a virtual presence in the courtroom and also educate them about the working of the court."

Needless to say, after dwelling in detail on the prevailing system of live streaming of court proceedings in other countries in subsequent paras and after mentioning the suggestions listed in this regard by the Attorney General of India in para 11, it is then pointed out in para 12 that, "As aforesaid, Courts in India are ordinarily open to all members of public, who are interested in witnessing the court proceedings. However, due to logistical issues and infrastructural restrictions in courts, they may be denied the opportunity to witness live proceedings in propria persona. To consummate their aspirations, use of technology to relay or publicize the live court proceedings can be a way forward. By providing "virtual" access of live court proceedings to one and all, it will effectuate the right of access to justice or right to open justice and public trial, right to know the developments of law and including the right of justice at the doorstep of the litigants. Open justice, after all, can be more than just a physical access to the courtroom rather, it is doable even "virtually" in the form of live streaming of court proceedings and have the same effect."

In para 13, Court pointed out that, "Publication of court proceedings of the Supreme Court is a facet of the status of this Court as a Court of Record by virtue of Article 129 of the Constitution, whose acts and proceedings are enrolled for perpetual memory and testimony. Further, live streaming of court proceedings in the prescribed digital format would be an affirmation of the constitutional rights bestowed upon the public and the litigants in particular. While doing so, regard must be had to the fact that just as the dignity and majesty of the Court is inviolable, the issues regarding privacy rights of the litigants or witnesses whose cases are set down for hearing, as also other exceptional category of cases of which live streaming of proceedings may not be desirable as it may affect the cause of administration of justice itself, are matters which need to be identified and a proper regulatory framework must be provided in that regard by formulating rules in exercise of the power under Article 145 of the Constitution. It must be kept in mind that in case of conflict between competing Constitutional rights, a sincere effort must be made to harmonise such conflict in order to give maximum expression to each right while minimizing the encroachment on the other rights. We are conscious of the fact that in terms of Section 327 of CrPC and Section 153-B of CPC, only court-directed matters can be heard in camera and the general public can be denied access to or to remain in the court building used by the Court. Until such direction is issued by the Court, the hearing of the case is deemed to be an open court to which the public generally may have access. The access to the hearing by the general public, however, would be limited to the size and capacity of the

courtroom. By virtue of live streaming of court proceedings, it would go public beyond the four walls of the court room to which, in a given case, the party or a witness to the proceedings may have genuine reservations and may claim right of privacy and dignity. Such a claim will have to be examined by the concerned Court and for which reason, a just regulatory framework must be provided for, including obtaining prior consent of the parties to the proceedings to be live streamed."

As it turned out, while agreeing with the recommendations and suggestions given by the Attorney General of India, it is then observed in para 14 that, "We generally agree with the comprehensive guidelines for live streaming of Court proceedings in the Supreme Court suggested by the learned Attorney General for India Shri K.K. Venugopal. The project of live streaming of the court proceedings of the Supreme Court on the "internet" and/or on radio and TV through live audio-visual broadcasting/telecasting universally by an official agency, such as Doordarshan, having exclusive telecasting rights and/or official website/mobile applicant of the Court, must be implemented in a progressive, structured and phased manner, with certain safeguards to ensure that the purpose of live streaming of proceedings is achieved holistically and that it does not interfere with the administration of justice or the dignity and majesty of the Court hearing the matter and/or impinge upon any rights of the litigants or witnesses. The entire project will have to be executed in phases, with certain phases containing sub-phases or stages. Needless to observe that before the commencement of first phase of the project, formal rules will have to be framed by this Court to incorporate the recommendations made by the learned Attorney General for India as noted in paragraph 11 above, while keeping in mind the basic issues, such as:-

