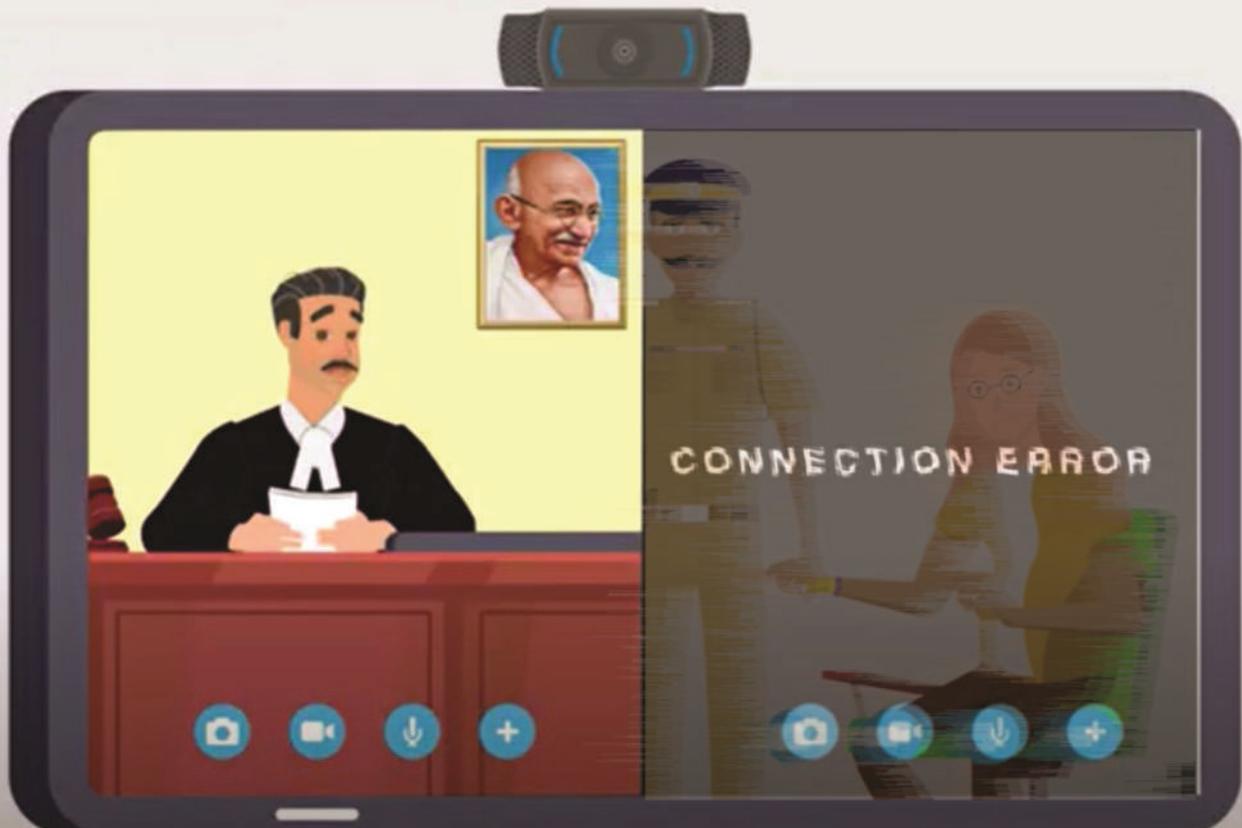


CHRI 2020

DISCONNECTED

VIDEOCONFERENCING AND FAIR TRIAL RIGHTS



CHRI
Commonwealth Human Rights Initiative
working for the practical realization of human rights in
the countries of the Commonwealth

ABOUT CHRI

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-governmental, non-profit organisation headquartered in New Delhi, with offices in London, United Kingdom, and Accra, Ghana. Since 1987, it has worked for the practical realization of human rights through strategic advocacy and engagement as well as mobilization around these issues in Commonwealth countries. CHRI's specialisation in the areas of Access to Justice (ATJ) and Access to Information (ATI) are widely known. The ATJ programme has focussed on Police and Prison Reforms, to reduce arbitrariness and ensure transparency while holding duty bearers to account. CHRI looks at policy interventions, including legal remedies, building civil society coalitions and engaging with stakeholders. The ATI looks at Right to Information (RTI) and Freedom of Information laws across geographies, provides specialised advice, sheds light on challenging issues, processes for widespread use of transparency laws and develops capacity. CHRI reviews pressures on freedom of expression and media rights while a focus on Small States seeks to bring civil society voices to bear on the UN Human Rights Council and the Commonwealth Secretariat. A growing area of work is SDG 8.7 where advocacy, research and mobilization is built on tackling Contemporary Forms of Slavery and human trafficking through the Commonwealth 8.7 Network.

CHRI has special consultative status with the UN Economic and Social Council and is accredited to the Commonwealth Secretariat. Recognised for its expertise by governments, oversight bodies and civil society, it is registered as a society in India, a limited charity in London and an NGO in Ghana.

Although the Commonwealth, an association of 54 nations, provided member countries the basis of shared common laws, there was little specific focus on human rights issues in member countries. Thus, in 1987, several Commonwealth professional associations founded CHRI.

Through its research, reports, advocacy, engagement, mobilisation and periodic investigations, CHRI draws attention to the progress and setbacks on rights issues. It addresses the Commonwealth Secretariat, the United Nations Human Rights Council members, media and civil society. It works on and collaborates around public education programmes, policy dialogues, comparative research, advocacy and networking on the issues of Access to Information and Access to Justice.

CHRI seeks to promote adherence to the Universal Declaration of Human Rights, the Commonwealth Harare Principles and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights.

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DISCONNECTED
VIDEOCONFERENCING AND
FAIR TRIAL RIGHTS

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“I am glad that CHRI is bringing out a report on videoconferencing and fair trial. This would be a much needed study that ignites discussion and corrective action.”

- Dr. Justice S. Muralidhar, Chief Justice, Orissa High Court

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CHRI appreciates the persistent efforts of Sahana Manjesh for conceptualizing the research framework, conducting the interviews and authoring the study. We thank Madhurima Dhanuka, the head of the Prison Reforms unit in the Access to Justice (AtJ) Programme, for working on the report from inception to finalisation. A sincere thanks goes to its International Director, Sanjoy Hazarika, and Media and Communications officer, Aditya Sharma, for their editorial inputs. CHRI also would like to acknowledge the contributions of Nidhisha Annam Philip, Mahesh Menon, Sarayu Natarajan (Founder, Apti Institute), Lakshmee Sharma (Senior Research Associate, Apti Institute), advocates Rajat Kumar and Harsh Bora, and colleagues of the AtJ programme at CHRI, including Sugandha Shankar, Amrita Paul, Palak Chaudhuri, Sabika Abbas, Siddharth Lamba, Anju Anna John, Devika Prasad, Devyani Srivastava and Raja Bagga, who have been instrumental in imagining the framework and evolving the research design. CHRI is grateful to Mahesh, Rajat, Chinmay Kanojia, Preeti Pratishruti Dash, Arjun Sheoran, Yash S. Vijay, Karan Tripathi, Poongkhulali Balasubramanian, Radhika Chitkara and Jyoti Maheshwari (advocates, legal researchers and judicial officers) who have been of immense assistance in establishing contact with the initial respondents for the study. No news on videoconference hearings was missed thanks to Karan and colleagues Raja, Sugandha and Madhurima, while Shruthi Naik (Senior Research Fellow, Daksh) provided valuable insights to the team on the policy framework of digital courts in India. Sugandha and Amrita helped give the report structure and substance. Kakoli Roy, Mohan Sundaram and Ajit Mishra helped the report get past the final stages.

This study would not have been possible without the support of the Friedrich Naumann Foundation.

ABOUT THE REPORT

'Disconnected: Videoconferencing and Fair Trial Rights' documents the experiences of 20 criminal lawyers and 10 judicial officers of criminal trial courts across the country, to understand the implications that videoconferencing hearings have on the fair trial rights of accused, especially of those who participate in these proceedings from prison.

With the Covid-19 induced lock-down, continuing challenges of the pandemic, and the ensuing restrictions on court hearings, videoconferencing has been widely adopted by courts as a necessary means of continuing their functioning and thus ensuring access to justice even amid the pandemic. Prior to the pandemic, videoconferencing was frequently used for judicial remand hearings, and in some cases, trial proceedings as well. However, such hearings, no matter how convenient they may appear, have far reaching implications on the fair trial rights of the accused. It is therefore important to assess the lessons learnt from the use of videoconferencing, before taking a decision to adopt it on a larger scale in trial courts.

The findings of the study reveal that not only is there divergence in the extent to which videoconferencing is used, but also in the perceptions of lawyers and judicial officers. Between outright rejection, and completely embracing this system, there are various other elements and nuances of usage which the respondents to this study urge consideration. The most significant learning from the study however has been that there is an urgent need to ensure that fair trial rights are made an integral part of videoconference hearings, without assuming that the rights enshrined in the Constitution and the CrPC are automatically supplanted to a videoconference hearing. The right against illegal detention, right against coercion, right to effectively participate in one's hearings, right to counsel, right to privileged communication with counsel, right against bias and protection from vulnerabilities, right to an open court hearing, and the right to equity of arms, have all emerged as some of the rights that are especially compromised in a videoconferencing hearing. This report sets out a word of caution, and suggests restraint by courts in using videoconferencing for vital criminal proceedings. It further highlights the non-existence of adequate safeguards that afford protection against rights violations for the accused, and the urgent need to ensure that fair trial rights are made an integral part of videoconference hearings.

INTRODUCTION

The introduction of videoconferencing into the criminal justice system in India has been ad hoc and incremental. Videoconferencing has been part of the larger plan to digitise courts and integrate Information and Communication Technology (ICT) into the court system. Even as this process was underway, state governments gradually began introducing videoconferencing systems for judicial remand hearings,¹ in order to address issues such as shortage of police escorts to transport under trial prisoners from prison to courts. This practice found legal sanction in 2008 with the amendment to s.167 (2)(b) of the Code of Criminal Procedure, 1973 ('CrPC'). Despite legislative sanction for the use of videoconferencing being limited, judicial decisions, passed in response to peculiar facts and situations, slowly enhanced the stages at which videoconferencing could be used in a criminal trial, adding to the disparity in the use of videoconferencing across the country.

With the Covid-19 induced initial lock-down and the ensuing restrictions on court hearings, videoconferencing has been widely adopted by courts as a means to continue their functioning. Surprisingly, while the use of videoconferencing increased, little attention was paid to installing safeguards to protect fair trial rights. While the normal functioning of courts is slowly resuming in different parts of the country, videoconferencing will remain one of the several legacies that the pandemic leaves behind. It is therefore crucial to objectively assess the lessons from the use of videoconferencing, and understand its varied implications before taking any decision on expanding their use in the trial courts.

At the core of any criminal trial is the accused, defending their selves against the might of the State – making them the most important part of these proceedings. In a complete reversal of priorities, videoconferencing hearings have the potential to reduce the accused to the most dispensable part of the trial, and it is against this fundamental reordering of the criminal justice system that we must guard against.

The disparities in practice and the lack of uniform standards applicable to the use of videoconferencing became apparent to CHRI in its engagement with prisons in different states of the country, with some states relying on videoconferencing much more than others. It also became apparent that there was a need to engage with the use of videoconferencing from the point of view of prisoners and the protection of their fair trial rights – a conversation that is conspicuous by its absence in policy documents, legislative changes, and judicial decisions. CHRI's interactions with prison officers, judicial officers, prisoners and lawyers also indicated that whether in terms of infrastructure or the rules applicable for the use of videoconferencing, there are significant gaps to fill.

In this study, CHRI sought out the experience of criminal lawyers and judicial officers of criminal trial courts across the country, in order to understand the implications that videoconferencing hearings have on the fair trial rights of accused, especially of those who participate in these proceedings from prison. The conversations covered experiences both before the pandemic, and during the pandemic, and traced their experiences through various stages of a criminal proceeding from the time of first production before a magistrate upon arrest, until the hearing on sentencing. The findings from these interactions have thus been analysed to provide vital insight into: (a) possible violation of rights of accused persons, (b) experience of participants in the use of videoconferencing at various stages of the trial, and (c) perception of participants regarding use of videoconferencing for criminal proceedings.

¹ Remand hearings are hearings subsequent to the first production of an accused person after arrest, till the time of filing of the charge sheet by the police.

The study is divided into six chapters.

The first chapter lays out research methodology. In the second chapter, the executive, legislative, and judicial history of the introduction of videoconferencing in India have been traced. Findings from similar studies in other jurisdictions of the world which have highlighted the fair trial concerns emerging from the use of videoconferencing, and findings on the fair trial rights which are compromised in a videoconferencing hearing as have emerged in the course of the study are discussed in chapter three.

