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e-Justice: Relating Practical Guidelines in Videoconferencing with the Concerns of Academic Literature

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Abstract

Videoconferencing was widely used in court proceedings during the covid 19 pandemic, and, probably, its use will not return to the point before the pandemic. The academic literature indicates many different concerns with videoconferencing in court proceedings that may ultimately impact the legitimacy of the judicial process. This study aims to appreciate if academic research has been incorporated into the practical recommendations which guide daily work in courts. First, we conducted a literature review to identify and organise the concerns about using videoconferencing in court proceedings. Then we selected two guidelines and evaluated whether their recommendations addressed solutions to concerns raised in the academic literature. We conclude that most of the concerns are present in the guidelines. Although, the concern regarding the difficulty of replicating the environment of the physical courtroom in videoconferencing, which is the most cited concern, is not addressed in the practical guidance.

Keywords: Videoconferencing; virtual hearings; virtual trials; remote hearings; e-Justice

1. INTRODUCTION

Information Technology (IT) adoption and use in the justice system are often referred to as e-Justice. It aims to improve access to justice, increase cooperation between legal authorities, strengthen the justice system, and improve the administration of law (Kesan, Jimenez, & Gasco, 2015).

Two main classes of IT tools are central to the judiciary: Case Management Systems (CMS) and Courtroom Technology (CT). In the latter class, we can highlight videoconferencing systems that, sometimes, are interconnected to courtroom record systems (Rocha, Carvalho, & Suxberger, 2021). Videoconferencing has been used in the judiciary for a while, but it gained great importance after the COVID-19 pandemic. At that time, courts worldwide had to close their doors and find alternatives to continue with the judicial procedures (Fabri, 2021).

Videoconferencing has many recognised benefits, such as saving costs, reducing the time of judicial procedures, and increasing access to court hearings (Rowden, 2018; Salyzyn, 2012; Sourdin, Li, Simm, & Connolly, 2020; Yamagata & Fox, 2017). Nonetheless, important criticisms focus on the threats that remote hearings can pose to legal conformity and the legitimacy of the judgment. (Dumoulin & Licoppe, 2016; Easton, 2018).

The widely recognised need for advice on how to deal with videoconferencing by judges and courts has been addressed by institutions that issued practical guidelines. Aiming to minimise the potential negative

impacts of video hearings and to ensure the legitimacy of the judicial procedure and its outcome, these documents guide the preparation and operation of videoconferencing in courts' daily activities.

In this paper, we relate academic literature concerns with videoconferencing in the judiciary with practical recommendations issued by reputed, independent organisations from the judicial milieu. In doing so, we intend to establish to what extent practical recommendations influencing judicial activities are consistent with empirical evidence related to the risks of videoconferencing in courtrooms.

The paper is structured as follows: Section 2 addresses the methodology, Section 3 presents a concept of videoconferencing and a brief history of its use, Section 4 resumes the main constraints for videoconferencing uses, Section 5 describes the characteristics of the guidelines and relates them to the concerns found in literature, and Section 6 provides conclusions and a research agenda.

2. METHODOLOGY

We carried out a literature review of articles that address videoconferencing research in justice proceedings to identify the main concerns with its use. We searched on Scopus and Web of Science in June 2022, using the expressions “virtual hearings” and justice, videoconferencing and justice, “virtual court”, and “virtual trials”. We search for articles, in all years, in the English and Portuguese languages, in the fields: of article title, abstract, and keywords. Seventy-three papers were identified. 13 duplicated references and 35 false positive articles were excluded. We analysed the 25 remaining to identify and classify issues and concerns related to court videoconferencing. These issues and concerns were then confronted with selected guidelines for videoconferencing published by reputed, independent organisations from the judicial milieu. So we can identify among those present in the literature that the practical guidelines also address. Only concerns that were explicitly mentioned were considered. Those considered only indirectly or that were superficially treated were not considered.

3. VIDEOCONFERENCING CONCEPT AND HISTORY

Videoconferencing is a technology based on the web that allows hearings and trials for the judiciary to occur regardless of a physical courtroom. It involves one or more participants that cannot be in the same location and encompass real-time two-way transmission of data, voice and image (Bellone, 2013; Wallace & Laster, 2021). Videoconferencing systems allow the recording and recovery of audio and voice, an important tool to speed up justice procedures. Videoconferencing in the judiciary is also called “virtual courts” (Stephens, 2001).