- (i) To begin with, only a specified category of cases or cases of constitutional and national importance being argued for final hearing before the Constitution Bench be live streamed as a pilot project. For that, permission of the concerned Court will have to be sought in writing, in advance, in conformity with the prescribed procedure.
- (ii) Prior consent of all the parties to the concerned proceedings must be insisted upon and if there is no unanimity between them, the concerned Court can take the appropriate decision in the matter for live streaming of the court proceedings of that case, after having due regard to the relevancy of the objections raised by the concerned party. The discretion exercised by the Court shall be treated as final. It must be non-justifiable and non-appealable
- (iii) The concerned court would retain its power to revoke the permission at any stage of the proceedings suo motu or on an application filed by any party to the proceeding or otherwise, in that regard, if the situation so warrants, keeping in mind that the cause of administration of justice should not suffer in any manner.
- (iv) The discretion of the Court to grant or refuse to grant such permission will be, inter alia, guided by the following considerations:
  - (a) unanimous consent of the parties involved,
  - (b) even after the parties give unanimous consent the Court will consider the sensitivity of the subject matter before granting such permission, but not limited to case which may arouse passion or social unrest amongst sections of the public,
  - (c) any other reason considered necessary or appropriate in the larger interest of administration of justice, including as to whether such broadcast will affect the

dignity of the court itself or interfere with/prejudice the rights of the parties to a fair trial,

(v) There must be a reasonable time-delay (say ten minutes) between the live court proceedings and the broadcast, in order to ensure that any information which ought not to be shown, as directed by the Court, can be edited from the broadcast.

What cannot be also missed out here is exactly what para 15 postulates. It states that, "Until a full-fledged module and mechanism for live streaming of the court proceedings of the Supreme Court over the "internet" is evolved, it would be open to explore the possibility of implementation of Phase-I of live streaming in designated areas within the confines of this Court via "intranet" by use of allocated passwords as a pilot project. The designated areas may include:

- (a) dedicated media room which could be accessible to the litigants, advocates, clerks and interns. Special provisions must be made to accommodate differently abled people;\
- (b) the Supreme Court Bar Association room/lounge;
- (c) the Supreme Court Advocates-on-Record Association room/lounge;
- (d) the official chambers of the Attorney General, Solicitor General and Additional Solicitor Generals in the Supreme Court premises;
- (e) Advocates' Chambers blocks;
- (f) Press Reporters room."

More importantly, it is then mentioned in para 16 that, "It may be desirable to keep in mind other e-measures to be taken for efficient management of the entire project such as:

(i) Appoint a technical committee comprising the Registrar (IT), video recording expert(s) and any other members as may be required, to develop technical guidelines for video recording and broadcasting court proceedings, including the specific procedure to be followed and the equipment to be used in that regard.

(ii) Specialist video operator(s) be appointed to handle the live broadcast, who will work under the directions of the concerned Court. The coverage itself will be coordinated and supervised by a Court-appointed officer.

(iii) The focus of the cameras in the court room will be directed only towards two sets of people:

- (a) The Justices/Bench hearing the matter and at such an angle so as to only show the anterior-facing side of the Justices, without revealing anything from behind the elevated platform/level on which the Justices sit or any of the Justices' papers, notes, reference material and/or books;
- (b) The arguing advocate(s) in the matter and at such an angle so as to only show the anterior-facing side of the Justices, without revealing anything from behind the elevated platform/level on which the Justices sit or any of the Justices' papers, notes, reference material and/or books;

(c) There shall be no broadcast of any interaction between the advocate and the client even during arguments.

(iv) Subject to any alteration of camera angles for the purpose of avoiding broadcast of any of the aforesaid papers, notes, reference materials, books and/or discussions, the camera angles will remain fixed over the course of the broadcast.

(v) This Court shall introduce a case management system to ensure inter alia that advocates are allotted and adhere to a fixed time limit while arguing their matter to be live streamed.

(vi) This Court must retain copyright over the broadcasted material and have the final say in respect of use of the coverage material.

(vii) Reproduction, re-broadcasting, transmission, publication, re-publication, copying, storage and/or modification of any part(s) of the original broadcast of Court proceedings, in any form, physical, digital or otherwise, must be prohibited. Any person engaging in such act(s) can be proceeded under, but not limited to, the Indian Copyright Act, 1957, the Indian Penal Code, 1860, the Information Technology Act, 2000 and the Contempt of Courts Act, 1971."

It is then clarified in para 17 that, "We reiterate that the Supreme Court Rules, 2013 will have to be suitably amended to provide for the regulatory framework as per the contours delineated hereinabove. We may hasten to add that it would be open to frame such regulatory measures as may be found necessary for holistic live streaming of the court proceedings, without impinging upon the cause of administration of justice in any manner."