In chapter four, emergent concerns regarding the use of videoconferencing during the different stages of a criminal proceeding, including pre-trial, trial and bail hearings, are mapped. In order to understand the pre-trial stages, the manner in which first remand, police custody remand, judicial custody remand, and other hearings such as supplying relevant documents to the accused, framing of charge, recording of confession statements under s. 164 CrPC and miscellaneous hearings conducted through videoconferencing has been documented. Subsequently, the stages of a trial including the recording of evidence, recording of statements of the accused under s. 313 CrPC and final arguments as conducted through videoconferencing is documented. Finally, the manner in which bail hearings have been taking place through videoconferencing in different parts of the country during the restricted functioning of courts is documented. The key takeaways from the opinions expressed by the respondents to the study are also part of this chapter.

In chapter five, an attempt is made to establish the connection between videoconferencing and fair trial rights through detailed recommendations on possible safeguards to protect fair trial rights. The emphasis is to limit the use of videoconferencing to non-vital criminal proceedings, and for institutionalising safeguards for use of videoconferencing in other court hearings.

CHAPTER 1: RESEARCH METHODOLOGY

This is a qualitative phenomenological study, designed to understand diversity of practice and experience, while also being able to gauge basic compliance with procedural safeguards in criminal trial proceedings conducted through videoconferencing. On 27 July 2020, a consultation was held with researchers and practising criminal defence lawyers to discuss and fine-tune the study design. Participants included Dr. Sarayu Natarajan and Ms. Lakshmee Sharma from the Bangalore based Aapti Institute, a research institute working at the intersection between technology and society; Mr. Mahesh Menon, Assistant Professor with the Chennai based Daksha Fellowship, having research experience on issues of criminal justice and human rights; criminal defence advocates Mr. Rajat Kumar and Mr. Harsh Bora, who brought with them rich experiences from having conducted proceedings both in physical court and through videoconferencing in the trial courts of Delhi; and team members of CHRI's Access to Justice Programme. The consultation allowed for the evolution of a study design that would facilitate collection of experiences for a relatively new phenomenon in the judiciary, through a mapping of the processes involved in a criminal trial, while also being mindful of the constraints of conducting a study remotely owing to the pandemic.

This study draws on: (1) interviews conducted with stake holders; and (2) legal and policy documents on the issue.

A. INTERVIEWS

In order to understand the experience of lawyers and judges in a criminal trial court, and to determine their issues, concerns and adaptation to different stages of a criminal proceeding through videoconferencing, semi-structured questionnaires were designed to conduct in-depth interviews with these stake holders. Separate questionnaires were created for lawyers and judges. Both questionnaires had two broad sections – practice and use of videoconferencing in the pre-Covid times, and during the restricted functioning in Covid times. This distinction was necessary since the traditional IP based videoconferencing system were not uniformly available, functional or capable of being connected to lawyers' devices in all courts, requiring courts to adopt web-based applications through laptops/phones/ other devices for videoconferencing during the pandemic. Each of these sections of the questionnaires were further sub-divided to broadly map the proceedings before a magistrate/sessions judge including: first production upon arrest, police custody and judicial custody remand hearings, filing and supplying copies of the charge sheet and other documents to the accused, framing of charge, recording of examination-in-chief and cross-examination, recording of statements of the accused under s.313 of the CrPC, final arguments on conviction and sentencing and additionally, bail hearings. A pilot interview was done towards finalisation of the questionnaires. Questionnaires administered on lawyers and judicial officers form annexures A and B to this report, respectively.

In total, 20 lawyers, and 10 judicial officers were interviewed. The interviews were conducted telephonically with the participants, between August 2020 and December 2020. Each interview lasted for about 30-45 minutes. Participants were assured of anonymity, to ensure that the conversation could be frank, and also to protect the interests of the clients/jurisdictions being represented by the participants. The interviews were recorded by manual data entry on Survey Monkey questionnaires, simultaneously with the telephonic interview. In select cases, participants were contacted subsequently for clarifications, if any.

Selection of lawyers: Lawyers were contacted through professional networks of CHRI, information in the public domain on District Legal Services Authorities (DLSA) panel advocates, and recommendations by initial participants. While this is by no means reflective of the multiple diversities of both legal professionals and accused persons, the sample size was chosen to be as internally diverse as possible. Lawyers were selected to include:

1. **Regional diversity:** Cities covered include Ahmedabad (Gujarat), Aligarh (Uttar Pradesh), Bangalore (Karnataka), Bargarh (Odisha), Bhopal (Madhya Pradesh), Chandigarh (UT, Punjab and Haryana), Chengalpattu (Tamil Nadu), Cochin (Kerala), Durg (Chhattisgarh), Guwahati (Assam), Hyderabad (Telangana), Jaipur (Rajasthan) , Kolasib (Mizoram), Kolkata (West Bengal), Mumbai (Maharashtra), Mysore (Karnataka), Nainital (Uttarakhand), Patna (Bihar), Senapati (Manipur) and Srinagar (UT, Jammu and Kashmir). The only overlap of state in the interviews was for Karnataka, since Bangalore is an outlier compared to other parts of the state in the extent of use of videoconferencing.
2. **Diversity of practice:** Legal aid lawyers empanelled with DLSAs, private defence lawyers, lawyers working with organisations that provide representation to socio-economically vulnerable persons, lawyers defending persons accused in terror offences and organised crime, lawyers defending accused in run-of-the-mill cases and public prosecutors were interviewed.
3. **Diversity in years of practice:** Lawyers who participated in the interviews had been practising from two–to 26 years.

Selection of judicial officers: Judicial officers were contacted through CHRI's networks, recommendations by initial participants, and nominated by Registrar Generals of High Courts. In order to maintain anonymity, judicial officers will only be identified by state/UT and not city/district. Judicial officers were selected to include:

1. **Regional diversity:** One judicial officer each from Delhi, Haryana, Jammu and Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Manipur and Sikkim were interviewed. In Rajasthan, two judicial officers were interviewed, since they offered insight into different aspects of the questionnaire given their current postings – their combined responses are considered as one response in the report.
2. **Difference in level of videoconferencing usage:** Pursuant to the interviews with lawyers, it became evident that the nature of usage and reliance on videoconference hearings differed across regions. The short listing of judicial officers for the interviews was based on this understanding, such that as much diversity of practice as possible could be studied. Only some of the states overlap with the states from whom lawyers were also interviewed.
3. **Diversity in seniority:** The judicial officers who participated in the interviews included Judicial Magistrates, Chief Judicial Magistrates, Sessions Court Judges and judicial officers posted with District and State Legal Services Authorities.

B. LEGAL AND POLICY DOCUMENTS

In addition to the interviews, government policy documents, judgments of the High Courts and Supreme Court, rules/notifications/standard operating procedures/circulars published by courts have also been analysed. Secondary data including existing studies on videoconferencing undertaken by individuals and organisations in India, and in other jurisdictions such as Australia, the United Kingdom, and the United States of America have also been consulted as relevant.

Limitations and disclaimers:

- The participants of the study provided information on the basis of their own experience, which did not always cover every stage of trial.

- Since only one person was interviewed per jurisdiction selected, there was no cross-verification with other participants but only with existing rules/SOPs.
- The period of study saw multiple government policies on lock-downs and restrictions on congregations, both at the national and state level. The experience recorded for the proceedings during restricted court functioning must therefore be considered for conditions at the time of the interview. Even within the study period, there were changes in how much and how often courts could re-open their functions. In the time since the interviews, in several jurisdictions, more proceedings had restarted, while some others had to reduce functioning due to increase in the number of Covid-19 cases.

CHAPTER 2: LAW AND POLICY

The journey of the entry of videoconferencing into the Indian judicial system can be considered from three perspectives: (a) the executive's formulation of the National Policy and Action Plan to introduce ICT in the judiciary, (b) legislative developments introducing videoconferencing and (c) judicial decisions recognising the use of videoconferencing. Given these different pulls and pushes, there are currently multiple realities in the extent and manner in which videoconferencing is used in courts, particularly in the criminal trial courts of the country.

Key developments in the introduction of videoconferencing into criminal trials

2003	<i>State of Maharashtra v. Dr. Praful B. Desai</i> decided by the Supreme Court; held that witnesses in a foreign jurisdiction can depose through videoconferencing in a criminal trial.
	↓
2004	Proposal to set up an e-Committee made by the Chief Justice of the Supreme Court of India to the Minister of Law and Justice, Government of India.
	↓
2005	National Policy and Action Plan submitted by the e-Committee, and formally accepted.
	↓
2006	Amendments proposed to the CrPC for introducing videoconferencing at certain stages of a criminal proceeding; referred to the Standing Committee for scrutiny.
	↓
2007	eCourts Integrated Mission Mode Project Phase I launched.
	↓
2008	Amendments to the CrPC notified.
	↓
2015	eCourts Integrated Mission Mode Project Phase II launched.

A. EXECUTIVE POLICY

In July 2004, the then Chief Justice of the Supreme Court of India, Justice R.C. Lahoti, wrote to the Minister of Law and Justice with a proposal to set up an e-Committee which would be tasked with formulating a policy for the introduction of Information and Communication Technology (ICT) to the Indian judiciary. This proposal was approved by the Union Government, and the first e-Committee was set up under the leadership of Dr. Justice G.C. Bharukha (Retd.), and three other members. By August 2005, the National Policy and Action Plan was submitted before the Chief Justice of the Supreme Court,

which was formally launched on 5th October 2005. This policy was subsequently incorporated into the Mission Mode Project under the National e-Governance Plan, with the National Informatics Center (NIC) appointed as the implementing agency.²

The National Policy and Action Plan laid down the roadmap for the introduction of ICT into the judiciary, in a three-phased manner. The eCourts Integrated Mission Mode Project Phase I was launched in 2007. The process of acquiring videoconferencing equipment was initiated during this first phase, although the focus was on computerisation of courts and digitisation of case status. The introduction of videoconferencing for production of undertrial prisoners and for distant examination of witnesses was planned in Phase II of this policy, which was formally launched in 2015.³

The underlying principle for the introduction of ICT into the judiciary was to ensure transparency and accountability to the system, and to reduce judicial delay.⁴ Neither the Policy and Action Plan for Phase I,⁵ nor II,⁶ specifically identify and address the fair trial rights of accused in this re-imagined administration of court practices. Even the evaluation study of the project commissioned by the Department of Justice did not enquire into the experience of the accused produced through videoconferencing or the fair trial rights which may require attention.⁷ This blind spot in the blue print that introduced videoconferencing is reflected in the manner in which it operates in reality, as will be discussed in the subsequent chapters.

B. LEGISLATIVE HISTORY

State amendments to the Code of Criminal Procedure 1973 (CrPC), recognising the use of videoconferencing for the extension of judicial remand under s. 167(2)(b) CrPC, had been made from time to time: Andhra Pradesh (2000), Chhattisgarh (2006), Delhi (2004), Gujarat (2003), Madhya Pradesh (2008), Maharashtra (2004), Rajasthan (2005) and Tamil Nadu (2003). In 2006, a bill was tabled in the Rajya Sabha, to amend the CrPC, recognising the use of videoconferencing at the national level for the first time.⁸ The proposed amendments were meant to benefit women prosecuting sexual offences. Changes included the recording of statements under s. 161 CrPC, s. 164 CrPC and evidence of witnesses in warrant cases under s. 275 CrPC, through audio-video means. There was also a proposal for the extension of judicial custody under s. 167(2)(b) of the CrPC through videoconferencing. The amendments to sections 161 and 164 of the CrPC were envisaged in order to ensure that witnesses would not rescind from their statements at the time of the trial. The amendment to s. 167(2)(b) was introduced to cope with the shortage of staff to escort undertrial prisoners to court.⁹

2 By the time that Dr. Justice Bharuka was appointed to the ECommittee, he was already experienced with digitisation of courts. As a sitting judge of the Patna High Court, he had begun the process of computerisation of that High Court. When he was transferred as a sitting judge of the Karnataka High Court, he was instrumental in the automation of courts in Karnataka. During his tenure, courts in the state had been computerised, and videoconferencing was being contemplated for the production of under trial prisoners in Bangalore. The Karnataka model became the blueprint for the approval of the proposal to set up the e-Committee. (2007), "Towards Speedy, Inexpensive, Transparent and Accountable Justice : Justice GC Bharuka, Chairman, e-Committee, Supreme Court of India", E-Gov, 4 November: <https://web.archive.org/web/20170119090534/https://egov.eletsonline.com/2007/11/towards-speedy-inexpensive-transparent-and-accountable-justice-justice-gc-bharuka-chairman-e-committee-supreme-court-of-india-2/>, as on 20 December 2020.

3 Dr. Justice G.C. Bharuka, "Implementation of Information and Communication Technology in Indian Judiciary": http://rajasthanjudicialacademy.nic.in/docs/2_s6.pdf, as on 20 December 2020.

4 EFC Note for E-Courts Project – Phase II: <https://doj.gov.in/sites/default/files/Policy%20and%20Action%20plan.pdf>, as on 20 December 2020.

5 E-Committee, Supreme Court of India (2005), National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary: <https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf>, as on 20 December 2020.