Videoconferencing can be divided into two configurations. In the first, most parties appear in a physical courtroom, but one or more people appear remotely. In the second configuration, all participants appear via video (Rossner, 2021).

The first configuration was observed in most cases before the pandemic. Virtual hearings are held remotely in exceptional cases such as people living in remote areas, certain extremely vulnerable witnesses, for security reasons for people in custody, expert witnesses, people medically incapacitated and in cross-border procedures (Gray, Citron, & Rinehart, 2013; Rattan & Rattan, 2021; Wiggins, 2006). These early remote hearings fall under the first configuration mentioned above.

Gradually, mainly for practical and economic reasons, judiciaries started to use videoconferencing for a wide range of cases (Diamond et al., 2010; Young, 2011). The expansion of video hearings triggered criticisms about the danger of using this technology without an appropriate evaluation.

With the unexpected arrival of the COVID-19 pandemic, courts used videoconferencing widely, mainly in the second configuration aforementioned: all participants appear from their homes in the video call. With the pandemic, judiciaries allowed the judicial hearing to be held online in most cases, except for jury trials, to avoid further damages (Giancomelli & Lamarque, 2020; Rossner & Tait, 2021).

After the pandemic's decline, court hearings will likely not return to the same situation. Surveys indicate that most participants report having positive experiences with the virtual audience (Baker & McKenzie International, 2021).

Concerns about the impact of the widespread use of video conferencing on individual rights led the International Commission of Jurists (ICJ) to issue, in November 2020, the "Videoconferencing, Courts and COVID-19: Recommendations Based on International Standards". In June 2021, the European Commission for The Efficiency of Justice (CEPEJ) published the Guidelines on videoconferencing in judicial proceedings. Both documents provide guidelines for videoconferencing in courtrooms and will be analysed against the concerns found in the literature.

4. CONCERNS ABOUT THE USE OF VIDEOCONFERENCING SYSTEMS IN THE JUDICIARY

Reviewing the literature, we found that concerns about using videoconferencing in legal proceedings can be arranged in two groups. As shown in the diagram in Figure 01, the first group encompasses concerns that affect the appropriate realisation of remote hearings. The appropriate realisation of remote hearings is viewed as a previous condition for the regular administration of justice and the legitimacy of hearings. The second group of concerns would threaten the judicial proceedings and the legitimacy of judgments even if videoconferencing were carried out properly, with no constraints. While the problems in the first group could ideally be solved, problems in the second group call into question the suitability of videoconferencing in court proceedings, at least for some specific judicial matters.

In the first group, technological and infrastructure problems are the most cited problem in the literature. It encompasses a lack of adequate electricity and telecommunications infrastructures. Malfunctions of videoconferencing systems, failure in Wi-Fi connection and others that result in interruptions, picture or sound "freezing" during hearings can affect trial outcomes and are cited as regular occurrences (Bild et al.,

2021). The digital divide is another concern. The lack of skills to use videoconferencing or the absence of equipment can limit access to hearings. Procedural aspects respect the correct preparation, including adjustments to hearings conducted remotely. And finally, normative aspect concerns relate to an absence or inconsistency of videoconferencing with legal regulation.