Finally, Para 18 states that, "In conclusion, we hold that the cause brought before this Court by the protagonists in larger public interest, deserves acceptance so as to uphold the constitutional rights of public and the litigants, in particular. In recognizing that court proceedings ought to be live streamed, this Court is mindful of and has strived to balance the various interests regarding administration of justice, including open justice, dignity and privacy of the participants to the proceedings and the majesty and decorum of the Courts." Para 19 envisages that, "As a result, we allow these writ petitions and interventionists' applications with the aforementioned observations and hope that the relevant rules will be formulated expeditiously and the first phase project executed in right earnest by all concerned. Ordered accordingly." Para 20 then observes that, "While parting, we must place record our sincere appreciation for the able assistance and constructive suggestions given by the learned counsel and the parties-in-person appearing in the case."

Here it is prudent to discuss the important points of the separate judgment delivered by Justice **Dr. DY Chandrachud**. Para 27 states that, "Public confidence in the judiciary and in the process of judicial decision making is crucial for preserving the rule of law and to maintain the stability of the social fabric. Peoples' access to the court signifies that the public is willing to have disputes resolved in court and to obey and accept judicial orders. Open courts effectively foster public confidence by allowing litigants and members of the public to view courtroom proceedings and ensure that the judges apply the law in a fair and impartial manner."

While stressing on the inevitable importance of technology, it is then pointed out in para 34 that, "In the present age of technology, it is no longer sufficient to rely solely on the media to deliver information about the hearings of cases and their outcomes. Technology has become an inevitable facet of all aspects of life. Internet penetration and increase in the use of smart phones has revolutionized how we communicate. As

on 31 March 2018, India had a total of 1,206.22 million telecom subscribers and 493.96 million internet users. Technology can enhance public access, ensure transparency and pave the way for active citizen involvement in the functioning of state institutions. Courts must also take the aid of technology to enhance the principle of open courts by moving beyond physical accessibility to virtual accessibility."

It is important to note that, Justice Dr DY Chandruchud in para 38 has also illustrated the multiple reasons why live streaming will be beneficial to the judicial proceedings. It states that, "There are multiple reasons why live-streaming will be beneficial to the judicial system:

- a. The technology of live-streaming injects radical immediacy into courtroom proceedings. Each hearing is made public within seconds of its occurrence. It enables viewers to have virtual access to courtroom proceedings as they unfold;
- b. Introduction of live-streaming will effectuate the public's right to know about court proceedings. It will enable those affected by the decisions of the Court to observe the manner in which judicial decisions are made. It will help bring the work of the judiciary to the lives of citizens.
- c. Live-streaming of courtroom proceedings will reduce the public's reliance on second-hand narratives to obtain information about important judgments of the Court and the course of judicial hearings. Society will be able to view court proceedings first hand and form reasoned and educated opinions about the functioning of courts. This will help reduce misinformation and misunderstanding about the judicial process;
- d. Viewing court proceedings will also serve an educational purpose. Law students will be able to observe and learn from the interactions between the Bar and the Bench. The archives will constitute a rich source for aspiring advocates and academicians to study legal advocacy procedures, interpretation of the law, and oratory skills, among other things. It will further promote research into the institutional functioning of the courts. Live-streaming and broadcasting will also increase the reach of the courts as it can penetrate to even part of the country;
- e. Live-streaming will enhance the rule of law and promote better understanding of legal governance as part of the functioning of democracy;
- f. Live-streaming will remove physical barriers to viewing court proceedings by enabling the public to view proceedings from outside courtroom premises. This will also reduce the congestion which is currently plaguing the courtrooms. It will reduce the need for litigants to travel to the courts to observe the proceedings of their cases;
- g. Live-streaming is a significant instrument of enhancing the accountability of judicial institutions and of all those who participate in the judicial process. Delay in the dispensation of justice is a matter of serious concern. Live-streaming of court proceedings will enable members of the public to know of the causes of adjournments and the reasons why hearings are delayed; and
- h. Above all, sunlight is the best disinfectant. Live-streaming as an extension of the principle of open courts will ensure that the interface between a court hearing with virtual reality will result in the dissemination of information in the widest possible sense, imparting transparency and accountability to the judicial process.