6 E-Committee, Supreme Court of India (2014), Policy and Action Plan Document Phase II of the eCourts Project: https://main.sci.gov.in/pdf/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf, as on 20 December 2020.

7 National Council of Applied Economic Research (2015), Evaluation Study of eCourts Integrated Mission Mode Project: <https://doj.gov.in/sites/default/files/Report-of-Evaluation-eCourts.pdf>, as on 20 December 2020.

Code of Criminal Procedure (Amendment) Bill, 2006: https://www.prsindia.org/sites/default/files/bill_files/bill21_2007032621_CRPC_2006_Bill.pdf, as on 20 December 2020.

8 Code of Criminal Procedure (Amendment) Bill, 2006: https://www.prsindia.org/sites/default/files/bill_files/bill21_2007032621_CRPC_2006_Bill.pdf, as on 20 December 2020.

9 Statement of Objects and Reasons, Criminal Procedure Code (Amendment) Act, 2008: <https://www.casemine.com/act/in/5a979da24a93263ca60b7195>, as on 20 December 2020.

This bill was sent to the Standing Committee for discussion. With respect to the amendment to s.167(2)(b) of the CrPC, the discussions concluded that:

“Even though video linkages are to be used only for extending judicial custody, the Committee has its apprehensions that ill treatment and atrocities committed on the accused in jail may not be shown/manifested to the judge as it would have been if the accused had been presented physically before him. Since there would be physical gap of space between the accused, who will be in jail and his advocate, who will be in court, effective communication between them may not take place in such a situation.”¹⁰

Two crucial concerns were raised by the Standing Committee – the effective ability of the magistrate to determine the condition of the accused in judicial custody, and also the right of the accused to consult with their lawyers. They rightly considered that both of these issues were likely to be compromised with the use of videoconferencing.

Despite these concerns, the amendments proposed in 2006 subsequently were passed into law in 2008 with no special safeguards designed for the use of videoconferencing systems.¹¹ Significantly, by this time, the Supreme Court had decided the case of *State of Maharashtra v. Dr. Praful Desai* and recognised that under s. 273 CrPC, evidence of witnesses in warrant cases triable by Sessions Court could be recorded through videoconferencing systems.¹² While s.273 CrPC was not amended by the 2008 amendments in line with this decision, s. 275 CrPC (for the recording of evidence in warrant cases triable by magistrates) was amended to allow for the recording of statements of witnesses through audio-video means. Some states have subsequently amended s. 273 CrPC to permit audio-video recording of witness statements.¹³

2008 CrPC amendments introducing audio-video electronic means

s. 161(3): “The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so he shall make a separate and true record of the statement of each person whose statement he records:

Provided that statement made under this sub-section may also be recorded through audio-video electronic means:”

s. 164(1): “Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force; or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:”

¹⁰ Standing Committee Report on the Criminal Procedure (Amendment) Bill, 2006: http://164.100.47.5/rs/book2/reports/home_aff/128threport.htm, as on 20 December 2020.

¹¹ Criminal Procedure Code (Amendment) Act, 2008.

¹² (2003) 4 SCC 601.

¹³ Code of Criminal Procedure, (Gujarat Amendment) Act, 2017; Criminal Law (Madhya Pradesh) Amendment Bill, 2019.

s.167(2)(b): “no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage”

s.275: “In all warrant-cases tried before a Magistrate, the evidence of such witnesses shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his diction in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in his behalf:

Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocates of the person accused of the offence.”

In addition to the CrPC, special legislations also recognise the use of videoconferencing. The most significant of these is the Protection of Children from Sexual Offences (POCSO) Act, 2012. At the stage of investigation, statements of the minor can be recorded through audio-video means.¹⁴ In order to develop court settings which are as conducive to putting a minor victim at ease in the process, the POCSO Act recognises the use of videoconferencing for the recording of evidence of minor victims without having to confront the accused, while allowing the accused the opportunity to hear the evidence and consult with their counsel.¹⁵ Special courts designed to enable these mechanisms are envisaged as a part of this system. However, very few Special Courts under the POCSO Act have been set up, prompting the Supreme Court to pass directions to enable this, especially in districts which have a large number of cases under this legislation.¹⁶

LAW COMMISSION REPORTS

Over the years, various Law Commission Reports, on different issues, have considered the use of videoconferencing systems. In 2003, the 185th Law Commission Report which suggested various amendments to the Indian Evidence Act categorically held that the Indian system was not prepared for the introduction of videoconferencing. This conclusion was reached after a detailed consideration of the experience of other jurisdictions which were experimenting with videoconferencing in their trials. Soon thereafter, the 188th Law Commission Report mooted the introduction of videoconferencing for commercial courts. In 2006, the 198th Law Commission Report suggested the use of videoconferencing for witness protection programmes, and quoted *Dr. Praful B. Desai* as legal validity for this. In 2009, the 230th Law Commission Report made a passing reference for the need to have video conferencing as part of embracing technology in courts.

C. JUDICIAL DEVELOPMENTS

The judiciary too has played an integral role in promoting the use of videoconferencing in court hearings. Various court directives have provided recognition and validation to the use of videoconferencing for recording of statements of witnesses and accused; for conducting entire trial proceedings; and have also issued guidelines for its use.

¹⁴ S.26(4), POCSO Act.

¹⁵ S.36(2), POCSO Act.

¹⁶ In re Alarming Rise in the Number of Reported Child Rape Incidents, Suo Motu WP(Cr) No.1 of 2019.

a) Recording of statements

i) Witness statements

In *State of Maharashtra v. Dr. Praful B. Desai*,¹⁷ the Supreme Court had to decide the validity of recording evidence of a witness through videoconferencing. This question arose since the witness was based outside India and when summoned to give his evidence in court, sought to do so through videoconference. The Court held that this was permissible, since the presence of the accused in the hearing was not compromised.

State of Maharashtra v. Dr. Praful B. Desai

Facts of the case: A trial court in Maharashtra allowed an application by the prosecution requesting a medical doctor based outside India to be allowed to testify as a witness in a medical negligence case for offences under ss. 338, 109 and 114 of the IPC, through videoconferencing. The witness while agreeing to testify had refused to travel to India and could not be compelled to be present. This order was challenged in the Bombay High Court, which on a reading of s.273 CrPC held that such recording of evidence would not be permissible, as evidence must be recorded in the presence of the accused. This order of the Bombay High Court was challenged in an appeal at the Supreme Court both by the State of Maharashtra and the complainant.

Arguments against the use of videoconference: Unless procedure says otherwise, there can be no departure from the CrPC. Section 273 CrPC starts with a non-obstante clause, and the only exceptions to mandatory presence of the accused are laid down under ss. 284-290 CrPC (commissions) and ss. 295-296 (affidavits). Further, amendments had been made to the CrPC where videoconferencing was expressly permitted, while no such amendment had been made to s. 273 CrPC.

Decision: Prosecution's request to examine the witness through videoconferencing allowed.

Reasoning: 'Presence' in s.273 CrPC was read to mean constructive presence, and not necessarily physical presence. The Supreme Court held that the 'presence' of the accused to be secured under s. 273 of the CrPC would not be affected when a witness deposes through videoconferencing since the accused will be present in court at the time, and would be able to see the witness clearly.

Significantly, the court noted: "in fact the accused may be able to see the witness better than he may have been able to if he was able to if he was sitting in the dock in a crowded court room. They can observe his or her demeanour. They can hear and rehear the deposition of the witness. **The accused would be able to instruct his pleader immediately and thus the cross-examination of the witness is as efficient, if not better...**" (Emphasis supplied)

Following this, some High Courts made provisions for medical personnel to adduce evidence through videoconferencing, without having to visit the court.¹⁸ Videoconferencing has also been recognised in the recording of evidence of the prosecutrix in sexual offence cases, if they stay outside the jurisdiction of the court.¹⁹

However, neither the amendments to the CrPC in 2008, nor the decision of the Supreme Court in

¹⁷ (2003) 4 SCC 601.

¹⁸ Vishal Joshi (2014), "Docs to Record Evidence via Video-conferencing", The Tribune, 26 May: <https://www.tribuneindia.com/news/archive/haryana/docs-to-record-evidence-via-video-conferencing-412671>, as on 20 December 2020; *State of Punjab v. Mohinder Singh*, decided on 21 August 2013.

¹⁹ *Sujoy Mitra vs State Of West Bengal*, Criminal Appeal No.1620 of 2015.

Dr. Praful B. Desai recognised the recording of evidence with the accused being produced through video conference, although in practice, various courts have relied on *Dr. Praful B. Desai* for this. The accused are present at the prison end, while the witness, counsel and judge are present in the court end.²⁰ *Dr. Praful B. Desai* specifically held that one of the reasons that examining witnesses through videoconferencing is permissible is that the accused is present alongside their counsel and can instruct them immediately to enable an efficient cross-examination of the witness. This is impossible to achieve when the accused is not present alongside their counsel, as is the case when they are produced through videoconferencing facilities in the prison.

ii) Recording of statement of the accused under s.313 CrPC through videoconferencing

Some High Courts have also recognised the recording of statements under s. 313 of the CrPC through videoconferencing where the state would incur expenses in providing security to the accused to be produced in court.²¹ In a high profile case in which the politician Sasikala was facing trial, she waived her right to be present in court physically and opted for her statement under s. 313 of the CrPC to be recorded through videoconferencing.²² However, courts can also reject a request to record statements under this provision through videoconferencing where a strong case is not made out.²³

iii) Audio-video recording of statements under s.161 and s.164 CrPC

The amendments to ss. 161 and 164 CrPC, permitting the audio-video recording of statements, have not yet been implemented on a large scale. However, in 2017, the Supreme Court while hearing a criminal appeal noted that in cases which have a high possibility of witnesses rescinding from their statements and turning ‘hostile’, it might be useful to record their statements through audio-video means as permissible under s.164 of the CrPC.²⁴ Following this, some states have started taking steps in this direction. For instance, in October 2019, the Director General and Inspector General of the Karnataka Police Department made a proposal before the law department of the state government to start recording statements of witnesses under s.164 of the CrPC through audio-video means in order to strengthen prosecution evidence.²⁵

b) Conducting complete trial proceedings through videoconferencing

It was perhaps with Abdul Kareem Telgi, the infamous counterfeiter, who was facing multiple cases across multiple jurisdictions, that the use of videoconferencing for the entire duration of the trial was experimented for the first time. The prisons in which he was lodged, and the courts in the cities his trials were taking place in, set up videoconferencing mechanisms to facilitate his participation in the trials.²⁶ Telgi unsuccessfully challenged his trial being conducted in this manner.²⁷ In a death confirmation case, the Bombay High Court heard arguments on the legality of a trial which was conducted through videoconferencing. It was held that since *Dr. Praful B. Desai* recognises videoconferencing in trial, the

20 Asha Ranjan v. State of Bihar, Writ Petition (Criminal) No. 147 of 2016, decided on 15 February 2017.

21 In the High Court of Punjab and Haryana v. CBI and Another, decided on 28 January 2014.

22 N.Sasikala v. Assistant Director, Enforcement Directorate, decided on 9 May 2019.

23 Irfan Ahmed v. State of Maharashtra and Another, decided on 11 September 2019.

24 Doongar Singh v. State of Rajasthan, Criminal Appeals 2045-2046 of 2017, decided on 28 November 2017.

25 Shiyakumar Menasinakai (2019), “Karnataka Takes Tech Route to Arrest a Hostile Problem” 21 October: <https://www.deccanherald.com/state/karnataka-takes-tech-route-to-arrest-a-hostile-problem-769901.html>, as on 20 December 2020.

26 (2005) “Steps Taken for Arranging Video Conferencing in Telgi Case”, Outlook, 12 August: <https://www.outlookindia.com/newswire/story/steps-taken-for-arranging-video-conferencing-in-telgi-case/316620>, as on 20 December 2020; (2007) “Telgi Cases at Standstill Due to Lack of Video-conference Facility”, OneIndia, 15 February: <https://www.oneindia.com/2007/02/15/telgi-cases-at-standstill-due-to-lack-of-video-conference-facility-1171548415.html>, as on 20 December 2020; (2009) “Restore Video Conferencing System in Court, Telgi Pleads”, Indian Express, 16 December: <https://indianexpress.com/article/cities/mumbai/restore-video-conferencing-system-in-court-telgi-pleads/>, as on 20 December 2020.

27 Abdul Karim Telgi v. CBI, Criminal Original Petition No.25880 of 2007, decided on 17 September 2007.

conviction and sentence were confirmed,²⁸ which appears to have been an incorrect interpretation of the court's directives in *Dr. Praful B. Desai*, as has been previously discussed.

c) Guidelines for the use of videoconferencing

Despite the fact that legislative amendments to the CrPC introduced videoconferencing in criminal trials in 2008, it was only in 2016 that the first set of guidelines for the use of video conferencing were drafted, by the Delhi High Court.²⁹ Subsequently, a few other High Courts adopted SOPs/guidelines,³⁰ passed directions through judgments,³¹ or were in the process of drafting guidelines.³² However, not all High Courts had passed such directions/drafted rules by the time of the pandemic in March 2020.

