

The Impact of Video Proceedings on Fairness and Access to Justice in Court during Covid-19

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ABSTRACT

Video recording of the proceedings would undoubtedly benefit in increasing the transparency in the judicial system. It would also support in strengthening the pillars of faith and confidence among the citizens in the country combating for their rights. Live recording of the entire scenario of the court-room would also curtail the risk of disputes occurring on the various grounds which may be raised by the parties like, during their absence some contentions or facts might not have been taken into proper consideration by the judge while hearing the matter and the order was passed or the advocate would have represented the case in an inappropriate manner.

KEYWORDS: E-Courts, Video proceedings, justice, Fundamental Rights

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INTRODUCTION

The Covid-19 pandemic has disrupted court operations across the world, prompting judges to postpone nonessential proceedings and conduct others through video or phone. Even as courts have begun to reopen, many are also continuing or testing new ways to expand the use of remote technology.² At the same time, public health concerns are leading some legal services providers and other advocates to oppose the return to in-person proceedings.³ Beyond

the current moment, several court leaders have also suggested that expanded use of remote technology should become a permanent feature of our justice system.⁴

Remote technology has been a vital tool for courts in the midst of a public health crisis. But the use of remote technology — and its possible expansion — also raises critical questions about how litigants' rights and their access to justice may be impacted,

² Daniel Siegel, "Miami, Orlando Headline Fla. Courts' Remote Trial Experiment," Law360, June 4, 2020, <https://www.law360.com/articles/1279653/miami-orlando-headline-fla-courts-remote-trial-experiment.>; and Jake Bleiberg, "Texas Court Holds First US Jury Trial via Videoconferencing," Associated Press, May 22, 2020, <https://abcnews.go.com/Health/wireStory/texas-court-holds-us-jury-trial-videoconferencing-70825080>.

³ Rocco Parascandola and Molly Crane-Newman, "Lawyers Fear Sudden Return to NYC Courthouses Next Week will Spread Coronavirus," Daily News, July 8, 2020, <https://www.nydailynews.com/new-york/nyc-crime/ny-courts-reopening-early-outrage-lawyers->

[advocates-20200708-42rpmgyhyjc2jphrqohwdsyy6q-story.html](https://www.nydailynews.com/new-york/nyc-crime/ny-courts-reopening-early-outrage-lawyers-advocates-20200708-42rpmgyhyjc2jphrqohwdsyy6q-story.html).

⁴ Lyle Moran, "How Hosting a National Pandemic Summit Aided the Nebraska Courts System with its Covid-10 Response," Legal Rebels Podcast, May 13, 2020, https://www.abajournal.com/legalrebels/article/rebel_s_podcast_episode_052.; and Katelyn Kivel, "How the Coronavirus Revolutionized Michigan's Courts," The Gander Newsroom, July 14, 2020, <https://gandernewsroom.com/2020/07/14/coronavirus-revolutionized-courts/>.

either positively or negatively, and what courts and other stakeholders can do to mitigate any harms.

This paper collects and summarizes existing scholarship on the effects of video technology in court proceedings. Federal courts, immigration courts, and state courts have long used video technology for certain kinds of proceedings.⁵ While the available scholarship on the use of video proceedings is limited, existing research suggests reason for caution in expanding the use of these practices, as well as the need for further research on their potential effects.

For Example:

- One study of criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense.⁶
- A study of immigration courts found that detained individuals were more likely to be deported when their hearings occurred over video conference rather than in person.⁷
- Several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video.⁸

⁵ Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Video-conferenced Hearings on Bail Decisions," *Journal of Criminal Law and Criminology* 100 (2010): 877-878, 900; Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 934; and Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*, National Association for Presiding Judges and Court Executive Officers, 2016, 12, <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

⁶ Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions," *Journal of Criminal Law and Criminology* 100 (2010): 893.

⁷ Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 966; and Frank M. Walsh and Edward M. Walsh, "Effective Processing or Assembly-Line Justice - The Use of Videoconferencing in Asylum Removal Hearings," *Georgetown Immigration Law Journal* 22 (2008): 271-72.

⁸ Holly K. Orcutt et al., "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials," *Law and Human Behavior* 25 (2001): 357-8, 366. However, it is important to note that these studies are simulated experiments and not observations of actual court proceedings, so outcomes might have differed if video proceedings were used and examined in an actual court

- In three out of six surveyed immigration courts, judges identified instances where they had changed credibility assessments made during a video hearing after holding an in-person hearing.⁹

Research also suggests that the use of remote video proceedings can make attorney-client communications more difficult. For example, a 2010 survey by the National Center for State Courts found that 37 percent of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations.¹⁰ Remote proceedings can likewise make it harder for self-represented litigants to obtain representation and other forms of support by separating them from the physical courthouse. A study of immigration hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely.¹¹

At the same time, other research suggests that remote video proceedings may also enhance access to justice under some circumstances. For example, a Montana study found that the use of video hearings allowed legal aid organizations to reach previously underserved parts of the state.¹²

Organizations such as the Conference of Chief Justices have called for the expanded use of video or telephone proceedings in civil cases, particularly for self-represented and low-income litigants, as a way of reducing costs for those who, for example, may need to take time off work to travel to court.¹³ **13**

hearing. Also worth noting is that the judge, bailiff, and attorneys questioning the children were in the room with the children testifying; the children only appeared by CCTV to the mock jurors.

⁹ Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, 2017, 55, <https://www.gao.gov/assets/690/685022.pdf>.

¹⁰ Eric Bellone, "Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom," *Journal of International Commercial Law and Technology* 8 (2013): 44-45.

¹¹ Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 938.

¹² Richard Zorza, *Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment*, Legal Services Corporation, 2007, 1, 3, <https://docplayer.net/3126017-Video-conferencing-for-access-to-justice-an-evaluation-of-the-montana-experiment-final-report.html>.

¹³ National Center for State Courts, *Call to Action: Achieving Civil Justice for All*, 2016, 37-38 <https://iaals.du.edu/publications/call-action-achieving-civil-justice-all>.

One challenge in interpreting this research is that court systems hear a wide range of cases, both civil and criminal, and the use of videoconferencing may pose widely disparate challenges and benefits for litigants in different types of cases. Courts are involved in adjudicating everything from evictions to traffic violations, from multimillion-dollar commercial disputes to felony cases. In some instances, litigants are detained in jails or detention centers. In others, they may be self-represented. Courts hold preliminary hearings, arraignments, settlement negotiations, scheduling conferences, arguments on legal motions, jury trials, and much more.

At its core, this review of existing scholarship underscores the need for broad stakeholder engagement in developing court policies involving remote proceedings, as well as the need for more research and evaluation as courts experiment with different systems.

Impact of Video Proceedings on Case Outcomes

A handful of studies have directly assessed whether replacing certain in-person proceedings with videoconferences impacted substantive outcomes in criminal, civil, or immigration proceedings. Several other studies have sought to evaluate the impact of using video on factors that are likely to affect substantive outcomes, such as credibility assessments by juries or other factfinders, and communication between attorneys and their clients.