Para 45 of Justice Chandrachud's judgment is very relevant here, it states that, "Comprehensive guidelines for live streaming of Court proceedings have been submitted by Mr K.K. Venugopal, learned Attorney General of India, Ms Indira Jaising, learned Senior Counsel, Mr. Virag Gupta, learned Counsel and Mr Mathews J Nedumpara, learned Counsel. These have been duly considered in framing the model guidelines below. The model guidelines are based on the following broad principles:

a. Article 145(1) of the Constitution provides:

"Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court.."

Determining the modalities for live-streaming of the proceedings of this Court can appropriately be dealt with under the Rules which should be framed in pursuance of Article 145(1). Regulating, generally, the practice and procedure of the Court would extend to formulating Rules for live-streaming;

b. Not all cases may be live-streamed. Certain sensitive cases like matrimonial or sexual assault should be excluded from the process of live-streaming;

c. Live-streaming will be carried out with a minimal delay to allow time for screening sensitive information or any exchange which should not be streamed;

d. The final authority to regulate suspension or prohibition of live-streaming in a particular case where the administration of justice so requires, must be with the presiding judge of each court;

e. Live-streaming will be carried out only by persons or any agency authorized under the directions of the Chief Justice of India, or as contemplated in the Rules. The streaming and broadcasting will be hosted by this Court on its website with the assistance of the National Informatics Centre and the Ministry of Electronics and Information Technology;

f. The copyright over all the material recorded and broadcast in this Court shall vest with this Court only; and

g. The recordings and broadcast may not be used by anyone for commercial purposes.

h. Archives shall be maintained of all live-streaming, to be hosted on the web-site of the Court."

Para 46 further stipulates that, "The model guidelines are of a suggested nature and will not detract from the authority of the Court to frame Rules under Article 145(1) in order to determine all the modalities, including (i) the phases in which live-streaming shall be introduced; (ii) the types of cases for which live-streaming of cases will be provided; (iii) authorising the use of appropriate technology; (iv) the agencies through which live-streaming will be implemented; (v) other facets for implementation; and (vi) laying down norms for the use of the feed.

Model guidelines for broadcasting of the proceedings and other judicial events of the Supreme Court of India are as follows:

**(i) Kind of matters to be live-streamed**

1. Proceedings involving the hearing of cases before the Supreme Court shall be live-streamed in the manner provided below:

a) cases falling under the following categories shall be excluded as a class from live-streaming:

(i) Matrimonial matters, including transfer petitions;

(ii) Cases involving sensitive issues as in the nature of sexual assault; and

(iii) Matters where children and juveniles are involved, like POCSO cases.

b) Apart from the general prohibition on streaming cases falling in the above categories, the presiding judge of each courtroom shall have the discretion to disallow live-streaming for specific cases where, in his/her opinion, publicity would prejudice the interests of justice. This may be intimated by the presiding judge in advance or live-streaming may be suspended as and when a matter is being heard; and

c) Where objections are filed by a litigant against live-streaming of a case on grounds of privacy, confidentiality, or the administration of justice, the final authority on live streaming the case shall lie with the presiding judge.

In addition to live-streaming of courtroom proceedings, the following events may also be live-streamed in future subject to the provisions of the Rules:

(a) Oath ceremonies of the Judges of the Supreme Court and speeches delivered by retiring judges and other judges in the farewell ceremony of the respective Supreme Court Judges; and

(b) Addresses delivered in judicial conferences or Full Court References or any event organized by the Supreme Court or by advocate associations affiliated to the Supreme Court or any other events.

## **(ii) Manner of live-streaming**

1. Live-streamed and archived videos of the broadcast shall be made available on the official website of the Supreme Court. The recorded broadcast of each day shall be made available as archives on the official website of the Supreme Court by the end of the day;

2. Live-streaming shall commence as soon as the judges arrive in the courtroom and shall continue till the Bench rises;

3. The presiding judge of the courtroom shall be provided with an appropriate device for directing the technical team to stop live-streaming, if the Bench deems it necessary in the interest of administration of justice;

4. Live-streaming of the proceedings should be carried out with a delay of two minutes;

5. Proceedings shall only be live-streamed during working hours of the court;

6. Courtroom proceedings will continue to be live-streamed unless the presiding judge orders the recording to be paused or suspended;

7. To give full effect to the process of live-streaming, advocates addressing the Bench, and judges addressing the Bar, must use microphones, while addressing the Court;

8. Recording of courtroom proceedings shall be done by the Registry with the technical support of National Informatics Centre or any other public/private agency authorised by the Supreme Court or the Ministry of Information and Technology; and

9. The portions of proceedings which are not broadcast online, on the direction of the presiding judge of the Bench shall not be made part of the official records and shall be placed separately as 'confidential records'.

