

Use of e-devices in judicial proceedings in a Convention-compliant manner

by

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Summary:

The keynote on the use of e-devices in judicial proceedings in a Convention-compliant manner will focus on the use of videoconferencing in legal proceedings. It will present the CEPEJ guidelines on videoconferencing which were adopted in June 2021, especially procedural, technical and organizational issues and practices, and align application of new technologies in the judiciary with the general principle of safeguarding the existing standards on human rights, democracy and the rule of law. In particular, it will encourage a technology-neutral approach and emphasise the need to accept innovation as tools to support, and not disrupt the existing rights. Efficient implementation and use of potential technologies primarily depends on the capacities and skills of stakeholders involved with the process, and these should be developed strategically, systematically and continuously in order to take full advantage of the potential benefits.

The pandemic has challenged many of the concepts that we used to take for granted, and forced us to appraise anew both our dependence on the existing technologies, relations and methods of operation, and the need to accept new ones more decisively – often a challenge in traditionally conservative systems such as justice.

In some cases, judges and courts already had prior experience with videoconferences and remote hearings due to mutual assistance and judicial cooperation. Case law of the ECHR also provided guidance to some aspects of videoconferencing, for example also without the consent of the defendant in criminal cases.

In majority of the new types of uses that were suddenly needed during the emergency conditions, however, it was not only the experience that was lacking in previously unaccustomed legal professionals. It was also the lack of equipment, facilities, support and protocols.

Solutions had to be found and applied to the most urgent matters, which could not be postponed without significant risk to the rights of parties.

I was assisting the Slovenian judiciary in the first weeks of the pandemic in, for example, setting up new channels of communication with mental health facilities in order to create a feasible system of protecting the legal rights of newly detained patients, as their legal capacity had to be assessed by a judge within 48 hours.

Technology, protocols, and adequate frameworks ... everything had to be developed and implemented basically from scratch. Situations like this happened all over the world, with varying success.

¹ *Actual delivery of the speech may differ*

We have perhaps all seen the video of an attorney who accidentally applied a cat filter during a Zoom based legal proceeding? There are many lessons that can be gained from this anecdote, but please allow me to distill only a couple.

Technology is a tool. A means, not the end. It should serve people and procedures, not disrupt them. Use of tools depends on skills, and skills must be developed. They depend on knowledge transfer.

Technology literacy, implementation and access gaps must be addressed continuously. Learning is a curve. This applies to all types of users, and all types of technology.

Emergency conditions have forced us to take advantage of the technology in a wider manner, but they have also shown the potential how they could be used as a relatively regular procedural tool.

Among many benefits, they can increase efficiency of time, funds, transparency, and can improve access to courts and their publicity.

But they also bear risks. At the end, legal procedures are primarily about the final users, the beneficiaries of the judicial system and of the principles of the rule of law, and about their rights – our rights, your rights.

The anecdotes are an example of the incumbent professional stakeholders, the ones responsible to provide services to the real users, and on whose competence and quality of work the final users depend, and rely on.

Technical competence can, with adequate input, be gained relatively easily.

Application of law to individual cases, however, also requires a human, empathic, individualised, direct and creative quality. Not only to pass the test of fairness by not finding violations to any of the rights of defence. And it would be easy to find those when the quality of connection is poor or interrupted. Not only to conform to the ideals of distributive justice. But above all, to perform the function of creating a just, cohesive and reliable community, of the rule of law in the best sense of the phrase, through procedural justice.

This depends in no small matter on human introspection, on adequate personal responsibility of individuals for their decisions, and if needed, additional human supervision.

Relying on technology can make it easier to conduct proceedings, but with that, it can also easily reduce the perceived rate of personal involvement, and with that the rate of individual responsibility, or even agency. Often, this can happen inadvertently and unconsciously, through sheer convenience. The impact on the individuals, and also on the system, is however, objective.

In one particular, non-COE country, death sentences were pronounced by videoconferences during the pandemic in 2020, and they were pronounced almost twice as much than in the same period a year before. Let us reflect on that for a moment.

It is of utmost importance that we are conscious of the dangers of automating, or industrialising the application of justice, and that we continuously and

transparently assesses the impact and risks of application of new technologies on human rights, democracy and the rule of law.

I believe this caveat can equally be applied to both topics of today's discussions, videoconferencing, and even more so artificial technology, with, among other issues, the risk of increasing and scalable reliance on statistically potentially accurate, but individually non-causal algorithmic justice.

At its 36th Plenary meeting on June 16-17 this year, CEPEJ, the European Commission for the Efficiency of Justice, adopted Guidelines on videoconferencing in judicial proceedings.

They provide a set of key measures that states and courts should follow to ensure that use of videoconferencing in judicial proceedings does not undermine the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and meets the requirements of the Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

The purpose is to provide states with a framework which aims to eliminate any risk of a violation of the parties' rights during remote hearings, in particular their right to be heard and to actively participate in proceedings, and the right of defence. The Guidelines cover all judicial proceedings and can also be applicable *mutatis mutandis* to the public prosecution services.

They provide four sets of fundamental principles.

All guarantees to a fair trial under ECHR apply to remote hearings in all judicial proceedings, and require particular attention to the right to effective access to a court, fairness of the proceedings, adversarial character of the process, equality of arms, proper administration of evidence, time to prepare and access to materials, the court's decision in a reasonable time, and data security and risk management.