With the lock-down and restricted functioning of courts subsequent to the Covid-19 pandemic, the Supreme Court e-Committee constituted a sub-committee consisting of retired judges of High Courts. The sub-committee drafted the Model Rules for Videoconferencing for Courts, 2020 ('Model Rules').³³ These Model Rules were communicated to all the High Courts of the country, which they were free to adopt them, or to frame their own rules should they deem fit. In October 2020, the Supreme Court directed High Courts which had not yet notified these rules to do so at the earliest.³⁴ As of November 2020, several High Courts had notified these Model Rules, with minor modifications, under Articles 225 and 227 of the Constitution,³⁵ while some had adopted SOPs/guidelines.³⁶

However, neither the Model Rules, nor the rules/SOPs/guidelines provide for the specific manner in which criminal trials are required to be conducted through videoconferencing, and are very basic in nature. Surprisingly, the principles of fair trial find negligible mention in these rules.

Some of the concerns with respect to the Model Rules that must be highlighted are as follow:

- The rules permit the use of videoconferencing for 'all stages of judicial proceedings and proceedings conducted by the Court', making no distinction between key stages in a criminal trial and procedural hearings.
- The coordinators, appointed where an accused is to be produced from within judicial custody, is designated to be the Jail Superintendent or Officer in-charge of the prison, although an independent authority from the court ought to have been appointed for this task to ensure independence and fairness in the process.
- The rules permit first remand/production before a magistrate upon arrest through videoconferencing, where there are exceptional circumstances (including a pandemic, natural calamities, circumstances implicating law and order and matters relating to the safety of the accused and witnesses), without providing any additional safeguards to ensure that the accused is free to speak to the magistrate without threat or fear, or requiring any additional precautions to be taken by the magistrate.
- The rules permit extension of police custody remand through videoconferencing, where there are exceptional circumstances, without providing any additional safeguards to ensure that the accused

28 State of Maharashtra v. Chandrabhan Sudam Sanap, Confirmation Case No.3 of 2015, decided on 20 December 2018.

29 Videoconferencing Guidelines Issued by the High Court of Delhi, 2016.

30 Tripura Videoconferencing (Conduct of Proceedings including Recording of Evidence and Remand of Accused in the trial/remand Court) Rules, 2018; Videoconferencing Guidelines Issued by the High Court of Andhra Pradesh and Telangana, 2017; Madras High Court Video Conferencing Rules, 2018; Videoconferencing Guidelines Issued by the High Court of Punjab and Haryana, 2018.

31 Rajendra S. Biradkar v. State of Maharashtra, Criminal Writ Petition (PIL) No. 286 of 2004.

32 The state of Karnataka was in the process of finalising their guidelines prior to the lock-down.

33 Model Videoconferencing Rules, 2020: <https://cdnbbsr.s3waas.gov.in/s388ef51f0bf911e452e8dbb1d807a81ab/uploads/2020/08/2020082629.pdf>, as on 20 December 2020.

34 Model Videoconferencing Rules, 2020: <https://cdnbbsr.s3waas.gov.in/s388ef51f0bf911e452e8dbb1d807a81ab/uploads/2020/08/2020082629.pdf>, as on 20 December 2020.

35 Delhi High Court, Gauhati High Court, Jharkhand High Court, Karnataka High Court, Madras High Court, Manipur High Court, Meghalaya High Court, Odisha High Court, Sikkim High Court, Chhattisgarh High Court, Himachal Pradesh High Court, Tripura High Court.

36 Telangana High Court, Bombay High Court, Punjab and Haryana High Court, Rajasthan High Court, Uttarakhand High Court.

is free to speak to the magistrate without threat or fear, or requiring any additional precautions to be taken by the magistrate.

- The rules permit the recording of confession statements of the accused under s. 164 of the CrPC to be done through videoconferencing, where there are exceptional circumstances, without providing any additional safeguards to ensure that the accused is free to speak to the magistrate, except to provide that the magistrate must ‘take due precautions’ to ensure that there is no coercion, threat or undue influence.
- The rules provide that the court will enable an accused being produced from custody to consult their counsel in private before, during and after the hearing, without considering the reality that most courts and prisons do not have the technology or the infrastructure to enable this. The rules also do not emphasis on the need to ensure that communications between lawyer and client remain confidential.
- If a remote user informs the court, through the appointed coordinator, that due to technological issues, there was prejudice caused, then the court upon satisfying itself, can declare the hearing to be incomplete and direct re-connection or physical appearance in court. However, this right must be informed to the accused appearing from prison custody, without which there cannot be enforcement of the same. Further, since the coordinator is the superintendent of the prison, if the accused wishes to make a submission regarding prison related issues, and is prevented from making such submissions through the prison videoconferencing system, this may never reach the court for its consideration.
- The rules provide that where necessary, accused must be provided with translators, experts in sign languages, and special educators. However, the rules do not specify if these facilitators will be present in the prison-end of the hearing, or the court-end, and if this is a sufficient measure to ensure a fair hearing for persons who are already constrained to participate in the hearings.

All of the policies, legal amendments, judicial pronouncements, and rules indicate that videoconferencing has been introduced in criminal trials without cohesion, or an honest assessment of the impact this can have on fair trial rights, and with significant misapplication of principles and rights.

D. EXISTING INFRASTRUCTURE

The level of penetration of videoconferencing systems in the courts across the country is not uniform. As per data provided by the Supreme Court e-Committee to the Department of Justice, as of September 2020, a total of 3,477 court rooms have been equipped with videoconferencing facilities, with 14,443 yet to be provided with such facilities.³⁷ Of the 1350 prisons in India,³⁸ 1272 prisons are equipped with videoconferencing facilities.³⁹ This means that more than 94% of the prisons in India are currently videoconference enabled, whereas less than 20% of the courts are equipped with videoconferencing systems. The dissatisfaction with the disparity was expressed by the Rajya Sabha noting that the eCourts Integrated Mission Mode Project seems to be ‘progressing at a tortoise’s pace’.⁴⁰

This disparity was also corroborated by the respondents interviewed in this study. It was learnt that in some courts, videoconferencing facilities had been provided, but were not functional,⁴¹ while some

37 Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (2020), One Hundred-Third Report on Functioning of Virtual Courts/ Court Proceedings through Video Conferencing (Interim Report): <https://d2r2ijn7njrktv.cloudfront.net/IL/uploads/2020/09/11150617/103-Report-on-Virtual-Courts.pdf>, as on 20 December 2020.

38 National Crime Records Bureau (2019), Prison Statistics India 2019: <https://ncrb.gov.in/en/prison-statistics-india-2019>, as on 20 December 2020.

39 Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (2020), One Hundred-Third Report on Functioning of Virtual Courts/ Court Proceedings through Video Conferencing (Interim Report): <https://d2r2ijn7njrktv.cloudfront.net/IL/uploads/2020/09/11150617/103-Report-on-Virtual-Courts.pdf>, as on 20 December 2020.

40 *Ibid.*

41 Kolasib (Mizoram), Chengalpattu (Tamil Nadu), Patna (Bihar), Jammu and Kashmir.

received systems just before the lock-down without a chance to use them,⁴² or had no system in place at all.⁴³ Even within court complexes of some jurisdictions, while some court rooms had functional systems, some did not,⁴⁴ or only one court room in a court complex had a system for use.⁴⁵

Given that the court videoconferencing systems are not available or functional in many jurisdictions, hearings during the pandemic have taken place on various digital platforms including Vidyo, Jitsi, Cisco Webex, Zoom, and at times through Whatsapp calls or normal calls/conference calls where technical problems were faced with the digital platforms. While internet connection is a concern in most places, particular regions have special concerns, such as Jammu and Kashmir which functioned on 2G network at the time of the study, hilly terrains where internet connection is patchy and rural areas where internet facilities are not always available. In response to an unstarred question in the Rajya Sabha regarding the availability of videoconferencing in rural areas, it was stated that one videoconferencing equipment had been provided per court, but with no information of actual implementation.⁴⁶

42 Cochin (Kerala).

43 Durg (Chhattisgarh), Senapati (Manipur).

44 Mumbai (Maharashtra).

45 Rajasthan, Madhya Pradesh.

46 Unstarred Question No.584, Rajya Sabha, answered by Sri Ravishankar Prasad, Minister of Law and Justice, Communications and Electronics and Information and Technology, on 17th September: <https://doj.gov.in/sites/default/files/RS-17.09.20.pdf>, as on 20 December 2020.

CHAPTER 3: VIDEOCONFERENCING, A FAIR TRIAL AND THE DISCONNECT WITH RIGHTS

A. EXPERIENCES IN OTHER JURISDICTIONS

Videoconferencing has been introduced and experimented with in different jurisdictions of the world and has been met with similar criticisms of violating fair trial rights of accused. For instance, a study including magistrates, probation officers, lawyers and intermediaries, conducted in the United Kingdom on the use of videoconferencing in criminal trials revealed the inability of privileged communication between lawyers and clients, strained rapport with judges, inability to gauge the mental condition and other vulnerabilities of defendants, disengagement by defendants in the process and growing distance between the judge and the defendant. The study warned that further enquiry were necessary before further rolling out videoconferencing as a fix-all solution.⁴⁷

In another study from the United Kingdom, conducted during the pandemic with defence solicitors, barristers, accredited legal representatives, judges, magistrates and police officers, preliminary findings suggested that most participants found a break-down in communication between lawyers and clients leading to no/poor legal advice, mechanical extension of remand, inability of defendants to seek medical and other necessary assistance, and reduced fair trial rights.⁴⁸

A study in Australia, based on the experience of prisoners who were produced through videoconferencing for their trials revealed that video conferencing adds an additional level of invisibility to the defendant in the trial, excluding neutrality and openness from the process. In the already secluded environment of a prison, court production through videoconferencing dehumanises the process of a trial. This technology also enables judges to cut-off a prisoner from the process.⁴⁹

Research on the use of videoconferencing in the USA have also established how the perception of accused who are produced through videoconferencing results in more stringent bail conditions, and more adverse outcomes in bail hearings, when compared to accused produced in person.⁵⁰ Academic writing has also criticised the effect that videoconferencing has on the right of the accused to confront a witness, the right to consult counsel while pleading guilty for charges, infringement of the right against testimonial compulsion, lack of uniformity in procedures of videoconferencing, and the resultant sense of emotional detachment.⁵¹

In a brief released by the Incarcerations Nations Network on the use of videoconferencing across several jurisdictions during the pandemic, one of the important conclusions was that a digital layer should not be grafted onto existing procedures, and instead rules specific to the use of technology in criminal trials

47 Penelope Gibbs (2017), Defendants on Video: Conveyor Belt Justice or a Revolution in Access?: https://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf, as on 20 December 2020.

48 Fair Trial (2020), Justice under Lockdown (England and Wales): <https://www.fairtrials.org/publication/justice-under-lockdown-england-wales>, as on 20 December 2020.

49 Carolyn McKay (2016), "Video Links from the Prison: Permeability and the Carceral World", International Journal of Crime Justice and Social Democracy: https://www.researchgate.net/publication/296467907_Video_Links_from_Prison_Permeability_and_the_Carceral_World, as on 20 December 2020. For more on this research by the author, see her book titled, The Pixelated Prisoner: Prison Video Links, Court 'Appearance' and the Justice Matrix, published by Routledge (2020).

50 Shari Seidman Diamond, Locke E. Bowman, Manyee Wong and Matthew M. Patton (2010), "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions", Journal of Criminal Law and Criminology: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>, as on 20 December 2020.

51 Patricia Raburn-Remfry, "Due Process Concerns in Video Production of Defendants", Stetson Law Review: <https://www.stetson.edu/law/law-review/media/due-process-concerns-in-video-production-of-defendants.pdf>, as on 20 December 2020.

must be formulated. It also revealed that some basic pillars of fair trials may be compromised including access to defence counsel and confidentiality, right to be present and effectively participate in the hearing, right to presumption of innocence and the right to an open court hearing. In remote proceedings it can be impossible to know whether individuals (defendants or witnesses) are experiencing dangerous pressure, or even torture, beyond the frame of their webcam, which may affect their ability to speak truthfully and free of coercion. Interactions through videoconferencing also results in reduced amount and richness of information available compared to in-person appearances. Appearance through video conference from prison could lead to a negative bias, affect persons already facing discrimination on account of class, caste, gender and other vulnerabilities, and could result in unjust outcomes.⁵²

In November 2020, the International Commission of Jurists,⁵³ issued a guidance document on videoconferencing hearings.⁵⁴ The note emphasised that ‘while state institutions, including the judiciary and court services, must adopt measures to protect the right to life and right to health during health emergencies, such measures must also respect the requirements of legality, non-discrimination, necessity and proportionality.’ While highlighting the impact of videoconferencing hearings on fair trial rights, the document laid down a number of recommendations to safeguards the rights of litigants in such proceedings.