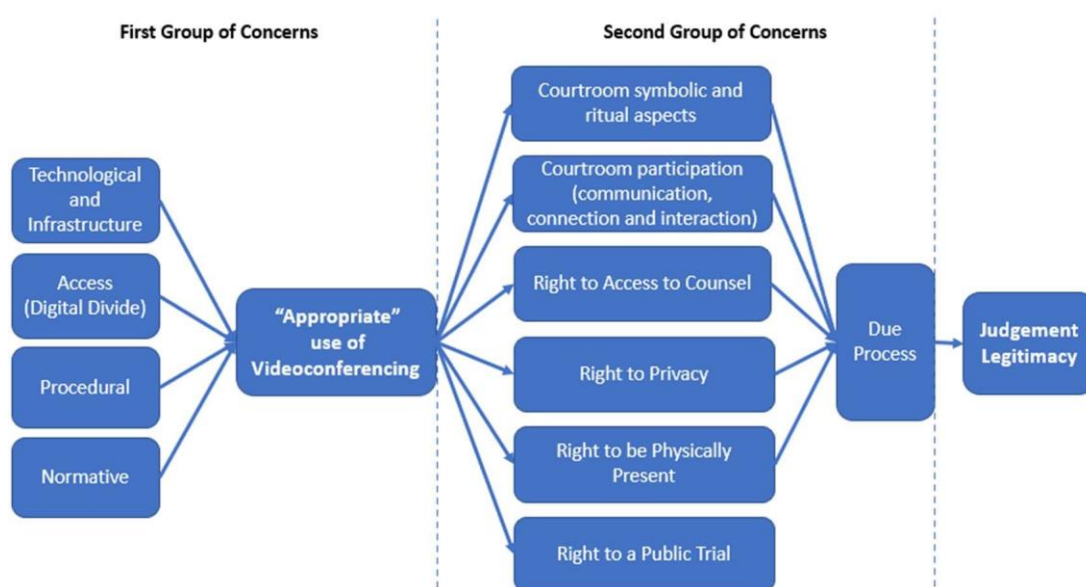


Figure 1 –Concerns related to the use of videoconferencing (Elaborated by the authors)

The second group includes concerns about the loss of courtroom symbolism and ritual aspect, which can affect the adjudication’s seriousness and the participants’ role. Authors highlight the architectural aspect of the courtroom as an important factor in creating the court “atmosphere” that encourages reflection and affirms that where trial decisions are taken is not common places (Rowden, 2018).

Videoconferencing proceedings can affect participation during hearings, as communication, interaction and connection are impaired during virtual hearings. Non-verbal communication is seriously diminished when participants appear remotely, and the dynamic of court audiences is modified, affecting trial outcomes. The right to consult privately with counsel is not observed when all participants are in different physical locations, leading to ineffective assistance for defendants. The right to privacy is also threatened by videoconferencing, as systems may present security problems or even because participants may record the hearings. At last, videoconferencing jeopardise the right to a public trial. Public participation is limited in remote hearings, which is essential to assure fairness and limit abuse of judicial power (Turner, 2002).

Table 01 presents all the concerns categories and the authors that refer to each.

Concerns Category First Group	Source
Technological and Infrastructure	Bellone (2013); Beyene et al. (2015b); Bielik et al. (2020); Bild et al. (2021); Nir & Musial (2022); Puddister & Small (2020); Rowden (2018); Sourdin et al. (2020); Stephens (2001); Turner et al (2022)
Access (Digital Divide)	Bellone, (2013); Bielik et al. (2020); Puddister & Small (2020); Rossner (2021); Sourdin et al, (2020)
Procedural	Beyene et al. (2015b); Nir & Musial (2022); Sourdin et al. (2020)
Normative	Dumoulin & Licoppe (2016); Puddister & Small (2020); Stephens, (2001)
Concerns Category Second Group	Source
Courtroom symbolic and ritual aspects	Heinsch et al. (2021); Mulcahy (2008); Nir & Musial (2022); Rossner (2021); Rowden (2018); Rowden & Anne (2018); Salyzyn (2012)
Courtroom participation (communication, connection, and interaction)	Dumoulin & Licoppe (2016); Heinsch et al. (2021); Mckay (2018); Rossner (2021); Rowden (2018); Salyzyn (2012); Sourdin et al. (2020)
Access to Counsel	Bellone (2013); Rowden (2018); J. I. Turner et al. (2022)
Privacy	Puddister & Small (2020); Rossner (2021); Sourdin et al. (2020)
Right to be physically present	J. I. Turner et al. (2022); Wiggins (2006)
Right to a Public Trial	Dumoulin & Licoppe (2016); Puddister & Small (2020); Rossner (2021)

Table 1 – Concerns about the use of Videoconferencing

5. RELATION OF PRATICAL TOOLS IN VIDEOCONFERENCING WITH ACADEMIC LITERATURE

The International Commission of Jurists (ICJ) is a widely respected organisation founded in 1952 that aims to promote and protect human rights. It comprises 60 eminent judges and lawyers from all regions of the world. They use their legal expertise to “ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realisation of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession (International Commission of Jurist, 2022)”.