Video Proceedings and Substantive Outcomes

One study by law and psychology professor Shari Seidman Diamond and coauthors, published in the *Journal of Criminal Law and Criminology*, looked at the impact of using closed-circuit television during bail hearings in Cook County, Illinois. The study found that judges imposed substantially higher bond amounts when proceedings occurred over video.¹⁴

In 1999, Cook County began using closed-circuit television for most felony cases, requiring defendants to remain at a remote location during bail hearings. A 2008 analysis of over 645,000 felony bond proceedings held between January 1, 1991 and December 31, 2007 found that after the closed-circuit television procedure was introduced, the average bond amount for impacted cases rose by 51 percent — and increased by as much as 90 percent for some offenses. By contrast, there were no statistically

¹⁴ Shari Seidman Diamond et al., “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions,” *Journal of Criminal Law and Criminology* 100 (2010): 897.

significant changes in bond amounts for those cases that continued to have live bail hearings.¹⁵ These disparities persisted over time. The release of this study, which was prepared in connection with a class action lawsuit challenging Cook County’s practices, caused the county to voluntarily return to live bail hearings.¹⁶

The authors theorized several explanations for the difference in bond amounts in Cook County. Among other things, they pointed to the picture quality and the video setup, which gave the appearance that the defendant was not making eye contact. In addition, they suggested that the defendant’s remote location made it difficult for their attorney to gather information in advance of the hearing or consult with their client during the hearing. The authors also pointed out that the video was in black and white, and that litigants with darker skin were difficult to see on camera. Finally, they raised the question of whether some aspect of appearing in person affects a person’s believability.¹⁷ 17

Another study by law professor Ingrid Eagly looked at the use of video technology to adjudicate immigration proceedings remotely, finding that detained respondents were more likely to be deported when their proceedings occurred over videoconference.¹⁸ Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s.¹⁹ The use of

¹⁵ *Ibid*, 896.

¹⁶ *Ibid*, 870.

¹⁷ *Ibid*, 884-85, 898-900.

¹⁸ An earlier analysis by Frank and Edward Walsh in the *Georgetown Immigration Law Journal* likewise found disparities in outcomes in asylum cases. The study, which looked at fiscal years 2005 and 2006, found that “the grant rate for asylum applicants whose cases were held in person is roughly double the grant rate for the applicants whose cases were heard via [video].” Walsh and Walsh, “Effective Processing,” 271. These differences were statistically significant, and the authors found similar and statistically significant differences when controlling for whether the applicant was represented by counsel. However, according to Eagly, most immigration hearings were not coded for whether they were conducted in person or by video prior to 2007, undercutting the reliability of the findings. Eagly, 946. Nor did the study identify the basis by which some asylum applicants were designated for video conference, suggesting the possibility of confounding variables. Nevertheless, the striking difference in asylum rates highlights the need for further research.

¹⁹ “Video Hearings in Immigration Court FOIA,” American Immigration Council, last modified August 11, 2016, accessed October 14,

videoconferencing, even without the petitioner's consent, is specifically authorized by statute.²⁰ According to the Transactional Records Access Clearinghouse Immigration Center at Syracuse University, from October through December 2019, one out of every six final hearings deciding an immigrant's case was held by video.²¹ Eagly examined outcomes for detained immigrants in immigration court, comparing those who participated via video to those who participated in person.²² Eagly used a nationwide sample of nearly 154,000 cases, in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012.²³

Eagly found what she described as a "paradox": detained immigrants whose proceedings occurred over video were more likely to be deported, but *not* because judges denied their claims at higher rates. Rather, these respondents were less likely to take advantage of procedures that might help them. Detained individuals who appeared in person were 90 percent more likely to apply for relief, 35 percent more likely to obtain counsel, and 6 percent more likely to apply only for voluntary departure, as compared to similarly situated individuals who appeared by video. These results were statistically significant, even when controlling for other factors that could influence case outcomes.²⁴ **24**

At the same time, among those individuals who actually applied for various forms of relief, there was no statistically significant difference in outcome after controlling for other factors. However, because video participants were *less likely* to seek relief or retain counsel, video cases were still significantly more likely to end in removal.²⁵ Eagly argued that

2021, <https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia>.

²⁰ See 8 U.S.C. § 1229a(b)(2)(A)(iii); see also 8 C.F.R. § 1003.25(c) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.").

²¹ TRAC Immigration, "Use of Video in Place of In-Person Immigration Court Hearings," January 28, 2020, <https://trac.syr.edu/immigration/reports/593/>.

²² Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 933

²³ *Ibid.*, 960.

²⁴ Among other things, Eagly controlled for the type of proceeding and charge, the respondent's nationality, whether they are represented by counsel, their judge, and the year the proceedings took place. Eagly, "Remote Adjudication," 938.

²⁵ Eagly looked at two samples, a national sample and a subset of locations that she called the Active Base Sample. She found that "in the National Sample, 80 percent of in-person respondents were ordered removed, compared to 83

"[t]elevideo must therefore be understood as having an indirect relationship to overall substantive case outcomes—one linked to the disengagement of respondents who are separated from the traditional courtroom setting."²⁶ **26**

Eagly relied on interviews and court observations to explore why video proceedings led to less engagement by respondents. She suggested that respondents may have been less likely to participate fully in video proceedings due to logistical hurdles requiring advanced preparation, such as the need to mail an application for relief in advance of the hearing, rather than bringing one to court and physically handing over a copy. She also highlighted the difficulties that video proceedings pose in allowing individuals to communicate effectively and confidentially with their attorney. Finally, she found that respondents often found it difficult to understand what was happening during video proceedings, and that many perceived a video appearance as unfair and not a real "day in court," an assertion which has also been made by the American Bar Association Commission on Immigration.²⁷ **27**

A few studies have also examined the impact of video testimony on jury trials, with mixed results. One study by psychology professor Holly Orcutt and coauthors examined the impact of remote testimony by children in sexual abuse cases. The authors created a simulation involving a fake crime with children and an adult actor. The children then testified on their experiences within the experiment during a mock trial, using actors and mock jurors.²⁸ The child

percent of televideo respondents. In the Active Base City Sample, 83 percent of in-person respondents were ordered removed, compared to 88 percent of televideo respondents." The disparities in outcomes were statistically significant. Eagly, "Remote Adjudication," 966.

²⁶ Eagly, "Remote Adjudication," 938.

²⁷ Eagly, "Remote Adjudication," 978, 984, 989. A 2019 report from the American Bar Association, which issued recommendations for reforming the immigration system, argued that based on its 2010 findings, the use of video conferencing technology can undermine the fairness of proceedings by making it more difficult to establish credibility and thus argue one's case. The report goes on to suggest limiting the use of video to nonsubstantive hearings. See American Bar Association Commission on Immigration, 2019 Update Report: Reforming the Immigration System, 2019, 18, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system

²⁸ Some children experienced the fake crime and some did not. In addition, some children were asked to modify their

witnesses testified either in person or via one-way closed-circuit television.²⁹ **29**

Orcutt found that when children testified via closed-circuit television, the mock jurors rated them as less honest, intelligent, and attractive, and concluded that their testimony was less accurate. Mock jurors were also less likely to vote to convict the defendant (accused by the child witness), when the child testified by closed-circuit television.³⁰ Thus, closed-circuit testimony “appeared to result in a more negative view of child witnesses as well as a small but significant decrease in the likelihood of conviction [of the defendant].”³¹ However, after jurors deliberated, there was no statistically significant impact of video versus live testimony on the verdict.³² It is possible that study participants had a specific skepticism about remote testimony by children in abuse cases due to assumptions about why a child might not testify in person. However, this study also raises the possibility that remote witness testimony is generally less likely to be seen as credible, disadvantaging litigants and raising fairness concerns in cases where testimony is likely to be critical to a party’s case.

