

VIRTUAL COURTS & ONLINE DISPUTE RESOLUTION: ARE WE READY YET?

PART ONE OF THE TWO-PART SERIES

By Legal League Consulting

With the world going topsy-turvy in last few weeks, owing to the outbreak of deadly Coronavirus or COVID-19, not just nations across the globe, but organisations, institutions and individuals have transformed their lives and tried to cooperate towards measures required to be taken to reduce further spread of the pandemic.

The Indian Judiciary scaled down its conventional way of operating from within the court premises as a measure in this direction. Placing reliance on technology, the Hon'ble Supreme Court of India decided that court hearings will take place through electronic means. It announced that during the period where social distancing guidelines are to be observed, court hearings in congregation will be an exception.

In this article, **Bithika Anand**, Founder and CEO of Legal League Consulting, spoke to stalwarts from the legal fraternity to discuss the landmark steps taken by the Hon'ble Supreme Court to facilitate delivery of and access to justice in the times of COVID-19.

In the first part of this two-part series, Bithika interacts with iconic lawyers **Ameet Naik, Chander Lall, Pravin Anand** and **Zulfiqar Memon**, to understand their perspective on embracing the technology and challenges associated with the same. She analyses the developments and asks the most pertinent question - Are we ready yet?

PRESERVING THE RULE OF LAW & ACCESS TO JUSTICE IN TIMES OF COVID-19

The hardest times in life make us evolve and transition from one version to another. The global outbreak of COVID-19 pandemic has been one of the toughest situation humankind has seen in the recent past. The unabated spread of the pandemic has left even the so called superpower countries of the world crippled. What started as social distancing and restriction on physical movement as precautionary measures has now been scaled up to global lock down. But the beauty of human race lies in its inner strength to evolve to a higher level each time they encounter an impediment. In no time, all sections of society found means to connect on virtual platforms to continue to function, even if minimally.

In a democracy like India, preserving the rule of law and access to justice are fundamental to the nature of our Constitution. The dispensation of justice has to continue even during the trying times. Hearings by way of congregation and physical presence has been the norm so far in our judicial system. The Supreme Court of India, the apex body in charge of delivery of justice in the country, was facing the mammoth task of ensuring delivery of and access to justice in compliance with the social distancing guidelines.

Truly rising up to the occasion, the Supreme Court of India, on March 22, 2020, announced that it shall be conducting hearings through videoconferencing mode. Rooms with requisite facilities for this purpose were made available for the convenience of the members of the bar. The advocates on record and parties in person were allowed to indicate extreme urgency in the matter; and if the presiding judge was convinced, the matter would be heard through video conferencing. This step by the apex court marked the beginning of a new era of dispensation of justice in the Indian legal system. Those who always thought that technology cannot be imbibed in its truest sense, were taken by a surprise! Within no time the Supreme Court launched desktop and mobile application called "Vidyo", which could be downloaded and used for video conferencing. The step was met with a mixed reaction from various sections of lawyers. While some welcomed the development with open arms, several others were either confused or apprehensive as to how this step would integrate into day-to-day functioning of the courts in India.

COURT FUNCTIONING THROUGH VIDEO-CONFERRING SEES THE LIGHT OF THE DAY

Shortly when the government of India announced a nationwide lockdown on March 24, 2020, most of the courts across the nation announced that they would either not be functioning or taking up only urgent matters during the period of lock down. Vide another circular issued on March 26, 2020, the Supreme Court of India announced that it shall continue to hear matters involving extreme urgency through videoconferencing mode and the steps for such virtual hearings shall continue to be followed by advocates on record and parties in person. The Hon'ble Apex Court indicated that filings should be made through e-filing mode available on the Supreme Court website and the hearings were to be conducted through remote videoconferencing links instead of video conferencing facility available at the Supreme Court premises. The Hon'ble Court also went to the extent of announcing that should there be any inconvenience faced by the members while linking to the video conferencing facility, the court was willing to consider alternative online platforms like Skype, FaceTime and even WhatsApp! The circular, once again, showed the exemplary leadership by the Apex Court in such extraordinary circumstances.