B. DISCONNECT WITH RIGHTS

In this segment, the fair trial rights which are or can be compromised when criminal proceedings take place through videoconferencing, have been articulated. These are based on the interactions held with lawyers and judicial officers. An attempt is made to emphasise the importance of each right, and the insights shared by participants that substantiated the disconnect between videoconferencing and fair trial rights.

1. Right against arbitrary arrest and ill-treatment

Articles 20, 21 and 22 of the Constitution of India, 1950 together protect the rights of an accused. Article 20(2) safeguards a person from being put under any form of duress, or torture, in testifying against themselves. Article 21 disallows any restriction on life and personal liberty unless done through valid, just, fair, and reasonable laws. The importance of Article 22(1) and (2) at the time of arrest of a person cannot be overemphasised – these clauses recognise the right of a person to be informed of the grounds of arrest, to counsel, and to be produced before a magistrate within 24 hours of arrest, and safeguard a person from illegal and arbitrary arrests.

The requirement of production before a magistrate within 24 hours of arrest is also codified under s. 57 of the CrPC. In *D.K. Basu v. State of West Bengal*,⁵⁵ the Supreme Court laid down several guidelines meant to protect the rights of an arrested person, while in *Arnesh Kumar v. State of Bihar*,⁵⁶ the Supreme Court clarified that arrest cannot be made routinely and that there must be cogent reasons satisfying the need for arrest. s. 167(1) CrPC provides for the first remand of an arrested person, while s. 167(2) CrPC provides the basis for extension of remand of an arrested person – either in police custody, or judicial custody.

The enforcement and oversight of these safeguards at the first instance is in the hands of the magistrate before whom an arrested person is produced. At the stage of first production upon arrest, the magistrate

52 Incarceration Nations Network (2020), Is Virtual Justice Really Justice?: https://www.incarcerationnationsnetwork.com/wp-content/uploads/2020/09/Virtual-Justice-Toolkit_Draft-FINAL-with-Hyperlinked-SC.pdf, as on 20 December 2020.

53 The International Commission of Jurists is a group of 60 eminent judges and lawyers from all regions of the world.

54 International Commission of Jurists (2020), Videoconferencing, Courts and COVID-19: Recommendations based on International Standards: https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf, as on 20 December 2020.

55 Writ Petition (Crl) No. 592 of 1987.

56 Criminal Appeal 1277 of 2014, decided on 2 July 2014.

is required to determine if the arrest is valid, if the person under arrest has legal representation, if their family has been informed of their arrest, and if they are under any duress from the police in testifying against themselves. At the stage of extension of police custody, the magistrate is required to determine if there is sufficient basis for seeking such custody, if there is any threat to the safety of the accused, if every day of police custody is accounted for, and if it is being sought no later than is legally permissible, and only after providing cogent reasons.⁵⁷ The oversight of the magistrate remains even when the accused is in judicial custody, in order to determine if they are facing any hardship within the prison, and if their rights are being violated inside prison.

Observations: Covid-19 induced restrictions made it difficult to ensure that the first production upon arrest and determination of police custody extension could be conducted through physical hearings.⁵⁸ Thus, several courts resorted to videoconferencing hearings even for these proceedings, which are by law, mandated to be in person under normal circumstances.

Lawyers who responded to the survey explained that there were no additional measures taken during production through videoconferencing from within police custody. Judicial officers who had to resort to the use of videoconferencing informed the study team that they would ask the accused questions about their well-being, whether their family had been informed of their arrest, insist on seeing the medical examination documents, and where they felt there was a need to exercise caution, seek personal presence of the accused. However, they also expressed their dissatisfaction with such videoconferencing hearings as it did not create the necessary neutrality required for the accused to speak without fear, nor was it possible to determine the physical well-being of the accused as mobile phones of police officers would often be used for such a hearing, and this would not provide sufficient view of the body of the accused, or the ability to see the accused walk, or offer a chance to ask the police officer to step outside the room.

Further, s. 167(2)(b) CrPC specifically provides that the extension of remand in judicial custody can be through videoconferencing, which is notably absent for the first remand upon arrest and remand extension of police custody, signifying the importance of physical assessment of the well-being of an accused at those stages by the magistrate. However, the Model Rules permit first production, and subsequent remand hearings to be through videoconferencing, in exceptional circumstances, for reasons to be recorded in writing.⁵⁹

Under s. 164 of the CrPC, a magistrate can record a statement of confession by an accused. The 2008 amendment permitted the recording to be through audio-video means, as long as the advocate of the accused is also present. The Model Rules also allow for the recording of statements under s. 164 of the CrPC through videoconferencing, where exceptional circumstances exist. However, a confession statement of an accused must be determined to be independent and under no state compulsion. This is important, as under s. 26 of the Indian Evidence Act, no statement made in police custody can be proved against an accused except that which is recorded by a magistrate. The investigating agencies cannot seek to bring on record indirectly through s. 164 of the CrPC, what is otherwise barred, and this independence is to be ascertained by the magistrate recording the statement. Given the lack of presence of a lawyer with the accused, recording of such statements through video-conferencing, can be concerning.

The Disconnect: Videoconferencing hearings compromise the ability of magistrates to ascertain the physical well-being of the accused. They limit the ability of the accused to convey concerns regarding the legality of their arrest or share grievances against ill-treatment, coercion or abuse by the police. Further, they reduce the ability of magistrates to verify the independence of statements made by the accused.

57 Anupam Kulkarni v. CBI, 1992 SCR (3) 158.

58 See next chapter for more detailed discussion on this issue.

59 Rule 11.1.

2. Right to effective participation in hearings and the right to be present at the hearing

The accused is at the centre of the criminal trial process, because this is the person whose liberty is in question, and this is the person who has to protect themselves from the might of the State. Every accused has the right to be present for one's trial in order to be able to mount a full and effective defence. Article 14(3)(d) of the International Covenant on Civil and Political Rights, 1966 recognises the right of an accused to have their trial conducted in their presence.

Presence of the accused is necessary at every stage of a criminal proceeding, from the time of arrest, till the time of sentencing. Evidence can only be recorded in the presence of the accused. s.273 of the CrPC provides that: "Except as otherwise expressly provided, all evidence taken in the course of trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader." Where produced at the stage of examination of witnesses, in the absence of being connected with the counsel or having access to the documents before the court, the accused is likely to not follow the proceedings. In some instances, the right to be present for the hearing can be waived by the accused, for reasons to be recorded by the judge, or if there is a possibility of disturbance in the trial by the accused.⁶⁰ However, dispensing with the presence of the accused must not be resorted to as far as possible.⁶¹

Observations: Production through a videoconferencing system, at whatever stage, compromises the right to effective participation of an accused in their trial. Whether through the traditional videoconferencing system, or online platforms, connectivity concerns and poor quality of audio and video were reported by both lawyers and judicial officers who participated in this study. Participants noted that the accused were often unable to see or hear the proceedings clearly, and they rarely had the opportunity to speak with their counsel, or address the court.

It was shared that judicial remand hearings, which is the stage where videoconferencing is most commonly used, is often a mechanical exercise. In the instances that accused are produced at the stage of recording of evidence, the camera is often not focused, and there are several technical issues in the quality of sound. Sometimes, several accused are produced at once, making it noisy from the prison-end. Many prisons do not have specially designated areas for videoconferencing systems to be set up, often having to be placed in other areas such as the legal aid clinic or library or office room. This makes it difficult for the accused to follow the proceedings, or to communicate with their counsel if the need arises, amid the din. In addition to these concerns, the accused rarely have access to the documents produced during a videoconference hearing. Presence secured through videoconferencing systems as they are currently designed is therefore merely a formality, and not conducive to securing effective presence of the accused.

The Disconnect: Videoconferencing hearings limit the role and agency of the accused in the trial, thereby infringing the vital fair trial right of a person to effectively participate in their own hearings.

3. Right to effective counsel

Article 22(1) Constitution recognises the right to be defended by a lawyer of one's choice. Under s. 41D CrPC, an accused is allowed to meet with their counsel at the time of interrogation and investigation upon arrest. The right to be defended by a pleader of one's choice in a criminal court is also recognised under s. 303 CrPC. If an accused is unrepresented in a Court of Session for want of means to hire a lawyer, a legal aid lawyer must be provided to them under s. 304(1)CrPC. This right to legal aid is recognised at all stages of a criminal proceeding, and is protected under Article 39A of the Constitution, and given effect to through the Legal Services Authority Act of 1987. Accused persons are entitled to

⁶⁰ s.317 CrPC.

⁶¹ Commonwealth Human Rights Initiative (2019), Fair Trials Manual, pg.101: <https://www.humanrightsinitiative.org/publication/fair-trial-manual-2019>, as on 20 December 2020.

seek access to a private or legal aid lawyer at any stage of the process including at the time of police questioning, arrest, interrogation, production, trial and for appeals.

Observations: Lawyers interviewed for the study revealed that they did not know when their clients were being produced for their remand hearings, and consequently, they do not have a chance to be present for the same. Judges who were interviewed explained that some lawyers do not turn up at the stage of a remand hearing because they know that this will most likely be an ineffective hearing. It was also shared that remand extension hearings were often taking place in the absence of a lawyer. Further, even though frameworks are in place to ensure presence of a legal aid lawyer at the time of production and remand hearings, during restricted court functioning, legal aid lawyers were not always present, leading to accused remaining unrepresented during such hearings.

The Disconnect: Lawyers play an important role in the protection of the right to a fair trial, the right to liberty, and the prevention of torture and other ill-treatment of the accused. Videoconferencing hearings compromise these rights, as the accused do not always have access to their lawyers during such hearings.

4. Right to confidential communication with counsel

The right to discuss the particulars of the case in private with one's lawyer is essential to an accused being able to mount an effective defence. ss. 126 and 127 of the Indian Evidence Act recognise the sanctity of privileged communication between an attorney/their aids and a client. This is further given effect to in Rules 7 and 15 of the Bar Council of India Rules. Ensuring that the accused has an opportunity to speak confidentially with their counsel must extend to all stages of a trial, and during a trial as well. This right has also been recognised in the Model Rules.⁶²

The system before the lock-down did not have any in-built mechanisms to allow for such communication at the time of the hearing, most significantly even at the time of examination of witnesses. Lawyers were therefore required to seek instructions from their clients before the hearing. However, a criminal trial is dynamic, and unexpected answers may be given by witnesses, requiring the lawyer to seek instructions immediately, or the accused may have to inform their advocates about a point of fact which can have a bearing on the outcome of their case.

Advocates do not always make or have the time to visit their clients in prison, or even when they do, they may not be able to ensure confidential communication. It is only when the accused is present in court, at the time of the hearing, that the counsel is able to speak to them in confidence, and crucially, when the accused has a chance to speak to their counsel.

Observations: As one of the participants aptly stated,

“A lawyer is the director of the trial, and the accused is the scriptwriter. Unless the accused provides us with a script, how can the trial proceed?”

In the traditional videoconferencing model, the accused is present at the hearing from within the prison, while their legal counsel appears in court along with the judge and witnesses. In jurisdictions which have had these kinds of hearings, the counsels have had to seek instructions from their client by visiting them in prison before the hearing.⁶³ In the event that they need to confer with their clients with information they receive for the first time at a hearing either when a witness deposes to that effect, or when fresh documentary evidence is led, their only option is to seek an adjournment of the hearing, which may or may not be granted.

⁶² Rule 8.3.

⁶³ Mysore (Karnataka), Bangalore (Karnataka), Kolkata (West Bengal).

In the current pandemic, visiting prisons has been a daunting task since most prisons had/have closed meetings with outsiders to prevent infections and outbreaks. While some prisons permitted physical meetings even during the lock-down,⁶⁴ most did not. This, coupled with the fact that not all prisons have calling systems, or facilities for *e-mulakaat*,⁶⁵ has meant that accused and their counsel have not been able to meet to discuss their cases. Even where *e-mulakaat* was available on paper, it has not been very effective in reality,⁶⁶ or has only been available for legal aid matters,⁶⁷ or excluded certain categories of prisoners such as those accused in terror offences.⁶⁸ Lawyers have therefore mostly relied on case documents, meeting with family members where possible, or made requests with prison personnel to get instructions. A DLSA panel advocate shared that, in the event of no family to trace, as is the case with several legal aid matters, even this avenue is not available.⁶⁹

In good practice, in some jurisdictions, advocates filed/were permitted to file applications before concerned courts for permission to speak with their clients in prison.⁷⁰ Where physical meetings were not possible, courts directed prison authorities to allow phone calls with counsel.⁷¹ Another practice is that the judge leaves the court room and permits the counsel to speak with their client through the court videoconference system.⁷² In yet another good practice, one videoconference court room in the court complex was converted into a facility for lawyers to speak with their clients.⁷³ However, prison personnel remain on the side of the accused, or other accused persons may be present, such that confidential conversations are effectively not possible.