On the other hand, a series of studies from the 1970s and 1980s based on reenacted trials generally found that videotaped trials had no impact on outcomes. For example, in a reenacted trial involving an automobile personal injury case, staffed by actors, there was no statistically significant difference in the mean amount awarded by the jury, or in the jury’s retention of information, between the in-person and videotaped trials.³³ However, several caveats apply. First, these

testimony to falsely indicate that a crime had taken place. Orcutt et al., “Detecting Deception in Children’s Testimony,” 343.

²⁹ Orcutt et al., “Detecting Deception in Children’s Testimony,” 339-372.

³⁰ Ibid, 357, 367.

³¹ Ibid, 366.

³² Ibid, 358.

³³ Gerald Miller, “Televised Trials: How Do Juries React,” *Judicature* 58 (December 1974): 242-246. The jurors in Miller’s study thought they were rendering a verdict in an actual trial. A similar study likewise found no statistically significant difference in juror attributions of negligence or the amount awarded by jurors in simulated video and in-person trials. The mode of presenting expert witnesses did affect pre-deliberation award, information retention, and source credibility, but not in a straightforward manner. The plaintiff’s witness was more effective in obtaining favorable awards when he appeared live, while the defendant’s witness was more effective in reducing the award (advantaging the defendant) when he appeared on videotape. The study suggested that “The most plausible

studies did not address the use of remote jurors, or jurors who interacted with each other over video.”³⁴

Also relevant is that the technologies available to conduct remote proceedings today are vastly different than those used in studies in the 1970s and 80s. Finally, another limitation of these studies is that they do not address how less than ideal technological conditions may impact court dynamics. For example, a study of immigration courts by Booz Allen Hamilton for the Department of Justice determined that technological glitches had disrupted cases to such an extent that due process concerns may arise.³⁵ **35**

Lastly, the Administrative Conference of the United States has studied the use of video teleconferencing by federal executive agencies in administrative hearings. According to an analysis by the Bureau of Veteran Affairs, there was no evidence that video proceedings for veterans benefits adjudications had an impact on outcomes: “the difference in grants [for veterans’ benefits claims] between video hearings and in-person hearings has been within one percent” over the five-year period preceding the 2011 report.³⁶ The study also found that these hearings had increased productivity for Veterans Law Judges and supporting counsel by eliminating the need for travel to and from hearings.

explanation for this difference could be the variations in the communication skills of the two witnesses across presentational modes.” Gerald R. Miller, Norman E. Fontes, and Gordon L. Dahnke, “Using Videotape in the Courtroom: A Four-Year Test Pattern,” *University of Detroit Journal of Urban Law* 55 (Spring 1978): 668. See also Gerald R. Miller, Norman E. Fontes, and Arthur Konopka, *The Effects of Videotaped Court Materials on Juror Response* (East Lansing: Michigan State University Press, 1978).

³⁴ For additional research on simulated trials, see David F. Ross et al., “The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse,” *Law and Human Behavior*, 18, (1994): 553-566; and Tania E. Eaton et al., “Child-Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions,” *Journal of Applied Social Psychology*, 31 (2001): 1845-1858. However, in these studies, mock jurors watched videotapes of trials involving either live or videotaped testimony, so their findings are of limited utility for comparing videotaped and live trials.

³⁵ Booz Allen Hamilton, *Legal Case Study: Summary Report, 2017*, 23, <https://perma.cc/B3VS-FQAY>.

³⁶ Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, Administrative Conference of the United States, 2011, 24, <https://perma.cc/B3VS-FQAY>.

Other Effects on Litigants

Video and Perceptions of Credibility

In addition to studies that directly assess the relationship between video proceedings and outcomes, such as conviction or deportation rates, other research has looked at whether video testimony by a witness has an impact on how they are perceived by fact finders. Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications for the overall fairness of remote proceedings.

In addition to the Orcutt study discussed previously, several other studies have looked at the impact of video testimony by children on their perceived credibility in the context of sexual abuse cases, finding that video testimony had an impact on jurors' perceptions of the child's believability. For example, an analysis involving mock trials with actors where a child testified either in-person or via closed-circuit television found that testimony over video lowered jurors' perception of a child's accuracy and believability.³⁷ Similarly, in a Swedish simulation where different jurors watched the child testimony either live or via video, jurors perceived the live testimony in more positive terms and rated the children's statements as more convincing than the video testimony. Live observers also had a better memory of the children's statements.³⁸ **38**

Other research suggests that technological limitations may affect immigration judges' ability to assess credibility in video proceedings. For example, in a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing:

"For example, one immigration judge described making the initial assessment to deny the respondent's asylum application during a [video teleconference] hearing in which it was difficult to understand the respondent due to the poor audio quality of the [video teleconference]. However, after holding an in-person hearing with the respondent in which the audio and resulting interpretation challenges were resolved, the judge clarified the facts of the case, and as a result, decided to grant the

³⁷ Gail S. Goodman et al., "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions," *Law and Human Behavior* 22 (1998): 195-96.

³⁸ Sara Landstrom, "Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory," *Legal and Criminological Psychology* 12 (2007): 344-45.

respondent asylum. Another immigration judge reported being unable to identify a respondent's cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge's interpretation of the respondent's credibility."³⁹

Psychology research also provides theoretical support for the concern that individuals who appear by video may face disadvantages. For example, psychology professor Sara Landstrom, who studied video testimony by children, has described the "vividness effect," whereby testimony that is more emotionally interesting and proximate in a sensory, temporal, or spatial way is generally perceived by observers as more credible and is better remembered. Landstrom notes, "it can be argued that live testimonies, due to face-to-face immediacy, are perceived [by jurors] as more vivid than, for example, video-based testimonies, and in-turn are perceived more favourably, considered more credible and are more memorable."⁴⁰

Similarly, drawing from communications and social psychology research, law professor Anne Bowen Poulin argued, "[s]tudies reveal that people evaluate those with whom they work face-to-face more positively than those with whom they work over a video connection. When decision makers interact with the defendant through the barrier of technology, they are likely to be less sensitive to the impact of negative decisions on the defendant."⁴¹ **41**

Technology choices may also have unintended consequences. For example, research by G. Daniel Lassiter and coauthors have documented a camera perspective bias in the context of videotaped confessions, finding that observers were more likely to believe a confession was voluntary when the camera was focused only on the defendant during a videotaped interrogation.⁴² Poulin has also noted that space constraints may necessitate the use of close-up shots during some video hearings, which can

³⁹ Government Accountability Office, *Actions Needed to Reduce Case Backlog*, 55

⁴⁰ Landstrom, "Children's Live and Videotaped Testimonies," 335. See also Richard E. Nisbett and Lee Ross, L. *Human Inference: Strategies and Shortcomings of Social Judgment*. (Englewood Cliffs, NJ: Prentice-Hall, 1980).

⁴¹ Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant," *Tulane Law Review* 78 (2004): 1118.