The final big step came in when the Supreme Court, taking suo motu cognizance of the circumstances caused by the COVID-19 pandemic, issued guidelines for district courts functioning through video conferencing. In this landmark order, the Apex Court acknowledged that "Modern technology has enabled courts to enhance the quality and effectiveness of the administration of justice. Technology has facilitated advances in speed, accessibility and connectivity which enable the dispensation of justice to take place in diverse settings and situations without compromising the core legal principles of adjudication." Video conferencing and online hearings, which were so far being facilitated only by the Supreme Court of India and some selective high courts like the High Court of Bombay and Karnataka High Court, were prescribed as the mode of conducting hearings across all district courts. Going a step further and giving due consideration to the hardship of litigants who may not have the means for access to video conferencing facilities, the Supreme Court duly notified that video conferencing facilities shall be made available to such litigants; and if required the court should also appoint an amicus curiae for such litigants.

VIRTUAL COURTS - MATTER OF DUTY RATHER THAN MATTER OF DISCRETION

The progressive step taken by the Supreme Court has marked the dawn of times where technology will play an integral part in dispensation of justice across the country. This takes me back to the book titled "Tomorrow's Lawyers" by **Richard Susskind**, which I had read a few years back. When Richard Russkind predicted trends about use of technology by courts in this book, little did I realise that the concept and the philosophy woven therein would spread in the world. That the idea of technology becoming an integral part of judicial process would change the lives of millions in the world. The first edition of the book was released in the year 2013 and the concept of virtual courts and online dispute resolution was met with a lot of question marks by lawyers. In fact I would quote a very relevant portion from one of the chapters from the book, wherein Richard had aptly predicted how the courts in 2020 would look like.

"In the 2020s, I expect that online courts and ODR services will be telepresence enabled, that is, they will make extensive use of advanced video links. This will allow judges and mediators more easily to communicate with parties in real time."

It is surprising to observe how, way back in 2013, Richard was able to predict the future of dispute resolution and virtual courts. Today, as all of us battle the outbreak of this global pandemic, we realise how technology has come to the rescue of all us, who are either seeking justice or are committed towards delivery of justice. This giant step towards digitisation, though largely taken as a survival measure, could be a real game changer in the way our courts have traditionally functioned. In the order of April 6, 2020, the Hon'ble Supreme Court recognised that the Indian courts have been proactive in embracing advancement in technology in judicial proceedings. The robust infrastructure in place has reduced conventional impediments and legal uncertainty surrounding the use of virtual courts. Calling it a 'matter of duty' rather than a 'matter of discretion', the Hon'ble Court observed that developments in technology have opened up the possibility of virtual courts which are similar to physical courts.

THE EXPERTS' PERSPECTIVE

Bithika Anand, Founder & CEO of Legal League Consulting, spoke to some of the eminent lawyers of the country to understand their take on the recent developments with respect to embracing technology by the Indian Courts and the challenges associated with it.

Zulfiqar Memon, Managing Partner of the Firm MZM Legal LLP and a renowned name in the field of Disputes & White-Collar Crime, shared how the applicability of technological advancements in online dispute resolution and e-courts can be differently applicable at different stages of a criminal proceeding.

Speaking to Bithika, Zulfiqar said:



ZULFIQAR MEMON

Founder & Managing Partner
MZM Legal LLP

“Technology can very well cater to pre-trial stages that comprise of filing and furnishing of documentary evidence. The same can be filed online and verified at a later stage by the court. However at the trial stage, especially for criminal trials, human interaction is extremely important. Certain evidences have to be produced in the court physically and the most crucial stages of a criminal trial, like cross-examination, would be half as effective if done online, in comparison to cross-examination

of witnesses face to face. Therefore, technology and online dispute resolution will be more effective till pre-trial stages.”

He further differentiated how, at the High Court level, challenge is more about the mindset. Zulfiqar added,

“At the High Courts, witnesses are seldom called and proceedings mainly consists of lawyers arguing about the facts of the case and applicable laws. The judges examine the evidence already on record. The applicability and acceptance of technology at this stage may definitely be more than the trial stage. The mind-set of the lawyers will also play an important role here. Effectivity of lawyers standing in court is much in comparison to virtual interaction. But again, this is more about adapting to a way of functioning. With changing times, there will be change in mindset.”

Lauding the efforts of the judiciary towards converging the dispensation of justice and up gradation of technology, **Ameet B. Naik**, Founder & Managing Partner of Naik Naik & Co. and a litigator par excellence shared the following message with Bithika:

"We must compliment the efforts of Judges of Hon'ble Supreme Court, Bombay High Court and other courts across the country, who have taken the initiative to function through video conferencing and deliver orders in urgent cases.