In a rapid study conducted in the UK during the lock-down, it was concluded that one of the most significant rights compromised in this process is the right to access counsel, and the dilution of privileged communication between attorney and client.⁷⁴ Studies have also warned against the potential breach of privacy of litigants who join the system virtually, in addition to the privacy breach in any system of communication between lawyers and clients.⁷⁵

The Disconnect: Lawyers have faced difficulties in confidentially communicating with their clients during videoconferencing hearings, and also in accessing their clients in prison. The lack of inclusion of secure and confidential means of communication between lawyers and the accused in videoconferencing hearings is a fair trial violation.

5. Right against bias and protection for the vulnerable

Article 14 of the Constitution ensures equality before the law, and equal protection before the law, while Article 15(1) mandates that no person will be discriminated against on grounds of religion, race, caste, sex, place of birth. Studies around the world have shown that producing a person through videoconferencing can have adverse effects on the outcome of their case, as there is a certain perception of a person being produced from within custody as opposed to a person being produced in court.⁷⁶

64 Senapati (Manipur), Jaipur (Rajasthan).

65 Prison visits through video-conferencing facilities.

66 Durg (Chhattisgarh).

67 Bangalore (Karnataka).

68 Ahmedabad (Gujarat).

69 Nainital (Uttarakhand).

70 Durg (Chhattisgarh), Kolkata (West Bengal), Jammu and Kashmir.

71 Delhi, Mumbai (Maharashtra).

72 Ahmedabad (Gujarat).

73 Sikkim.

74 Fair Trial (2020), Justice under Lockdown (England and Wales): <https://www.fairtrials.org/publication/justice-under-lockdown-england-wales>, as on 20 December 2020.

75 Surveillance Technology Oversight Project (2020), Virtual Justice: Online Courts During Covid-19: <https://www.stopspying.org/virtual-justice>, as on 20 December 2020.

76 Nancy Gertner (2004), "Learning through Screens", Symposium: International Conference on the Legal and Policy Implications of Courtroom Technology: <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1260&context=wmborj>, as on 20 December 2020.

Studies also indicate more punitive outcome of proceedings conducted through videoconferencing when compared to personal presence of the accused.⁷⁷ Persons already facing vulnerabilities face further disadvantages when produced through videoconferencing.⁷⁸

A significant issue that may require legal redress is if an accused suffers from mental health concerns. Their trial may need to be suspended if they are incompetent to stand trial as per the law.⁷⁹

Participation in the hearing can be further compromised if the proceedings take place in a language not known to the accused. Article 14(3)(f) of the ICCPR recognises the right of an interpreter to an accused facing trial. The Model Rules provide for an interpreter or special educator where necessary.⁸⁰

Observations: Participants of this study expressed several concerns, especially those representing persons who come from socio-economic vulnerable profiles. As one respondent stated,

“I represent Gonds, Pardhis, Mansoori Muslims - persons who belong to vulnerable categories and are over represented in the criminal justice system. For them, the court system is already a complicated space to navigate. Any changes in this system must incorporate their lived experiences.”⁸¹

Another respondent stated that while videoconferencing may be easy to adapt to for formal witnesses such as police officers and medical officers who are well-versed in the court system, for women and daily wage earners who enter the court system for the first time, the judge has a crucial role to play in ensuring their effective participation in the proceedings. The judge must make special efforts to explain them the importance of each stage, and that is only possible through personal interaction in physical presence.⁸²

A court system is formal, and can be intimidating. Following the complexity of the law and procedure and finding legal counsel is already daunting for persons from vulnerable backgrounds. If videoconferencing is added to the mix, there is potential for further alienation from the court process.

While it is often very difficult to detect the mental health condition of a person even when produced physically, production through videoconferencing makes this harder. Unless this information is available with the family who can inform the lawyer, or the prison authorities are aware and inform the court, mental health conditions of an undertrial may remain undetected. All respondents affirmed that addressing mental health concerns of an accused in custody requires a concerted effort by the judiciary, prison staff, advocates and mental health professionals. As one judicial officer aptly remarked,

“In the case of mental health issues, it depends on the sensitivity of the judicial officer. I believe the reason there is a 15-day JC remand period is in order to ensure that we see how the accused is doing. If they don’t interact, if they look weak, if they are not responsive, then that is a good indication to enquire about their mental health condition.”⁸³

77 Shari Seidman Diamond, Locke E. Bowman, Manyee Wong and Matthew M. Patton (2010), “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions”, *Journal of Criminal Law and Criminology*: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>, as on 20 December 2020.

78 Incarceration Nations Network (2020), *Is Virtual Justice Really Justice?*: https://www.incarcerationnationsnetwork.com/wp-content/uploads/2020/09/Virtual-Justice-Toolkit_Draft-FINAL-with-Hyperlinked-SC.pdf, as on 20 December 2020.

79 Chapter XXV, CrPC.

80 Rule 5.9.3.

81 Bhopal (Madhya Pradesh).

82 Rajasthan.

83 Jharkhand.

The Disconnect: Videoconferencing hearings can exacerbate vulnerabilities of accused with special needs, as lack of physical presence can make it difficult for judicial officers as well as lawyers to identify specific needs.

6. Right to open court hearing

Article 14(1) of the ICCPR protects the right to a public hearing. Under s. 327 of the CrPC, a criminal court hearing must be conducted in an open court. However, this provision also provides for trials in sexual offences to be held *in-camera*, and empowers judges to restrict entry to a hearing under certain circumstances. The Supreme Court has held that unless there is a valid public interest, a hearing should be open.⁸⁴ The Model Rules also incorporate the principle that hearings must be open.⁸⁵ Studies on videoconferencing in other jurisdictions have shown that having an open court ensures trust in the justice system, and acts as a check on arbitrary judicial actions.⁸⁶ Further, it offers an opportunity for the family and friends of the accused to follow the trial, and discuss this further with lawyers.

Observations: While the traditional videoconferencing system is typically in a court which is open to the public (unless the hearing takes place in the chambers of the judge, or is heard *in-camera* in sensitive matters), the hearings which have been taking place on other platforms have not always been so.⁸⁷ Part of this arises from the fact that the hearings during the pandemic have taken place on platforms that cannot support multiple users at a time. Some courts have found ways around this by allowing blocks of persons into the hearing at a time.⁸⁸

In the early days of the restricted court hearings, a petition was filed by a law student in the Gujarat High Court seeking directions that court hearings must be open, which was subsequently addressed by the administrative side of the High Court.⁸⁹ All participants affirmed that having an open court enables oversight on the hearing.

The Disconnect: In several jurisdictions videoconferencing hearings did not allow access to public and family, violating the right to a public hearing.

7. Right to speedy trial and opt-in and opt-out rights

The right to not spend several years as an undertrial, without proof of guilt, is an essential aspect of the right to a fair trial.⁹⁰ However, the premise that videoconferencing enables a trial to be conducted quickly must be checked against the anvil of whether such a trial also respects other principles of fair trial, as enumerated above. Certain statutes also require that trials be conducted within a timeframe, requiring the system to devise ways for ensuring this. Since most jurisdictions have been working only on urgent matters such as remand and bail, trials have been in abeyance. This is especially burdensome on persons who have not been able to secure bail and are in judicial custody, resulting in lengthy detention as undertrials.

Observations: Some participants suggested that allowing for the accused to voluntarily choose to have a videoconference hearing if they cannot be physically produced in court due to escort shortage or the

84 Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1.

85 Rule 16.1.

86 Penelope Gibbs (2017), Defendants on Video: Conveyor Belt Justice or a Revolution in Access?: https://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf, as on 20 December 2020.

87 Kolkata (West Bengal), Chandigarh, Kolasim (Mizoram), Senapati (Manipur), Jaipur (Rajasthan), Chengalpattu (Tamil Nadu), Patna (Bihar).

88 Delhi, Kerala, Karnataka.

89 Pruthviraj Zala v. High Court of Gujarat, R/Writ Petition (PIL) NO. 99 of 2020,

90 Hussainara Khatoun v. Home Secretary, State of Bihar, 1979 SCR (3) 532.

pandemic induced restrictions, might prevent prolonged delay in trials.⁹¹ One respondent explained that in a terror offence, since the accused were in different cities, an order was passed directing the production of accused through videoconferencing. However, the court videoconferencing system was not functional at the time of this order, and over two years had passed but neither are the accused produced in person, nor through videoconferencing, leaving the case lingering.⁹² Therefore, while proponents of videoconferencing hearings often suggest that these hearings can help speed-up the trial process, in reality, it can be quite the opposite.

In situations of emergency such as the current pandemic, which pose unprecedented challenges, there is certainly a need to develop mechanisms which do not compromise on the right to speedy trial. The choice of migrating to videoconferencing however must not merely be vested on speed, but must include due considerations for rights of all parties. It is imperative that the right of any person to be physically present for their trial on criminal charges should be fully respected. Decisions to participate in hearings through videoconferencing, should not be undertaken without the accused's free and fully informed consent. Provision must be made for the accused to opt-out of videoconference hearings, i.e., at any point of the proceedings, request to revert to physical hearings. Similarly, if accused persons spend a long time waiting for their trial to progress, especially if they are imprisoned in districts other than where the trial court is or if they have multiple cases, and they are not produced in court due to escort shortage or other constraints, they must have the right to opt-in for a videoconference hearing, upon making an independent and informed choice.

The Disconnect: Use of videoconferencing hearings without the express and informed free consent of the accused person is a denial of their rights. Existing procedures in courts do not take this into account, and the decision to conduct hearings via videoconferencing rests solely upon the court. Accused do not have the right to opt-in or out of videoconference hearings.

8. Right to equity of arms

Equity of arms is a recognised fair trial principle, where both parties to a case are allowed a reasonable opportunity to present their case without any substantial disadvantage to either side.⁹³ Peculiar to the hearings in the lock-down and the reliance on technology is the inequity created by virtue of access to technology to participate in hearings.

Observations: The State decides when and how accused can be produced in court, a calculation based on its own convenience and not on the collateral implications that this can have on the rights of the accused. Any adverse order that may be passed against the accused through a videoconference hearing will necessarily have a more onerous burden on them. This automatically tilts the equity of arms in favour of the State.

In all of the hearings conducted during the lock-down, whether for remand, bail or at other stages, the ability to participate in these hearings necessitated knowledge of using technology, and was contingent on access to smart phones/laptops/computers by participants to the proceedings. Several older lawyers found this to be a challenge, resulting in courts converting one of the court rooms to a videoconference centre,⁹⁴ or bar associations setting up videoconferencing facilities for use by such lawyers.⁹⁵ In addition to this pre-requisite, the ability to access high-speed or reliable internet connectivity was also vital. Participation in videoconferencing hearings was restrained in several parts of the country, due to lack of infrastructure, or resources or technical know-how to join

91 Chandigarh, Srinagar (Jammu and Kashmir).

92 Mumbai (Maharashtra).

93 UN Human Rights Committee (HRC), General Comment No. 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial, 23 August 2007, CCPR/C/GC/32.

94 Delhi, Bargarh (Odisha).

95 Chandigarh.

such proceedings. The inability of lawyers to participate in videoconferencing hearings, serves as a disadvantage to accused persons.

The Disconnect: Difficulties in accessing technology, by lawyers as well as the accused, affects accused persons' ability to present an effective defence before the court. Videoconferencing hearings can leave accused persons at severe disadvantage in criminal proceedings, resulting in adverse orders or directions, gravely affecting their life and liberty.

CHAPTER 4: VIDEOCONFERENCING AND THE STAGES OF THE CRIMINAL JUSTICE PROCESS: EMERGENT CONCERNS

Interactions with lawyers and judicial officers during the course of this study- not only assisted in an articulation of the disconnect between videoconferencing hearings and fair trial rights, but also helped assess emergent concerns of videoconferencing at various stages of a criminal proceeding which are documented in this chapter.

A. PRE-TRIAL HEARINGS

1. First production hearing upon arrest

Law mandates that the first production of accused person subsequent to arrest must be done through physical production of the accused in the court within 24 hours. S. 167(1) and s. 167(2)(b) CrPC permit the production of an accused through videoconferencing, only in subsequent remand hearings. This too is limited only to remand hearings for a person in judicial custody, and not for persons in police custody.