**(iii) Technical specifications for live-streaming**

1. Live-streaming shall be conducted by the Supreme Court with its own camera-persons or by an authorized agency. No person who is not authorized by the Supreme Court will be permitted to record any proceeding;
2. Cameras should be focused only on the judges and advocates pleading before the Bench in the matter being live-streamed;
3. Cameras shall not film the media and visitor's galleries;
4. Cameras may zoom in on the Bench when any judge is dictating an order or judgment or making any observation or enquiry to the advocate; and

**(iv) The following communications shall not be filmed:**

- a) Discussions among the judges on the Bench;
- b) Any judge giving instructions to the administrative staff of the courtroom;
- c) Any staff member communicating any message to the judge or circulating any document to the judge;
- d) Notes taken down by the judge during the court proceedings; and
- e) Notes made by an advocate either on paper or in electronic form for assistance while making submissions to the court.

**(v) Archiving**

1. The audio-visual recording of each day's proceedings shall be preserved in the Audio-Visual Unit of the Supreme Court Registry;
2. Archives of all broadcasts of courtroom proceedings which have been live-streamed should be made available on the website of the Supreme Court; and
3. Hard copies of the video footage of past proceedings may be made available according to terms and conditions to be notified by the Supreme Court Registry. The video footage shall be made available for the sole purpose of fair and accurate reporting of the judicial proceedings of the Supreme Court.

**(vi) Broadcast Room**

1. The Registry will make one or more rooms or a hall available within the premises of the Supreme Court for the purpose of broadcasting the proceedings. Multiple screens along with the other necessary infrastructural facilities shall be installed, for enabling litigants, journalists, interns, visitors and lawyers to view the courtroom proceedings in the broadcast room(s). Special arrangements will be made for the differently abled.

**(vii) Miscellaneous**

1. The Supreme Court shall hold exclusive copyright over videos streamed online and archived with the Registry; and
2. Re-use, capture, re-editing or redistribution, or creating derivative works or compiling of the broadcast or video footage, in any form, shall not be permitted except as may be notified in the terms and conditions of use and without the written permission of the Registry."

## E. Conclusion and Suggestions

It is evident that justice should not only be done, but seem to be done. Open Justice enables the public to see how justice is administered and by subjecting it to public and press scrutiny, safeguards the fairness of the trial. The rule is that the trial should be conducted in open court where the public can view, media can report to the world or people who could not make it and the parties and witnesses to the suit shall watch the justice done. The imperative need for public justice was emphatically stressed by **Jeremy Bentham** when he said, 'Publicity is the very soul of justice. It keeps the judge, while trying, under trial.' Proponents of open justice assert numerous benefits. An overarching benefit is that it keeps courts behaving properly. Still, practical considerations often mean that the ideal of open justice must be weighed against other values such as privacy and cost and national security. Open justice is important for three reasons: First, it assisted in the search for truth and played an important role in informing and educating the public. Second, it enhanced accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done. There are other factors which sometimes must be balanced against the need for open justice especially in criminal matters and family matters.

Author feels that live streaming of Court proceedings has the potential of throwing up an option to the public to witness live court proceedings which they otherwise could not have due to logistical issues and infrastructural restrictions of Courts; and would also provide them with a more direct sense of what has transpired. Thus, technological solutions can be a tool to facilitate actualization of the right of access to Justice bestowed on all and the litigants in particular, to provide them virtual entry in the Court precincts and more particularly in Court rooms. In the process, a large segment of persons, be it entrants in the legal profession, journalists, civil society activists, academicians or students of law will be able to view live proceedings in propria persona on real time basis. The decision taken in swapnil Tripathi and Indira Jai Singh's Case is one of the most path breaking judgment ever delivered in the annals of the Supreme Court and will be always remembered in the time to come. It will not just promote more transparency but also enable common man to get well acquainted with how justice is delivered in the top court.