Now that the efficacy of digital technology has been tested in these challenging times, this is here to stay and should be a routine rather than an exception.”



AMEET B. NAIK

Founder & Managing Partner
Naik Naik & Co.

Ameet, who has played a key role in securing two landmark orders from the Bombay High Court, while functioning with his own team through videoconferencing, praised the judiciary whole-heartedly.

"I have been a part of couple of matters where urgent orders were granted by the Hon'ble Bombay High Court with a very pragmatic approach keeping in mind the effect of the unprecedented circumstances on commercial matters. I must say that the experience of being part of the hearing through video conferencing was nothing short of a personal hearing and all parties were completely satisfied with the hearing. Now that the efficacy of digital technology has been tested in these challenging times, this is here to stay and be a routine rather than an exception."

When Bithika spoke to legendary IP lawyer Pravin Anand, Managing Partner of Boutique IP Firm Anand and Anand, he shared the following about the internet and e-courts in his inimitable witty style:

"The Internet – We had moved from books, films and music to groceries, banking and social networking long ago. E-courts are relatively new. But they are great. Instant justice with instant coffee.

Nobody notices your pyjamas under formal upper attire, until the National Anthem is played!

Watch out the bark of your dear dog, although it may let you secure a good order."



PRAVIN ANAND

Managing Partner
Anand & Anand

When Bithika interacted with the tech-savvy IPR icon and Senior Counsel **Chander Lall**, who is known to be a pioneer in embracing technology and had introduced paperless office in his firm Lall & Sethi almost a decade back, he identified that the biggest challenge associated with acceptance of technology is the 'mindset' and 'attitude' of people. Recognising the efficiency that virtual courts and online dispute resolution can bring to the judicial system, Chander shared:



CHANDER LALL

Senior Counsel

“Use of technology is the engine for the future. The Coronavirus pandemic has taught us the need to reform and adopt technology as an integral part of our workings and lives.

When we can work from the comfort of our home, with enhanced efficiency, without contributing to the traffic and pollution, spending our time resourcefully and efficiently and overall save on infrastructure costs, why would we resist it.

Showing staunch support towards tech-solutions and in support of saving environment, Chander further added,

“Video conferencing, e-files and emails are the new normal. Adopt, adapt or perish.”

Calling physical courtroom hearings as a part of the ‘dark age’, Chander also highlighted the following:

“I hope I don't ever have to go back to the archaic, outdated ways of working again!”

Therefore, it is clear that not just the judiciary, even the lawyers and legal practitioners are in support of the virtual courts and online dispute resolution, although it may be implemented in stages.

Until appropriate rules are framed by the High Courts, the Supreme Court has indicated that the video conferencing shall be mainly employed for hearing arguments, whether at the trial stage or at the appellate stage. As regards recording of evidence, the Hon'ble Court has indicated that in no case shall evidence be recorded without the mutual consent of both the parties by video conferencing.

Summing up the conversation, Bithika Anand adds:



BITHIKA ANAND

**Founder & CEO
Legal League Consulting**

“Just as every cloud has silver lining, COVID-19 has perhaps showed us what is possible within the realms of technology. Tough times push you harder to experiment as its no more about sustenance, but survival. I feel this is the best time for us to transition and test our adaptability. As the courts are taking up only urgent matters and functioning selectively, the testing can be extensively done at this stage and any possible glitches can be addressed.

This will make us better prepared when the courts resume functioning as we would've tested all aspects by then and would be ready for a more efficient functioning.”

AUTHOR'S NOTE

The benefits of virtual courts and online dispute resolution are visible. We would not only be able to expand the accessibility of justice, but would also enhance efficiency, save costs and do our bit in saving the environment. The shift in the way courts were functioning hitherto is inevitable. We may take time to adapt, but the wheel of change is already in motion.

Will the lawyers accompany senior counsels and clients in video conferencing set-up at court premises or will they be at their respective camera-ends? Will virtual courts be a possibility for all types of cases? Will they replace conventional hearings in totality?

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As we move along, several questions will be answered. What was 'outlandish' at one point in time, is our 'vantage point' today.

What we see as our judicial system's current capability is only 'transitory'. It will continue to evolve over a period of time.

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NIPUN BHATIA

Vice President
Legal League Consulting