Despite the mandate for to physically produce accused persons, the Covid-19 pandemic forced several jurisdictions to resort to videoconferencing even for the first production of an accused upon arrest. In the restricted functioning of courts during the pandemic, different jurisdictions adopted different practices for first production, depending on the level of spread of the virus, level of access to technology and directions from their respective High Courts. Some courts continued to insist on physical production in court, after maintaining social distancing norms or setting up glass shields for the magistrates,⁹⁶ or requiring testing of the accused.⁹⁷ Some others provided for videoconferencing facilities in one part of the court complex, while the judges remained in their courtrooms/chambers in another part of the court complex to see the accused.⁹⁸

Some courts were allowed to secure presence through videoconferencing from police custody, through smart phones of police personnel, requiring physical presence in case there is any cause for concern after studying medical reports or after interacting with the accused.⁹⁹ Another practice was to designate a neutral place where accused would be brought by the police, and produced through videoconferencing.¹⁰⁰

Judicial officers who had to resort to videoconferencing expressed dissatisfaction with the process, but were constrained due the restrictions of the lock-down. As one judicial officer put it,

“In the initial days of the pandemic, we continued to do this process physically. However, there were some instances of persons being Covid positive. Subsequently, the High Court issued an office memorandum (OM) stating that it is sufficient to do this process through VC. So the accused is brought to the courtyard of the court and kept outside the court room, while I sit in chamber and see them through the VC system and

96 Haryana, Chandigarh, Sikkim, Mumbai (Maharashtra).

97 Senapati (Manipur), Kolkata (West Bengal), Mysore (Karnataka).

98 Bhopal (Madhya Pradesh), Hyderabad (Telangana), Bargarh (Odisha).

99 Kerala, Jammu and Kashmir.

100 Bangalore (Karnataka).

pass the remand order. This order is then taken to the courtyard where the signature of the accused is obtained in person. The police officer uses his or her mobile phone and a WhatsApp video call is made, which is also permitted as per the OM. The police officer keeps the phone as close as possible to the face of the accused, and sometimes the voice is not sufficiently clear. In the event that there is any doubt or cause for concern, the police officer is asked to show the body of the accused. We rely on the medical certificate to see if there is any report of abrasion or injury of any form.”

However, reliance on medical documents is also not a foolproof method of ensuring sufficient oversight, since medical documents often do not record or reveal all the injuries on the arrested person.

Some respondents expressed concerns with videoconferencing production at this stage, and insisted on physical presence of their clients before the magistrate.¹⁰¹ In some jurisdictions, although the rules permit the production of accused through videoconferencing for reasons to be recorded, by way of abundant caution, magistrates insisted on physical production by setting up jail courts where accused would be produced in person before duty magistrates.¹⁰² While these are good practices, it was also learnt that in some jurisdictions, the accused were produced neither physically nor through videoconferencing, but that intimation would be sent to the magistrate about a person's arrest, for which remand orders would be passed and communicated to the police.¹⁰³

Not securing production either physically or through videoconferencing is alarming. Such lack of oversight can lead to police excesses, as was evident with the custodial death of Jayraj and Bennex during the lockdown in Tamil Nadu.¹⁰⁴ Following this unfortunate incident, the Madurai Bench of the Madras High Court passed directions insisting on the physical production of accused before a magistrate upon arrest.¹⁰⁵

On the other hand, instances of positive Covid-19 cases among arrested persons led to the Kerala High Court issuing an Office Memorandum which allowed magistrates to use technology, including WhatsApp calls, to pass remand orders of arrested persons in exceptional circumstances,¹⁰⁶ with a similar order recognising the legality of first remand of arrested persons being passed by the Karnataka High Court for exceptional circumstances.¹⁰⁷

2. Police Custody Remand

A crucial stage after the arrest and first production of an accused, is when the police file an application seeking an order for retaining the accused in their custody for further investigation. Since this is the stage where police excesses may most likely occur, the role of the magistrate and the defence counsel in ensuring that the accused is not detained for any time longer than absolutely necessary, and with no threat to their well-being or coercion with respect to the case, is essential. It is also possible that a person already in judicial custody might be required in police custody. Crucially, police custody can only be sought within 15 days from the date of arrest for an offence under the Indian Penal Code (or longer if a special criminal statute allows for this, such as 30 days under the Unlawful Activities Prevention Act, 1967). As per s.167(2)(b) the court can grant the extension of remand for a person in police custody only if the accused is physically produced before in court.

101 Chengalpattu (Tamil Nadu).

102 Delhi.

103 (2020), “Tamil Nadu: Social Media Outrage, Protests Over Brutal Thoothukudi Custodial Deaths”, The Wire, 26 June: <https://thewire.in/rights/tamil-nadu-protests-thoothukudi-custodial-deaths>, as on 20 December 2020.

104 (2020), “Tamil Nadu: Social Media Outrage, Protests Over Brutal Thoothukudi Custodial Deaths”, The Wire, 26 June: <https://thewire.in/rights/tamil-nadu-protests-thoothukudi-custodial-deaths>, as on 20 December 2020.

105 Suo Motu W.P.(MD)No.6126 of 2020.

106 Jino Mathews Raju (2020), “Kerala High Court Issues an Official Memorandum Listing down Guidelines to be followed by Subordinate Courts Post Lockdown”, Libertarum Magazine, 25 May: <https://libertatem.in/law/high-court/kerala-high-court-issues-an-official-memorandum-listing-down-guidelines-to-be-followed-by-subordinate-courts-post-lockdown/>, as on 20 December 2020.

107 High Court of Karnataka v. State of Karnataka, 2020 SCC OnLine Kar 556, decided on 15-06-2020.

The Covid-19 pandemic forced several jurisdictions to resort to videoconferencing even for the grant and extension of remand for a person in police custody. Once again, there emerged diverse practices in how the remand hearing of a person in police custody were conducted during this period. Some courts continued to insist on personal production of the accused before them,¹⁰⁸ after testing of the accused for Covid where possible.¹⁰⁹ Some others retained the option of securing physical presence where needed, otherwise relying on videoconferencing.¹¹⁰ Videoconferencing was used in some jurisdictions, either by setting it up in another part of the court complex,¹¹¹ a neutral place where the accused would be brought by the police,¹¹² or from the police station itself.¹¹³ If police custody of an accused in judicial custody was being sought, then the videoconferencing system in the prison could be used for such a hearing.¹¹⁴

There were also jurisdictions where even though rules allowed for police custody remand through videoconferencing, the magistrates insisted on personal production by way of abundant caution in the prison court set up for this purpose.¹¹⁵ Further, some respondents insisted on securing the physical presence of their clients for any hearing on police custody.¹¹⁶ However, at this stage of a case, often the accused person has no access to a lawyer who can insist on such a right.

Alarmingly, there are instances of extension of police custody remand which have taken place without producing the accused either in person, or through videoconferencing.¹¹⁷ Additionally, with prisons being overcrowded, and measures underway to reduce prison population, persons who had been directed to be sent to judicial custody ended up having to stay in police custody since the prisons were turning them away.¹¹⁸

3. Judicial Custody Remand

As discussed previously in this report, the very introduction of videoconferencing was premised on being used for judicial custody hearings. No period of remand in judicial custody can exceed 15 days at a time.¹¹⁹ The shortage of escorts who can transport an accused from the prison to the court for a hearing is one of the major reasons for delay in trials, and is also considered to be an expense on the exchequer. However, given that a person is under the care of the court during this time, their wellbeing and protection is the duty of the court.

In some courts, videoconferencing is used solely for the purpose of remand hearings of persons in judicial custody,¹²⁰ or where there are security concerns for the accused if produced physically,¹²¹ or when there were law and order issues leading to non-availability of police escorts for court production of accused.¹²²

Remand hearings of persons in judicial custody is often a perfunctory exercise, and this is made much worse when it happens through videoconferencing. Multiple accused are produced in the

108 Chandigarh, Haryana, Mumbai (Maharashtra), Sikkim

109 Senapati (Manipur).

110 Kolkata (West Bengal), Jaipur (Rajasthan), Jharkhand.

111 Bhopal (Madhya Pradesh).

112 Bangalore (Karnataka).

113 Durg (Chhattisgarh), Jammu and Kashmir.

114 Kerala.

115 Delhi.

116 Chengalpettu (Tamil Nadu).

117 Srinagar (Jammu and Kashmir), Patna (Bihar).

118 Patna (Bihar).

119 S.309(2), first proviso, CrPC.

120 Aligarh (Uttar Pradesh), Hyderabad (Telangana), Srinagar (Jammu and Kashmir)

121 Bhopal (Madhya Pradesh), Jaipur (Rajasthan).

122 Bargarh (Odisha).

videoconferencing room of the prison, and judges often inform them of their next date without enquiring about their well-being.¹²³ Further, since the videoconferencing system is handled by prison personnel, and production takes place in their presence, accused may be under pressure to not report any prison-related concerns.¹²⁴ Respondents expressed concerns about the mechanical nature of this production. As one of them put it,

“Given the many purposes that a physical production serves for the accused - meeting the lawyer, meeting the family, etc. - even if it means it will cost the exchequer more, or require more personnel, it is very worth all of that. The State has kept the person in custody and the State must ensure that they are involved in the trial.”¹²⁵

This was a sentiment echoed by some judicial officers as well. They recognise the need for the accused to be able to be part of society, for a short period of time, when produced in person.¹²⁶ For many, this is the only chance to meet with their lawyers since lawyers often do not make/have the time to visit them in prison.

Most courts, which had functional videoconferencing systems, relied on it for remand hearings from judicial custody during the pandemic-induced restricted court functioning. Although the lawyer of the accused cannot be denied the right to be present at such a hearing, some participants informed that the timing and place of such hearing was not communicated to them, resulting in them not being able to be present at the remand hearing, or to speak to their clients.¹²⁷

In some jurisdictions, in the initial days of the lock-down, judicial custody would be extended in the absence of lawyers as they were not allowed inside court.¹²⁸ Yet others who had submissions to make on behalf of their clients could do so, but not at the time of production of their clients through videoconferencing.¹²⁹ Interestingly, one of the participants shared that since the accused could not be brought in person for remand hearings, and there was no videoconferencing system which could be used in prisons, only the lawyers were present in lieu of the accused for extension of remand.¹³⁰

The judicial officers interviewed for the study expressed how the accused who appeared for judicial remand hearings often wanted to explain to them their medical condition inside prison, or know the status of their cases. In the absence of prison visits by lawyers, especially curtailed during the lock-down, accused persons had no knowledge of the status of their cases. Further, not all courts had remand advocates appointed by the DLSA present in court, while some mandated their presence in order to liaison with the prison where necessary.¹³¹

In the event of any technical issues in the videoconferencing system during a remand hearing, there is a possibility to extend the remand automatically by another 15 days. However, all the judicial officers who participated in the study insisted on the shortest possible next date, or tried alternate means of seeking connection with the prison. In good practice, in some jurisdictions, accused are presented one at a time in the videoconferencing room at the prison-end to reduce commotion.¹³²

123 Chandigarh, Hyderabad (Telangana), Bangalore (Karnataka), Srinagar (Jammu and Kashmir).

124 Chandigarh.

125 Bangalore (Karnataka).

126 Kerala.

127 Chandigarh, Kolasim (Mizoram), Bhopal (Madhya Pradesh).

128 Durg (Chhattisgarh).

129 Chengalpattu (Tamil Nadu).

130 Senapati (Manipur).

131 Delhi.

132 Haryana.

4. Other Pre-Trial Hearings

The most important stages before a trial starts in a criminal proceeding, is the filing of chargesheet,¹³³ supply of copies of the chargesheet and relevant documents to the accused,¹³⁴ committal of the case in the event that it is triable by the Sessions Court,¹³⁵ and the framing of charge.¹³⁶ Once the charge is framed, the matter is ready to go into trial. However, there could be various other issues to litigate and determine in the pre-trial stage, such as the collection of voice and handwriting samples of the accused, recording of confessional statements under s.164 CrPC, complaints regarding prison conditions, and other issues.

In some jurisdictions, almost all judicial processes, including pre-trial hearings, in criminal cases triable by a magistrate take place through videoconferencing,¹³⁷ and in some others, most processes could take place through videoconferencing for reasons to be recorded and with the consent of the accused.¹³⁸

In the pandemic, videoconference was being used in some jurisdictions to forward documents in compliance with s. 207/s. 208 CrPC,¹³⁹ recording statements under s. 164 CrPC,¹⁴⁰ and hearing miscellaneous applications.¹⁴¹ Some jurisdictions had also used videoconferencing for the framing of charge,¹⁴² in some instances, without the presence of the counsel.¹⁴³

Several respondents felt that the presence of the accused for many of these pre-trial stages would not affect the case, and perhaps even make the process smoother. However, crucial stages such as the recording of confession statements under s. 164 CrPC and the framing of charge were seen in a very different light.