⁴² G. Daniel Lassiter et al., "Videotaped Confessions: Panacea or Pandora's Box?" *Law and Policy* 28 (2006): 195-201.

exaggerate features, obfuscate the perception of a person's size and age, and obscure body language.⁴³

Effects on Attorney-Client Communications and Relationship

Another question raised by the use of video proceedings is whether they impact communication and other aspects of the relationship between attorneys and their clients, who are frequently separated during remote proceedings. For example, in a 2010 survey by the National Center for State Courts, 37 percent of courts that used video proceedings reported that they had no provisions to enable private communications between an attorney and client when they were in separate locations.⁴⁴ Poulin also noted that even when a secure phone line for private attorney-client communication is provided, nonverbal communication is likely to be difficult, and it may be hard for a client to catch their attorney's attention with a question or to provide relevant information.⁴⁵

Similarly, Diamond's Cook County study on the impact of video proceedings on bail observed that separating attorneys and clients made it harder for them to quickly confer during a bail hearing. She noted that such a communication challenge could be consequential in a bail hearing: a defendant may be able to provide "mitigating details regarding past convictions that will greatly assist counsel... Obviously, such communications must occur immediately if counsel is to be able to make use of his client's information during a fast-paced bail hearing."⁴⁶

A study by the advocacy organization Transform Justice surveyed lawyers, magistrates, probation officers, intermediaries, and other officials about the use of remote proceedings in the United Kingdom. Fifty-eight percent of respondents thought that video hearings had a negative impact on defendants' ability to participate in hearings, and 72 percent thought that video hearings had a negative impact on defendants' ability to communicate with practitioners and judges.⁴⁷ Survey respondents indicated that they believed the following groups were the most

negatively impacted by video hearings: defendants with limited English proficiency, unrepresented defendants, and children under 18.⁴⁸ **48**

These findings were echoed in Florida's experience with remote video proceedings for juvenile detention hearings. In 2001, the Florida Supreme Court repealed an interim rule that had been in effect from 1999 through 2001 that authorized remote juvenile hearings.⁴⁹ In repealing the rule, the Court detailed public defenders' concerns that "there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom."⁵⁰ The court observed that "[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained."⁵¹ **51**

Additional Access to Justice Considerations

Another question raised by remote video proceedings is how their use impacts the public's access to justice in civil cases, where there is generally no right to counsel and where other safeguards for litigants are weaker than in criminal cases.

Access to Counsel and Other Resources in Civil Cases

One critical issue is the extent to which videoconferencing increases or diminishes burdens for self-represented litigants in arenas like housing or family court. Understanding the relationship between video proceedings and access to justice can inform courts' use of video both now and in the future, and help identify areas where courts should invest in additional resources or support for litigants.

The Conference of Chief Justices has encouraged judges to "promote the use of remote audio and video

⁴⁸ Gibbs, Defendants on video, 10, 26.

⁴⁹ Due to the Covid-19 pandemic, the Florida Supreme Court temporarily authorized video proceedings for juvenile delinquency proceedings (including juvenile detention hearings). See Florida Supreme Court, "Chief Justice Issues Emergency Order Expanding Remote Hearings and Suspending Jury Trials into Early July Statewide," May 4, 2020, <https://www.floridasupremecourt.org/News-Media/Court-News/Chief-Justice-issues-emergency-order-expanding-remote-hearings-and-suspending-jury-trials-into-early-july-statewide>.

⁵⁰ Amendment to Fla. Rule of Juvenile Procedure 8.100(A), 796 So. 2d 470, 473 (Fla. 2001).

⁵¹ Amendment to Fla. Rule of Juvenile Procedure 8.100(A), 796 So. 2d 470, 473 (Fla. 2001).

⁴³ Poulin, "Criminal Justice and Videoconferencing," 1121-1122.

⁴⁴ Bellone, "Client Communications and the Effect of Videoconferencing," 44-45.

⁴⁵ Poulin, "Criminal Justice and Videoconferencing," 1130.

⁴⁶ Diamond et al., "Efficiency and Cost," 881-882.

⁴⁷ Penelope Gibbs, Defendants on video — conveyor belt justice or a revolution in access?, Transform Justice, 2017, 16, http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf.

services for case hearings and case management meetings” in civil cases as part of a broader set of reforms to promote access to justice.⁵² The Conference cites, among other things, that video proceedings can help mitigate the costs borne by litigants who might have to travel far distances or take time off from work to attend in-person court proceedings.⁵³ Notably, the Conference of Chief Justices’ proposal calls for combining video proceedings with enhanced services for self-represented litigants, including internet portals and stand-alone kiosks to facilitate access to court services, simplified court forms, and real-time court assistances services over the internet and phone.

A report by the Self-Represented Litigation Network similarly observed that videoconferencing technology can reduce the time and expenses associated with traveling, transportation, childcare, and other day-to-day costs that individuals incur when they go to court. The report also noted the potential costs of such technology, including the possibility that remote appearances may lessen the accuracy of factfinding and reduce early opportunities to settle cases.⁵⁴ **54**

There is only limited research on the benefits and harms of video proceedings with respect to access to the courts. Eagly’s study of immigration court hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely, highlighting the role that courthouses often play in connecting self-represented individuals with resources, including representation.⁵⁵ **55**

On the other hand, a 2007 study on the use of videoconference technology in Montana, which included interviews and court observations, found that the use of video court appearances in both civil and criminal hearings enabled legal aid organizations to serve previously underserved parts of the state.⁵⁶ Montana, one of the largest and least populated states, had only 84 lawyers in the entire eastern portion of

⁵² National Center for State Courts, Call to Action, 37.

⁵³ National Center for State Courts, Call to Action, 37-38.

⁵⁴ John Greacen, Remote Appearances of Parties, Attorneys, and Witnesses, Self-Represented Litigation Network, 2017, 3-4; and see also Camille Gourdet et al., Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology, RAND Corporation, 2020, 4-5, https://www.rand.org/pubs/reserch_reports/RR3222.html (discussing advantages and disadvantages of remote proceedings in criminal cases).

⁵⁵ Eagly, “Remote Adjudication,” 960.

⁵⁶ Zorza, Video Conferencing for Access to Justice.

the state in 2004.⁵⁷ The study concluded that introducing video hearings means that “legal aid has a presence in counties from which they would be absent if video were not there as an option.”⁵⁸ Video proceedings also opened up greater opportunities for pro bono representation. The report endorsed the use of the video technology in Montana, while urging caution in ensuring that the technology was “used with sensitivity to overall access to justice goals,” including recognizing that there are cases that may not be appropriate for video appearances, such as those involving lengthy proceedings.⁵⁹ The study also acknowledged that there are still unanswered questions about how to properly cross-examine a witness over video and that the potential issues with such examinations could be more significant when dealing with an individual’s credibility or integrity.⁶⁰

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Beyond the use of videoconferencing, another study looked at an online case resolution system for minor civil infractions and misdemeanors. This online system did not use video; rather, individuals had the option to use an online portal to communicate with judges, prosecutors, and law enforcement at any time of day. The study found that the system saved time, significantly reduced case duration, and reduced default rates (where individuals lose cases by not contesting their claims).⁶¹ The author highlighted the costs associated with going to court for relatively low-stakes proceedings: “Physically going to court costs money, takes time, creates fear and confusion, and presents both real and perceived risks.”⁶² To the extent that video proceedings may similarly reduce some of the costs of going to the courthouse, this study suggests that in lower-stakes proceedings, the use of video can save time compared to attending in-person proceedings, and can enable more individuals to engage with the system rather than defaulting their

⁵⁷ Zorza, Video Conferencing for Access to Justice. For context, the overall population in this 47,500 square mile region was between 10 to 14 percent of the state’s total in 2004. See Larry Swanson, “Montana is One State with Three Changing Regions,” Belgrade News, February 28, 2019, http://www.belgrade-news.com/news/feature/montana-is-one-state-with-three-changing-regions/article_cc6ccb66-3b82-11e9-881c-8f20afd84778.html#:~:text=The%20Central%20Front%20region%20has,of%20the%20total%20in%201990.