States should establish a legal framework that provides a clear basis for allowing courts to hold remote hearings in judicial proceedings.

It is for the court to decide, within the applicable legal framework, whether a particular hearing should be held remotely, with the aim of ensuring the overall fairness of the proceedings.

The court should safeguard the right of a party to be effectively assisted by a lawyer in all judicial proceedings, including confidentiality of their communication.

The Guidelines address both procedural issues concerning all types of judicial proceedings, with an additional emphasis on the particularities of criminal proceedings, and technical and organisational requirements for videoconferencing in judicial proceedings.

Foremost among procedural issues, States should adopt a legal framework which provides the courts with sufficient grounds to decide whether a remote hearing in a particular case is reasonable and appropriate under the specific

circumstances. Parties should have the opportunity to consult with the court, and the decision should be open to possible review.

For criminal proceedings, a particular emphasis is put on the need of a legitimate purpose for using the system without consent of the defendant, and provide guidelines for effective participation of the defendant and their legal representation.

If legislation does not require the free and informed consent of the defendant, the court's decision for his or her participation in the remote hearing should serve a legitimate aim. This can be based on the protection of public order, public health, the prevention of offences, and the protection of the right to life, liberty, and security of witnesses and victims of crimes.

Compliance with the right to a trial within a reasonable time can also be considered by the court, in particular at stages in the proceedings subsequent to the first instance.

The defendant should have effective access to legal representation before and during the remote hearing, including the right to communicate with their lawyer confidentially before the beginning of the hearing.

Defendant should be able to confer with their legal representative and exchange confidential instructions without surveillance over a secured system.

Use of a secured line, different from the video link provided for the remote hearing, should be privileged.

In case of the defendant's continuous improper conduct, the court should inform the defendant of its power to mute, interrupt or suspend the defendant's video link, before actually making this decision.

Courts should ensure that the legal representative of the defendant is still able to exercise the right to legal assistance during the remote hearing and the proceedings as a whole.

Participants should be provided with clear rules, instructions, information materials and/or tutorials in advance. In order to participate effectively, all participants need to have an opportunity to test the audio and video quality, and to familiarise themselves with the features of the videoconferencing platform. The court should in particular consider the situation and challenges of persons in vulnerable positions.

Sufficient notice about technical requirements should be given in advance, and participants requested to secure a reliable video connection of sufficient quality. Ideally, a test should be scheduled.

Participants should be reminded that they appear before the court and should therefore behave suitably in compliance with applicable laws, good practices, and court etiquette.

The hearing's setting, including equipment, should guarantee the integrity of statements of every participant. They can attend a hearing by videoconference from courtrooms, detention facilities, law firms, or other safe places.

Participants should also be able to access IT support during remote hearings in order to avoid delays and technical difficulties, especially at detention facilities.

The court should be able to continuously monitor the quality, and ensure that the transmission can be seen and heard by those involved.

Court should react to reported technical incidents, especially by the defendant.

The system should enable effective participation of the defendant, who would be able to see and hear the participants of the remote hearing.

Security should mitigate the risk that the videoconferencing hardware, software and connections are vulnerable to improper access.

Contingency plans should be in place in order to effectively deal with issues such as sudden technical failures, disconnections, power outages, or data security breaches.

Cloud computing services used during remote hearings, and potential data storage, should comply with data protection laws.

If there is a technical incident or a failure that cannot be fixed, the remote hearing should be adjourned or suspended.

As a general rule, the court's autonomy should be strengthened and not restricted by the use of technology. The application should strive to ensure as much as possible a true-to-life hearing experience, especially when it comes to the hearing of witnesses. Videoconferencing rules should be technology-neutral and not impose, or discriminate in favour of, a particular type of technology.

The videoconferencing system provided by the court should be free of charge for all participants, easily accessible and user friendly. It should operate on standard hardware, and ensure data protection. This, of course, requires sufficient investment by the state both to secure access, allow scalability when required, and prevent the risks of dependence.

States should provide judges, court staff, and legal practitioners with sufficient training in IT solutions and related international standards of human rights protection. They should also encourage the courts to share best videoconferencing practices in order to reduce costs and increase efficiency.

Ladies and gentlemen,

The use of videoconferences during the pandemic was primarily aimed at maintaining the previous levels of access to courts, and right to a fair trial and especially the right to a trial within a reasonable time. At the same time, it pushed many of the judicial systems into the proverbial water and forced them to learn how to swim, or at least not drown, and to seriously consider developing swimming lessons afterwards.

In addition to the risks, opportunities also include the potentials to strengthen efficiency, procedural justice and its public perception. We need to draw appropriate conclusions from the lessons, and use them to adapt our systems and priorities by systematically addressing the challenges, along with the opportunities.

The guidelines on videoconferencing prepared by CEPEJ are a starting point, a check list of the issues that need to be addressed in order to use videoconferencing in a convention compliant manner. Like national frameworks

and solutions, they are to be updated by taking into account various experiences and good practices.

Technology is a tool. Use of tools depends on skills. Skills can be developed.

A key requirement for this is, of course, that states allocate adequate public funding, which provide the judges with the resources allowing them to make an informed determination on when and how to use them in individual cases.

Our efficiency in using the new technologies should, however, remain limited by our understanding of the risks, and by our commitment to the rights of individuals, the right to fair trial and defence, and the need to maintain and promote the legitimacy of justice.