Concerned that judicial institutions could continue to function effectively during the COVID-19 pandemic by guaranteeing the right to a fair trial by an independent and impartial tribunal, they produced, in November 2020, a set of recommendations for the use of videoconferencing in court proceedings: “Videoconferencing, Courts and COVID-19: Recommendations Based on International Standards” (Pollard, 2020).

The CEPEJ produced the second set of practical recommendations for courts. These recommendations address videoconferencing in legal proceedings regardless of the pandemic. The document title is “Guidelines on videoconferencing in judicial proceedings”. They emphasise the urgency that States and courts using videoconferencing do not undermine the right to a fair trial (CEPEJ, 2021).

It's important to stress that the two documents have different characteristics. While the recommendations of ICJ focus more on legal concerns related to human rights, presenting a legal approach predominantly, the CEPEJ guidelines present a more procedural approach despite not neglecting legal aspects.

We performed a systematic analysis of the guidelines to examine the occurrence of terms related to concerns about the impact of videoconferencing in the judiciary. In the conceptual analysis, we considered present only explicit terms or terms senses pertinent to each category of content (concerns category). In some cases, the guidelines didn't address specific practical recommendations, although the concern category was cited as a principle. Table 2 relates the concerns of academic literature with the recommendations of practical guidelines in Videoconferencing.

Concerns Category First Group	ICJ	CEPEJ
Technological and Infrastructure		✓
Access	Cited as a general principle	Cited as a general principle
Procedural		✓
Normative		
Concerns Category Second Group	ICJ	CEPEJ
Courtroom symbolic and ritual aspects		
Courtroom participation (communication, connection, and interaction)	✓	✓
Access to Counsel	✓	Cited as a general principle
Privacy	✓	✓
Right to be physically present		✓
Right to a Public Trial	✓	✓

Table 2 – Concerns addressed by practical tools

Both guidelines specifically address most concerns. ICJ recommendations emphasise the right to a public trial, the right to be physically present, and courtroom participation, focusing more on criminal cases. CEPEJs' guidelines recommend technological issues, procedural aspects, participation, access to counsel, privacy and the right to a public trial. The right to be physically present is addressed not literally but as the requirement of free and informed consent of the defendant to participate virtually (Council of Europe Commission of Efficiency of Justice - CEPEJ, 2021, p. 14). Both documents cite access to the courtroom hearing as a general principle of justice procedures. The right to consult privately with a lawyer is also mentioned as a general principle in CEPEJ guidelines. Technological and procedural aspects appear marginally in the ICJ, and privacy aspects are not present. The normative aspect is sometimes cited as a pre-condition to allow the virtual hearings but was not addressed in CEPEJ or ICJ recommendations as a specific topic of interest.

Finally, the most cited concern in literature, the courtroom symbolic and ritual aspects, are absent in both documents. CEPEJ guidelines recommend that "... the examination of the witnesses and experts during the remote hearing should follow as closely as possible the practice adopted when a witness or expert is present in the courtroom (p. 13)". However, this is the document's unique reference to the physical courtroom.

6. CONCLUSION

This research aims to relate two practical guidelines for videoconferencing in courtrooms with the concerns of academic literature. We found two groups of concerns that may affect procedural justice and the legitimacy of legal judgment. The first refers to factors that may interfere with the adequate realisation of videoconferencing. The second refers to videoconferencing per se.

The relationship between the concerns and the recommendation of practical tools shows that most concerns are addressed by the two documents analysed, although normative aspects are poorly explored. The concern regarding the difficulty of replicating the environment of the physical courtroom, even though it is a serious concern of academics, is not addressed in the practical guidance. Recommendations that address this worry should be incorporated into the guidelines, such as those conducted by Rossner. She suggests alternatives for incorporating symbols and adjusting designing rituals aligned with contemporary court users (Rossner, 2021; Rossner, Tait, & McCurdy, 2021).

The research is relevant once practical guides inform practitioners and managers from judicial organisations on what to do while planning and conducting a virtual hearing. Relating them to academic literature helps to improve the guidelines and suggests new research opportunities.

Once the study encompasses an extensive range of complex subjects, it was difficult to discuss further and deepen the knowledge of each one, which is a limitation of the study.

For future research, we intend to broaden the literature review, including other databases from the law, such as HeinOnline. The concerns of using videoconferencing systems and their relation to justice outcomes have to be more thoroughly and deeply evaluated, and the subject needs more empirical research.

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