⁵⁸ Zorza, Video Conferencing for Access to Justice, 12.

⁵⁹ Ibid, 13.

⁶⁰ Ibid, 18.

⁶¹ J.J. Prescott, “Improving Access to Justice in State Courts with Platform Technology,” Vanderbilt Law Review 70 (2017): 2028-2034

⁶² Ibid.

claims. However, it also highlights that videoconferencing is not the only way to conduct proceedings remotely, and that in some contexts online systems and other technologies have functioned well.⁶³

Additional Consideration for Marginalized Communities

Other research raises potential equity concerns about the broad use of video proceedings, particularly for marginalized communities and in cases where individuals are required to participate by video. These concerns underscore the need for additional research and evaluation as courts experiment with remote systems, as well as the need for courts to consult with a wide array of stakeholders when developing policies for video proceedings.

For instance, there is a substantial digital divide associated with access to the internet and communication technology. One critical unanswered question is whether and how video proceedings may exacerbate existing inequalities. According to studies by the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race.⁶⁴ Americans who live in rural communities are also less likely to have access to broadband internet.⁶⁵ The same is true

⁶³ See also Maximilian A. Bulinski and J.J. Prescott, "Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency," *Michigan Journal of Race and Law* 21 (2016). OCR systems involve transitioning some everyday court proceedings, such as civil infraction citations, outstanding failure-to-pay or failure-to-appear warrants, and some misdemeanors to be settled online, sometimes via videoconference.

⁶⁴ 29 percent of adults with household incomes below \$30,000 did not own a smartphone, 44 percent did not have home broadband services, and 46 percent did not own a traditional computer. Households with incomes of \$100,000 almost universally had access to these technologies. Monica Anderson and Madhumitha Kumar, "Digital Divide Persist Even as Lower-Income Americans Make Gains in Tech Adoption," Pew Research Center, May 7, 2019, <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>. Only 66 percent and 61 percent of Black and Latino Americans respectively have access to a home broadband compared to 79 percent of white Americans. Andrew Perrin and Erica Turner, "Smartphones Help Blacks, Hispanics Bridge Some — But Not All — Digital Gaps with Whites," Pew Research Center, August 20, 2019, <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/>.

⁶⁵ Andrew Perrin, "Digital Gap Between Rural and Nonrural America Persists," Pew Research Center, May

for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.⁶⁶

Technology disparities potentially pose significant hurdles to the widespread use of video court proceedings for marginalized communities, particularly when Covid-19 has led to the closure of many offices and libraries. The pandemic has also caused a massive spike in unemployment, which may hinder litigants' abilities to pay their phone and internet bills.⁶⁷ Because there is currently a dearth of research on how the digital divide impacts access to video proceedings, courts and other stakeholders should conduct their own studies before committing to the use of video hearings in the long term.

Other research has identified challenges that self-represented litigants face in navigating the legal system, including the need for training and support offered in multiple languages.⁶⁸ In some states, as many as 80 to 90 percent of litigants are unrepresented.⁶⁹ Another critical research question is

31, 2019, <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

⁶⁶ Disabled Americans are about 20 percentage points less likely than those without a disability to say that they have access to home broadband internet or own a computer, smartphone, or tablet. Monica Anderson and Andrew Perrin, "Disabled Americans are Less Likely to Use Technology," Pew Research Center, April 7, 2017, <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>.

⁶⁷ Rachel Dissell and Jordyn Grzelewski, "Phone, Internet Providers Extend Service Yet Some Still Disconnected from Lifelines During Coronavirus Pandemic," *Cleveland.com*, April 8, 2020, <https://www.cleveland.com/coronavirus/2020/04/phone-internet-providers-extend-service-yet-some-still-disconnected-from-lifelines-during-coronavirus-pandemic.html>. See also NORC at the University of Chicago, "Most Working Americans Would Face Economic Hardship If They Missed More than One Paycheck," press release, May 16, 2019, <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/most-working-americans-would-face-economic-hardship-if-they-missed-more-than-one-paycheck.aspx>.

⁶⁸ Phil Malone et al., *Best Practices in the Use of Technology to Facilitate Access to Justice Initiatives: Preliminary Report*, Berkman Center for Internet and Society at Harvard University, 2010, 6-7, 14-19, Appendix A, https://cyber.harvard.edu/sites/cyber.harvard.edu/files/A2J_Report_Final_073010.pdf.

⁶⁹ Jessica Steinberg, "Demand Side Reform in the Poor People's Court," *Connecticut Law Review*, 47 (2015): 741.

the extent to which courts are able to provide adequate support remotely, particularly in jurisdictions where courthouses have been the principal place where individuals going to court connect with resources.

A final question is how remote technology affects access to justice for individuals who do not speak English or have limited English proficiency. This is a particular concern in the judicial context because research suggests that dense court language can be difficult to communicate via translation to non-English speakers.⁷⁰

Research related to the use of remote translation in areas such as telemedicine has been mixed as to whether remote translation impacts quality and satisfaction.⁷¹ And while there is limited research on remote translation in courts, a study by the Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice found that approximately 30 percent of litigants in immigration court who used an interpreter appeared to misunderstand what was happening, either due to misinterpretation or inadequate interpretation.⁷² The study lacked a control group, making it difficult to assess the role that remote video immigration proceedings played in translation difficulties, but the report's authors suggested that, based on their observation of these proceedings, videoconferences exacerbated translation difficulties.⁷³

⁷⁰ Charles M. Grabau and Llewellyn Joseph Gibbons, "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation," *New England Law Review* 30 (1996): 237-244, 255—60. See also Ashton Sappington, "Implied Consent and Non-English Speakers," *John Marshall Law Journal* 5 (2012): 638.

⁷¹ Ann Chen Wu et al., "The Interpreter as Cultural Educator of Residents: Improving Communication for Latino Parents," *Archives of Pediatrics and Adolescent Medicine* 160 (2006): 1145-50; C. Jack, "Language, Cultural Brokerage and Informed consent — Will Technological Terms Impede Telemedicine Use?" *South African Journal of Bioethics and Law* 7 (2014): 14, 16-17; and Imo S. Momoh, *Cultural Competence Plan, Contra Costa County Mental Health Services*, 2010, 78, 101-108, 114, https://cchealth.org/mentalhealth/pdf/2010_cultural_competence_plan.pdf.

⁷² The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, 2005, 8, http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

⁷³ *Ibid.*

The Situation in India Before the COVID-19 Crisis

In fact, prior to the sudden onset of the COVID-19 crisis in 2019, fortunately, India had already covered a lot of ground in digitization of justice and court administration. Three particularly significant developments had been the E-Courts Project, and the development of Supreme Court and E-Court Services Apps.