So far as Indian judicial system is concerned it can be fairly concluded that to a extent it has followed the principle of open justice to make the system transparent and accountable. The strength of the judiciary is its open court system as everyone is free to watch what transpires in court. Such a system forecloses any possibility of hanky-panky or foul play. However, in India, the concept of open justice seems to be undergoing a silent burial as the courts are increasingly getting inaccessible. Besides, there is an increasing tendency to ban the reporting of court proceedings in sensitive cases.

In the latest instance, a Delhi court has restrained the media from reporting on the FIR filed against Justice **I.M. Qudusi**, a former Odisha high court judge, who is an accused in the medical admissions bribery case. The court has said that the constitutional right of free speech does not "confer a right" to defame persons and harm their reputation by "false and unsubstantiated allegations". It is baffling that the court has termed the allegations "false and unsubstantiated" before the trial. Going by this logic, there should be a total ban on reporting in criminal cases till the court pronounces its verdict. The reputation of every accused is as inviolable as that of a former judge. The only job of judges is to deliver justice, and it should be visible.

Nevertheless, the courts are increasingly imposing bans on the reporting of their proceedings. In the Sohrabuddin Sheikh fake encounter case, the trial court restrained the media from reporting its

proceedings. However, the Bombay high court set aside the ban order stating that the media is the “most powerful watchdog of society”. At a time when the media is under fire for almost every malady afflicting society, it is heartening to see that Justice **Rewati Mohite Dere**<sup>80</sup> ruled that “certainly the public has a right to know what is happening in this case”.

In the sexual harassment case against R.K. Pachauri, the trial court passed a baffling order that any news regarding this trial must carry the clarification that the matter is *sub judice* and that he is only an accused. It’s puzzling why Mr Pachauri was given this special privilege. It’s a matter of common knowledge that any matter is sub judice if the trial is still going on. While convicting Justice **C.S. Karnan** of contempt of court, the Supreme Court restrained the media from telecasting and publishing his (Karnan’s) statements. It is difficult to understand how his statements would have shaken the people’s faith in the judiciary when all the wild allegations made by him against judges of the Supreme Court and also his colleagues in the high court did not make any such impact.

In many cases Supreme Court of India is receiving information in sealed covers. In the National Register of Citizens Case, Court has – on multiple occasions – asked the state coordinator of the NRC to submit the details of his work to the Court in a “sealed cover” (including, on one occasion, refusing to share the contents of the “sealed cover” with the Attorney-General for India). In the Rafale Case, Court asked the Government to submit pricing details about its purchase of the Rafale aircraft in a “sealed cover”. And in the case involving corruption allegations at the CBI, court initially directed that the CVC’s report about the CBI Director Alok Varma be given to the latter in a “sealed cover”. No doubt in certain situations it is warranted but not in every case against the working of the Government. This “sealed covers” (“confidential reports”) culture may essentially set up a regime of secret justice, which is deeply and profoundly anti-democratic. A judicial regime in which the recourse is to the “sealed cover” – thus setting up a secret dialogue between the Court and the State, to the exclusion of the citizen – in my opinion has no place in a democratic set-up. It is suggested that balance of convenience should be more towards providing justice in open court so that the accused as well as the public are aware of the facts, circumstances, evidences, etc. about the case. The court should be specific to say why it departed from the justice being given in the open court. Live streaming of Cases before Supreme Court and Different High Courts should be immediately started to ensure faith in the working of judiciary.

At last, it is prudent to quote here the Chief Justice of Canada, the Rt Hon Beverley **McLachlin** P.C., that “The law belongs to the people. The principle of open justice is the cornerstone for ensuring that law fulfils this role, and does not become a tool for arbitrary power. Open justice exists in order to ensure that decisions in court are served properly and effectively. Exceptions to the rule of open justice represent those instances in which a completely open court would have undermined the purpose of the hearing. Nevertheless, when an application is made for a private hearing, the reasons for allowing it must be justified by the Court. This enables the confidentiality of information to be maintained, while ensuring that such exceptions are properly justified.”

---

<sup>80</sup> In the order passed by Revati Mohite Dere, J. addressed two criminal petitions filed challenging the jurisdiction of the City Civil and Sessions Court for passing an impugned order dated 29.11.17, in Session Cases Nos. 177of 2013, 178 of 2014, 577 of 2013 and 312 of 2014, banning the print, electronic and social media from publishing/posting or reporting any of the court proceedings.