I. E-Courts Project

Prior to the COVID-19 crisis, the E-courts project was one of the National e-Governance projects implemented in all the District/Subordinate Courts in the country. The main aim of the E-courts was to provide a transparent, accessible and cost-effective justice delivery system to all citizens through the Information and Communication Technology (ICT) and Internet enabled courts. Significantly, the E-courts Project had made digital interconnectivity possible among all courts from the District and Taluka level to the apex court. The E-courts project had been earlier conceptualised under the "National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary –2005" prepared by the e-Committee of the Supreme Court of India.⁷ Approved in 2010, it was saving a lot of time for users besides providing other benefits. As a public convenience, various E-Court services were availed by the concerned citizens through the Judicial Service Centre at a court complex.⁷⁴ So, provision already existed in majority of the courts for e-Service of summons, notices, warrants through e-mail via the internet; e-cause lists were available on the court website, as well as, case status, online filing, and orders and judgments in PDF, plus every important court information was also provided to the litigant, such as working days, holidays, names of judges, and so on, which came in handy at the time of the COVID-19 crisis.

II. The Supreme Court App

Another important step towards the digitization of the justice administration system which was already taken prior to the onslaught of the COVID-19 crisis was the introduction of the Supreme Court App. The Chief Justice of India, while explaining the utility of the application, expressed the hope that artificial intelligence fuelled law translation system would facilitate the quality translation and further help in improving the efficiency of

⁷⁴ *Govt. of India, Ministry of Law and Justice. Evaluation Study of eCourts Integrated Mission Mode Project*, National Council of Applied Economic Research, New Delhi, 2015, p. XV, https://www.researchgate.net/profile/Sohini_Paul3/publication/n/327200189_Evaluation_Study_of_eCourts_Integrated_Mission_Mode_Project/links/5b7f8952299bf1d5a723ca5b/Evaluation-Study-of-eCourts-Integrated-Mission-Mode-Project-Project.pdf, accessed 1 November 2021.

the Indian Judicial System. The Supreme Court App was to translate the judgements into nine regional languages.⁷⁵ Translation in court matters was a necessity and manual translation in the past used to be a major problem being quite laborious and consumed a lot of time often causing inordinate delays in the judicial process.

This official mobile app of Supreme Court of India, is free to download and also provides useful information on pending and decided cases with a personalized dashboard containing Cause Lists, Case Status, Daily Orders, Judgments, Latest Updates, Office Reports, Circulars and much more. All these can be accessed, downloaded and shared in a user friendly interface.⁷⁶

III. E-court Services App

Also much before the COVID-19 crisis made its appearance, in 2017, the E-courts Services mobile application was launched. The E-Court Services App provides information related to cases filed in the Subordinate Courts and most of the High Courts in the country. It can be exclusively used for District Courts or High Court or both. The App provides several useful features to digitally assist the lawyer or the litigant, including the provision of search by CNR — which is a unique number assigned to each case filed in District and Taluka Courts anywhere in India through the Case Information System – so that, simply by entering the CNR, one can get the current status and details of the case. In addition to Case Status, search options include Cause List and Calendar. The litigant or lawyer can save all cases of interest, which are shown under a 'My Cases' tab. This facilitates the creation and management of a portfolio of their cases or personal case diary for future use.

Further, the E-Court Services App also provides numerous other services including⁷⁷: Anyone can view entire case history of a lawsuit through this App; Case status, cause list, next date of hearing and so on. There is also a provision for lawyers and litigants to e-pay court

⁷⁵ The Economic Times, 26 November 2019, *SC proposes to introduce system of artificial intelligence, says CJI* <<https://economictimes.indiatimes.com/news/politics-and-nation/sc-proposes-to-introduce-system-of-artificial-intelligence-saysji/articleshow/72245549.cms?from=mdr>> accessed 15.09.2021.

⁷⁶ Computer Cell, Supreme Court of India. *Supreme Court of India – Official Mobile App*, <https://play.google.com/store/apps/details?id=com.nic.sciapp&hl=en_IN&gl=US> accessed 01.10.2021

⁷⁷ E-Court Services: District and Taluka Courts of India, <https://services.ecourts.gov.in/ecourtindia_v6/> and Official Website of District Court <eCourts Services App on Mobile For Checking Case Status./District Court in India | Official Website of District Court of India>, accessed 13.10. 2021.

fees.⁷⁸ The App provides scanning of QR code to access the entire case status. The App is also connected with all 18,000 District and Subordinate Courts and 21 High Courts with more than 3.2 crore (more than 30 million) case statuses available on the App. That such digitization initiatives in the judicial system were being well received is demonstrated by the fact that the App had seen over 17 lakh (1.7 million) downloads within a few months of its launch, recording almost 5,000 downloads a day.⁷⁹ Some useful features include that the History of Case Hearings option in the App shows entire history of the case from first date of hearing to current date of hearing. Whereas, the Judgment option shows link of all judgments and orders passed and uploaded in the selected case and judgments can be downloaded using the App.

Indian Courts' Responses to COVID-19 – A Speedier Metamorphosis of E-courts to E-judiciary in the Post COVID-19 Crisis Era

So, summarizing broadly, it can be said that the E-courts in India are digitized courts which, using the information and communication technologies (ICTs) and the Internet, provide online information to various stakeholders. Such online information may be a one way or two-way communication. One-way information involves the courts providing information online, such as every possible information as made available on a court's website. It also includes sending information to a person through any commonly used electronic mode such as SMS or WhatsApp. Whereas a two-way traffic, for example, includes online interaction among the litigants and lawyers and the courts.

In fact, it would also be pertinent to mention here that much before the advent of the COVID-19 crisis, E-courts had also become quite common in many other countries of the world as well, including the United States, South Korea, Singapore and so on. In India, as in other countries, the E-courts were already playing an important role in avoiding unnecessary congestion in the courts by giving opportunities to stakeholders to interact online with courts — a requirement that had emerged and had become more of a necessity much later under the safety protocols of the COVID-19 crisis.

However, E-judiciary is a step beyond E-courts. E-judiciary involves not only filing of cases online, but also includes, among other things, avenues for online interaction between the judges and advocates, online proceedings, online examination and cross examination

⁷⁸ Official Website of District Court, <eCourts Services App on Mobile For Checking Case Status./District Court in India | Official Website of District Court of India>, accessed 12 .10.2021.

⁷⁹ Thakur, Pradeep. *eCourts app brings reforms in justice delivery system*, Times of India, 4 March 2019.

of witnesses and finally passing of online judgments. Prior to COVID-19, after the success of E-courts, there was no urgency in moving forward and things had been moving at their own bureaucratic pace in the implementation of E-judiciary in India.

However, the COVID-19 crisis, due to its safety protocol norm of social distancing, started nudging the judicial administration to take a quicker leap from the existing stage of E-courts and jump to the next level, i.e., E-judiciary. In fact, as a direct consequence of the COVID-19 crisis, after E-courts we are now witnessing a new impetus to leapfrog from E-courts to E-judiciary as a preferred mode of justice administration in courts at various levels, as the following examination of the courts' responses to COVID-19 illustrates.

E-judiciary in India and the COVID-19 Crisis: Issues and Challenges

No wonder E-judiciary is being hailed as a safer mode of justice administration during the COVID-19 crisis with added efforts for its rapid universalization in the country. However, the move is also throwing up a number of challenges that need to be addressed as a priority for avoiding unnecessary hardship to lawyers and litigants during this rapid transition period.

1. Increase in Cases Pending

It is rightly observed that the COVID-19 crisis has not only caused immense harm the world over by not only bringing the down the economies but also caused adverse impact on many businesses and professions⁸⁰, and the legal profession is no exception. Regarding its impact on justice administration in India, it was rightly perceived that "Covid-19 has brought almost the entire world to a near-standstill, and India's justice delivery system — rarely known for its speed even in the best of times — is no different. Official data shows that while the institution of new cases, both in the higher judiciary and subordinate judiciary, had come down since the beginning of the nationwide lockdown on 25 March (2020), the disposal rate has also been severely affected due to the forced closure of courts. The judiciary has come under immense pressure to innovate during this pandemic so as to balance public health concerns with access to justice," and "All courts, including the Supreme Court, high courts and district courts, have been operating in a highly restricted manner. Mostly courts have already decided to persist with the restricted functioning".⁸¹

⁸⁰ LiveLaw.in, *Pandemic (Covid 19) And Nationwide Lockdown Severely Damages Legal Professionals*, <<https://www.livelaw.in/columns/pandemic-covid-19-and-nationwide-lockdown-severely-damages-legal-professionals-158010>>, accessed 15.10.2021

⁸¹ Civildaily. *Judiciary in Times of COVID-19 Outbreak*, 12 May 2020, <<https://www.civildaily.com/burning-issue->

Further, "Limited benches presiding over select matters daily, cases pending before constitution benches have been put on the back burner. In the entire month of April, 82,725 cases were filed in India's courts, while 35,169 cases were disposed of. Compare this to 2019, when the average number of cases filed per month was around 14 lakh (1.4 million)... while the average number disposed of per month was 13.25 lakh (1.325 million)".⁸²

Of particular importance is that the Indian Parliament too took the COVID-19 crisis seriously and set up a Parliamentary Committee Panel (hitherto referred as Parliamentary Panel) to look into the whole issue and its consequences. *This was the first report to be presented by any Parliamentary Panel on the impacts of Covid-19 pandemic*, and significantly, the Panel recommended "continuation of Virtual Courts even after the Covid-19 pandemic gets over for some identified categories", since "digital justice is cheaper and faster" and that the court was "more a service than a place".⁸³

But at the same time, the Parliamentary Panel admitted that virtual courts did have issues but they must succeed, as a virtual court is an improvement over traditional court. The Panel urged advocates to change with times and also recommended the teaching of a computer course in law courses and to make changes in the law to validate virtual court proceedings.⁸⁴

2. Reservations by the Bar

However, on the other hand, the Bar had its own reservations and did not seem to welcome such new technological changes in court functioning with open arms. Expressing concerns, the representatives of the Bar had argued before the Parliamentary Panel that the virtual proceedings favour the tech-savvy advocates besides depriving lawyers of an opportunity to present their case and change the course of arguments based on the changing dynamics of a case.⁸⁵ The Bar maintained that "An advocate gets to understand the mood of the judges and stands a better chance at convincing them during physical hearings. However, online hearing creates a psychological pressure on both the advocates as well as the judges. Evidence recorded by means of video

[judiciary-in-times-of-covid-19-outbreak/](https://www.civildaily.com/burning-issue-judiciary-in-times-of-covid-19-outbreak/) accessed 27.10.2021.

⁸² Ibid.

⁸³ Parliament of India. Rajya Sabha Secretariat, *Interim Report on the Functioning of the Virtual Courts/Court proceedings through video conferencing*, 11 September 2020, <https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/Press_ReleaseFile/OTHER/1/327P_2020_9_9.pdf>, accessed 27.10.2021.

⁸⁴ Ibid.

⁸⁵ Pratul Sharma, *Retain virtual courts post COVID-19, too: Parliamentary panel*, The Week, 11 September 2020.

conferencing may distort non-verbal cues such as facial expressions, postures and gestures”.⁸⁶

Lawyers maintained that virtual hearings deprived them of the opportunity to alter the course of argument based on the ‘changing dynamics of a case during a hearing’, as “An advocate gets to understand the mood of the judges and stands a better chance at convincing them during physical hearings. However, online hearing creates a psychological pressure on both the advocates as well as the judges. Evidence recorded by means of video conferencing may distort non-verbal cues such as facial expressions, postures and gestures,” the advocates claimed.⁸⁷

However, the Parliamentary Panel maintained that various Appellate Tribunals like Telecom Disputes Settlement and Appellate Tribunal (TDSAT), National Company Law Appellate Tribunal (NCLAT) and Intellectual Property Appellate Board (IPAB) can adapt to a system of complete virtual proceedings as they do not require personal appearances of the advocates or parties”.⁸⁸

Interestingly, a reviewer of the situation also concurred that the technological initiative “has been welcomed with open arms by stakeholders of the legal fraternity, which unfortunately includes only certain privileged and technology-aware class of lawyers, and not to the entire brethren”.⁸⁹ While another lamented that “The legal profession is in a position where lawyers and judges are all content with their archaic methods and are loath to get habitual with technology in law. Notwithstanding the fact that application of technology can give legal professions a new dimension”.⁹⁰

Even the Parliamentary Panel admitted that over 50 per cent of advocates, mostly at the district and lower courts were not having either a laptop or a computer and lacked skills required for virtual proceedings. Nonetheless, it was of the view that “In coming times, technology will emerge as a game-changer and advocates would be required to use technological skills in combination with

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ The Daily Guardian. *Parliamentary Panel Bats for ‘Digital Justice’; Virtual Courts to Continue*, 12 September 2020, <<https://thedailyguardian.com/parliamentary-panel-bats-for-digital-justice-virtual-courts-to-continue/>>, accessed 1 November 2022.

⁸⁹ Bar and Bench. *Virtual Courts: A sustainable option?*, Dubey, Pramod Kumar, 12 April, 2020, <<https://www.barandbench.com/columns/virtual-courts-a-sustainable-option>>, accessed 30 January 2021.

⁹⁰ Pleaders: Intelligent Legal Solutions. *Technology: Rejuvenate Legal Regime*, Aggrawal, Siddhi, <<https://blog.ipleaders.in/technology-rejuvenate-legal-regime/>>, 10 June 2020, accessed 29 January 2020

their specialised legal knowledge and, therefore, they should keep up with the changing times”.⁹¹

3. Access to Justice – the Digital Divide

Another serious repercussion as a consequence of the COVID-19 crisis in India is equally disturbing and cannot be ignored. The Courts in India at various levels, viz., Supreme Court, High Court and Subordinate or District Court levels through guidelines issued from time to time have been insisting on only virtual hearings in several types of cases during the COVID-19 crisis. However, due to the ground realities many litigants are barred from seeking justice for no fault of theirs. More specifically, in faraway rural areas or remote towns where there is no internet connectivity whatsoever, the lawyers are unable to contest and the litigants are suffering with the COVID-19 crisis situation to blame.

Besides, during the COVID-19 crisis, the situation seemed to be no different for other peripheral but important stakeholders in justice administration as well. Due to a substantial reduction in the footfall in the courts due to strictly imposed COVID-19 restrictions, there was meagre earning for the Notaries, Oath Commissioners and a section of lawyers who practised in relation to offences pertaining to petty crimes.

However, on the infrastructure front, with the COVID-19 pandemic dangers in view, the Government is also speedily providing video-conferencing rooms in courts across the nation⁹² in order to facilitate E-judiciary mode of justice administration during the COVID-19 crisis period.

Judicial precedents in relation to virtual courts:

A two-judge Bench in *Krishna Veni Nagam v. Harish Nagam*⁹³ while dealing with transfer petition seeking transfer of a case instituted under Section 13 of the Hindu Marriage Act, 1955, when both parties were not located within the jurisdiction of the same court, referred the parties to participate in the matrimonial dispute cases through video conferencing. While allowing the abovementioned transfer petition, the difficulties faced by the litigants living beyond the local jurisdiction was acknowledged by the Hon'ble Apex Court that “*it is appropriate to use videoconferencing technology where both the parties have equal difficulty due to lack of place convenient to both the parties. Proceedings may be conducted on videoconferencing, obviating the needs of the party to appear in person, wherever one or both the parties make a request for use of videoconferencing.*”

⁹¹ Pratul Sharma, *Retain virtual courts post COVID-19, too: Parliamentary panel*, The Week, 11 September 2020.

⁹² “2.5K courts to be equipped for online hearing”, The Tribune, Chandigarh, 7 December 2020, p.1

⁹³ Transfer petition (CIVIL) NO. 1912 OF 2014.

Later on, the Veni Nigam's case was overruled by the Supreme Court of India in *Santhini v. Vijaya Venketesh*⁹⁴ by a 2:1 majority. Chief Justice of India, Dipak Mishra and Justice AK Khanwilkar held that "in transfer petition, video conferencing cannot be directed". However, Justice DY Chandrachud wrote the judgment in favour of the use of modern technology and video conferencing. Justice Chandrachud in the dissenting opinion highlighted the pros of video conferencing which are laid down below:

- A. "The Family Courts Act, 1984 was enacted at a point in time when modern technology which enabled persons separated by spatial distances to communicate with each other face to face was not fully developed. There is no reason for court which sets precedent for the nation to exclude the application of technology to facilitate the judicial process."
- B. "Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice."

Pros and cons of video conferencing

The Chairman of Bar Council of India had addressed a letter to the CJI⁹⁵ opposing the virtual hearing post lockdown period stating the yawning gap between resources available for video-conferencing and e-filing with lawyers of humble background from rural cities as compared to that of the elite class of big cities. He urged to introduce a virtual court system in a phased manner. However, the council has appreciated the idea of conducting "virtual hearing" particularly the Apex Court and High Courts for extraordinary urgent matters, but the aforementioned letter highlights the fact that "90% of the advocates and judges are unaware of the technology and its nuances. The people sitting on elevated chairs are so distant from ground realities that's why they are advocating such thought process."

Many Lawyers have raised concerns regarding the virtual court proceeding not being open for public viewing as the facility is accessible only by the judges and the counsels representing the party. In *Naresh Shridhar Mirajkar & Ors vs. State of Maharashtra & Anr*⁹⁶ it was held that "Public hearing of cases before courts is as fundamental to our democracy and system of justice as to any other country." Though conventional technology interventions like the virtual

court are the need of the hour in current circumstances but the principle of the open court should not be compromised.

The Supreme Court recently issued a press note⁹⁷ addressing criticism against the continuation of virtual court hearing post-lockdown stating that the aim of both the system of adjudication through the open court system and the court system being conducted via video conferencing is delivery of justice. The press notes further state that "*Open Court hearings cannot be claimed as a matter of absolute right and process of adjudication itself does not demand an Open Court.*" However, in the present era when we are reliant on technology for every aspect of our lives, Virtual Court Rooms cannot be are "antithetical" to the open court system in any manner.

Currently, video conferencing is being used for extremely urgent matters whereas the e-filing facility is available for all matters. Apart from the current COVID-19 induced situation where there was a dire need for the judicial fraternity to remain accessible, the judiciary should approach the virtual court mission post- COVID-19 crisis as well. Unfortunately, even before this crisis, many people did face difficulty accessing justice through courts due to a variety of reasons including a lack of financial means, physical disabilities, and other unavoidable circumstances. There are several benefits of hearing via video conferencing including no requirement of physical presence wherein parties do travel miles to be present in person before courts and at the same time, it will be cost and time effective for the parties' perspective as well as the judiciary. Most importantly this will reduce carbon footprint. Video conferencing should be made optional in all courts across the country for all kinds of matters. Digitalisation will reduce the humongous number of pendency of cases before courts and will be an effective remedy for delayed justice.

The Hon'ble Supreme Court of India in *State of Maharashtra vs. Dr. Praful Desai*⁹⁸ stated in light of section 273 of CrPC, the term 'presence' cannot be interpreted to only mean the actual presence of a person in any court. Hence, evidence can be recorded without the requirement of being physically present in court in a situation where parties are located remotely, or cases where confidentiality is to be

⁹⁴ Transfer Petition (CIVIL) NO.1278 OF 2016.

⁹⁵ Letter BCI: D: 1372/2020 (Council) dated 28.04.2020.

⁹⁶ 1967 AIR, 1 1966 SCR (3) 744.

⁹⁷ Supreme Court of India, Note on open court hearings, 2 May 2020, retrieved from https://images.assettype.com/barandbench/2020-05/06c7b93c-c27a-4702-9b16-5a47841aa88f/Note_on_Open_Court_Hearing.pdf

⁹⁸ AIR 2003 (4) SCC 601

maintained, where there is an apprehension of danger to the life of any witness or instances where witnesses do not give their statements due to fear of getting entangled in court matters.

Conclusion

Though video conferencing technology has been a valuable tool during the Covid-19 pandemic, existing scholarship suggests reasons to be cautious about the expansion or long-term adoption of remote court proceedings. More research is necessary, both about the potential impact of remote technology on outcomes in a diverse range of cases, as well as the advantages and disadvantages with respect to access to justice. In the meantime, as courts develop policies for remote proceedings, they should consult with a broad set of stakeholders, including public defenders and prosecutors, legal services providers, victim and disability advocates, community leaders, and legal scholars.

Showing its impact in India, as evident particularly in the period after lockdown, the global COVID-19 crisis suddenly enforced a sudden, rapid and unprecedented shift in the mode of court administration at all levels of

judiciary. Key to this, has been a shift from E-Courts to E-Judiciary, in the form of virtual hearings.

Briefly, as of now, it cannot be said for sure that the COVID-19 crisis will be short-lived. That only time will tell, because the COVID-19 virus is showing long term after-effects as well, and long-Corona cases too are emerging, plus new strains/variants of the COVID-19 virus are making their appearance every now and then, like in the United Kingdom, South Africa, Brazil and so on, and the virus still continues to pose a dreadful potential global threat. We do not seem to be fully out of danger yet. So, for how long the COVID-19 crisis induced interim hurriedly introduced technological innovations and the new COVID-19 crisis prompted court working methods shall persist, is yet to be seen. Under the circumstances, whether these will become a permanent “new normal” in the court administration system of the country in times to come, is also difficult to predict. Nevertheless, this is an important aspect which would be the subject matter of future quantitative legal studies, after the ongoing COVID-19 crisis dust settles down.