The recording of a confession statement must be done with great care in order to ensure that the accused is giving the statement of their own free will and under no external compulsion. Recording this through videoconferencing does not allow the magistrate the ability to make this assessment in private with the accused.¹⁴⁴ With respect to the framing of charge, some respondents were of the opinion that this too could effectively be conducted through videoconferencing. However, one of the judicial officers interviewed raised the concern that issues such as mental health conditions and other vulnerabilities can only be effectively determined if the accused is spoken to at length, at least once before the trial. He was of the opinion that the stage of framing of charge is where the judge has the best opportunity to determine if the accused is following the charge that is being read out to them, and to determine if they wish to go to trial.¹⁴⁵

B. TRIAL HEARINGS

Existing laws and jurisprudence permit the use of videoconferencing during trial hearings for limited purposes. Some courts use videoconferencing to record evidence of expert witnesses (such as doctors and forensic experts) and witnesses in foreign jurisdictions.¹⁴⁶ Videoconferencing is also used to secure

133 S. 207 and s. 208 CrPC.

134 S. 209 CrPC.

135 S. 209 CrPC.

136 Chapter XVII, CrPC.

137 Bangalore (Karnataka).

138 Jharkhand.

139 Haryana.

140 Mumbai (Maharashtra).

141 Ahmedabad (Gujarat), Jammu and Kashmir, Mumbai (Maharashtra).

142 Delhi, Kerala.

143 Hyderabad (Telangana), Kerala.

144 Karnataka.

145 Karnataka.

146 Chandigarh, Haryana.

the presence of accused during recording of evidence when prison authorities make a request for this owing to security concerns.¹⁴⁷ In terror offences, organised crimes, and for persons identified as habitual offenders, recording of evidence, recording of statements under s.313 CrPC, and even final arguments on conviction and sentencing have taken place through videoconferencing.¹⁴⁸ It is also in these very cases that much is at stake for the accused, given the perception surrounding the case.

During the pandemic induced restricted functioning, some jurisdictions had commenced recording statements of the accused under s. 313 CrPC,¹⁴⁹ some were also recording evidence of witnesses,¹⁵⁰ and hearing final arguments.¹⁵¹ Commencement of recording of evidence, and statements under s.313 CrPC was being considered, with the consent of the accused, in some other jurisdictions.¹⁵²

1. Recording of Evidence

Lawyers who had some experience in conducting examination of witnesses through videoconferencing emphasised the limitations it placed on mounting a full and effective defence. For instance, if the witness is appearing through videoconferencing, such as say a medical expert, then the ability to confront them with documents and ask specific questions related to this is curtailed.¹⁵³ The appearance of witnesses through videoconference was considered to be acceptable for formal witnesses, or witnesses to uncontested facts by some respondents; however for key witnesses, and expert witnesses where cases hinged on electronic/forensic/other such evidence, then the presence of witness in person was preferred.¹⁵⁴ However, some lawyers expressed concerns about how independent a witness might actually be if appearing from a remote point, since it is possible that they could be under some form of coercion or influence.¹⁵⁵ Similar concerns were also expressed by judicial officers, in addition to the concern that remote locations having videoconferencing facilities (where witnesses can come to depose) is hard to imagine for some parts of the country.¹⁵⁶ Another concern expressed was that for a witness who is required to identify material objects in a case, such as say the murder weapon, blood stained clothes, and other such recovered articles, it might not be most effectively done through a videoconferencing system. Given that the witness may be deposing many years after the incident, without being able to closely examine the material object, such identification may become impossible or unreliable.¹⁵⁷

“In simple matters, I think it is alright to conduct examination through videoconferencing. However, where there are grave offences, complicated facts, there is a need to be able to observe the demeanour of the witness, how they react to some questions. Also, if there are objects to be shown such as the murder weapon, clothes, then seeing it and holding it physically makes a huge difference especially since the witnesses are likely to be deposing some years after the incident. Similarly, if there are expert witnesses such as forensic witnesses and there are complicated documents to exhibit and cross-examine about, then that too would be ideal in physical presence. I also want to say that the Model Rules, which we have adopted, makes this whole process of having remote points with personnel very unwieldy. These persons will need so many equipment. Plus, there is a physical copy of the typed deposition with

147 Mysore (Karnataka), Kolkata (West Bengal), Haryana, Delhi, Mumbai (Maharashtra).

148 Mysore (Karnataka), Kolkata (West Bengal), Haryana, Mumbai (Maharashtra).

149 Kerala.

150 Sikkim.

151 Jammu and Kashmir

152 Ahmedabad (Gujarat).

153 Chandigarh.

154 Mumbai (Maharashtra).

155 Mysore (Karnataka).

156 Sikkim.

157 Karnataka.

signatures that have to be scanned and printed, and also the audio-video recording - what if there is any contradiction between the two, what should prevail? It would be much simpler and practical to have witnesses continue to come to court”

Similarly, if the accused is the one being produced through videoconferencing, then the ability to confer with them on new points raised is difficult, even if the counsel have met them beforehand and discussed the case details. As one participant said,

“There will always be those surprise elements during a cross-examination, and it is always going to be difficult in those times without instructions from the client.”

Some respondents believed that there are many aspects about a physical hearing which cannot be replicated by a videoconference system, no matter how good the technology might be. Observing the demeanour of witnesses, reading the mood of the judge, consulting with their clients at the instant the hearing is taking place, and the ability to make persuasive and complex arguments are all only possible in a physical hearing.¹⁵⁸ To quote one of the respondents,

“As a criminal lawyer, I can only say that VC is not something I am rooting for. So much of court craft in criminal trials is about understanding the demeanour of the witness, to gauge what line of questioning to follow. In civil matters or family law, there are so many documents that a case depends on, and that is the basis of the case. But in criminal matters, the case relies on people as much as documents and that will always require observing subtleties of the witnesses, reading them, which is not possible through VC. It is also not possible to seek appropriate instructions from the clients when cross-examination takes place like this. Given this, and given how our judiciary is structured, VC is not something we are ready for or should push for.”¹⁵⁹

2. Recording of Statements under s. 313 CrPC

Lawyers who responded to the study expressed concerns with the recording of statements under s. 313 CrPC in complex cases through videoconferencing. For instance, in one terror trial, statements under s. 313 CrPC were sought to be recorded through videoconferencing. However, given that the chargesheet was bulky, and in a language unknown to the accused, the accused were concerned with going through this process without being present in person before the judge to be able to understand the evidence put to them.¹⁶⁰ There were also some judicial officers who insisted that the recording of statement under s. 313 CrPC is crucial to the determination of guilt or innocence, and a process they preferred to do in person. Noting the importance of the stage of recording statements under s.313 CrPC, one judicial officer said,¹⁶¹

“I have a very elaborate process of recording 313 statements. I make sure that the accused feels comfortable to open up to the court - only when the court is open with the accused, will the accused be open with the court. This is a stage where the court has a very important role to play, and must play. I insist on 313 statements being recorded in person. In some very rare instances, the accused themselves ask for VC, then I consider it.”¹⁶²

Some judicial officers however were of the opinion that the recording of statement of the accused could effectively be done through videoconferencing,¹⁶³ with some even saying that since in any case this is a

¹⁵⁸ Durg (Chhattisgarh), Chengalpattu (Tamil Nadu).

¹⁵⁹ Chengalpattu (Tamil Nadu).

¹⁶⁰ Ahmedabad (Gujarat).

¹⁶¹ Jharkhand.

¹⁶² Jharkhand.

¹⁶³ Delhi.

perfunctory exercise in which the accused mostly answers in the negative, the use of videoconferencing was sufficient.¹⁶⁴

3. Final Arguments

Some of the respondents to the study had made or heard final arguments through the traditional videoconferencing system.¹⁶⁵ In some of the jurisdictions, during the restricted functioning of courts, final arguments in cases where the recording of evidence had been completed were heard through videoconferencing.¹⁶⁶ Concerns were expressed by respondents regarding final arguments on conviction and sentencing in complex cases. In a terror trial, final arguments were sought to be done through videoconferencing, but the defence lawyers were reluctant to proceed as the hearing would require going through multiple documents, involving complex questions of facts and law.¹⁶⁷ Some judicial officers were of the opinion that in complex matters, they prefer to seek clarifications from the arguing lawyers, and have to pay attention to minute details, and preferred their physical presence,¹⁶⁸ while some felt that final hearings can effectively be heard through videoconferencing,¹⁶⁹ and some only proceeded with this stage after getting a no objection from the accused.

No hearings on sentencing in sessions cases were reported by any of the respondents to the study of having been conducted through videoconferencing, and so no conclusion can be drawn on the same. However, it bears mentioning that s. 235(2) CrPC bifurcates a trial into the conviction and sentencing stages, requiring both sides to adduce evidence relevant for the court to arrive at the most appropriate sentence for the accused.¹⁷⁰

C. BAIL HEARINGS

One of the most important functions which criminal courts have been dispensing in the past few months is to hear bail applications, both regular and anticipatory. In addition to protection of individual liberty, this has also been a measure to de-congest prisons. Following directions by the Supreme Court, every state had to set up a High Powered Committee (HPC) to lay down guidelines to assist courts in identifying persons who should be considered for release from custody.¹⁷¹

However, interviews with respondents revealed that most bail applications were heard like any other time, with the guidelines of the HPC making little to no difference in the outcome,¹⁷² or the bail conditions imposed by courts being impossible to achieve.¹⁷³

Ordinarily, the accused is not present for bail hearings in the cities that the study covered. However, some jurisdictions give the accused the option to be present for the hearing if they so request.¹⁷⁴ Bail hearings migrated to online platforms during the restricted functioning of courts in most jurisdictions, with some jurisdictions allowing physical hearings for lawyers who preferred it, while some others continued to hear bail applications in person. Some respondents stated that although there was an option to have argued bail through online platforms, they preferred to do so in person, as they believed

¹⁶⁴ Rajasthan.

¹⁶⁵ Mysore (Karnataka), Bangalore (Karnataka), Kolkata (West Bengal), Karnataka, Jharkhand.

¹⁶⁶ Jammu and Kashmir, Guwahati (Assam), Nainital (Uttarakhand), Sikkim, Manipur.

¹⁶⁷ Mumbai (Maharashtra).

¹⁶⁸ Rajasthan.

¹⁶⁹ Delhi, Karnataka.

¹⁷⁰ Jharkhand.

¹⁷¹ In Re: Contagion of COVID-19 Virus in Prisons, Suo Moto Writ Petition (C) NO. 1/2020; order dated March 23, 2020.

¹⁷² Chandigarh.

¹⁷³ Kolasib (Mizoram).

¹⁷⁴ Sikkim, Kolkata (West Bengal).

being persuasive and effective is curtailed when arguing through videoconference.¹⁷⁵

Some jurisdictions were able to migrate to online filing of bail applications and listing of their matters either through e-filing systems of the court, or through dedicated email IDs, or WhatsApp numbers.¹⁷⁶ In some jurisdictions, even though bail applications could be filed online, there would be no acknowledgement or communication, requiring the advocates to appear physically in court to follow up.¹⁷⁷ Some also reported that where multiple documents were filed, not all of them were placed before the judge.¹⁷⁸

In addition to these, another area of concern for some respondents, was that where bail was granted, the process of verifying the surety was a time consuming process, often leading to days, sometimes months, of delay.¹⁷⁹ This could be caused by minor typographical errors in the orders, requiring multiple rounds of clarification with the prison authorities.¹⁸⁰ Sometimes, this was also because courts insisted on sureties to be present in person, which was difficult during the lock-down.¹⁸¹

D. PERCEPTIONS AND OPINIONS ON THE FUTURE OF VIDEOCONFERENCING HEARINGS

Respondents to the study were asked whether they could imagine the possibility of videoconferencing being integrated into court practice in the future. Of the lawyers interviewed, 45% supported a hybrid court system, 30% supported an opt-in/opt-out method, and the remaining 25% did not support the introduction of videoconferencing at all. Among the judicial officers interviewed, 80% supported a hybrid system, while 20% believed that slowly there can be a transition to videoconferencing at all stages of a criminal trial. Although the response to the extent of use of videoconferencing varied, it was always with the caveat that the existing court videoconferencing system requires much smoothening and last mile linkages, in addition to strengthening the applicable rules, crafted for a criminal trial.

One of the respondents to the study said,

“Presently, the use of VC is in an experimental stage. But with the detailed Standard Operating Procedures on how to use the system, with safeguards regarding technical aspects and connectivity issues and while maintaining the dignity of proceedings, it is possible to integrate VC into the criminal trial system. It is also important to have necessary technical assistance to make the VC system user-friendly and efficient. Several older lawyers may not be very comfortable with this transition. But if we can build on consensus among lawyers, and take their inputs for the SOP, including things like allowing time to speak to the client and confer on points, there is a way forward.”

1. Hybrid courts

Some lawyers were of the opinion that a hybrid system where certain stages of the trial could be through videoconferencing, while other crucial stages must remain in person, would be the right way forward. Hearings where the presence of the accused is not required for consultation or for taking signatures, such as compliance with s.207/s.208 CrPC, verification of sureties, etc., could be through videoconferencing. However, framing of charge, recording of evidence, statements under s.313 CrPC, final arguments, must be in person. Such a hybrid system, they believed, would serve the dual purpose of speeding up the

175 Mysore (Karnataka), Chengalpattu (Tamil Nadu).

176 Hyderabad (Telangana), Bangalore (Karnataka), Srinagar (Jammu and Kashmir).

177 Patna, Jaipur (Rajasthan), Bhopal (Madhya Pradesh), Kolasib (Mizoram), Durg (Chhattisgarh).

178 Patna (Bihar).

179 Chengalpattu (Tamil Nadu), Hyderabad (Telangana), Delhi.

180 Delhi.

181 Durg (Chhattisgarh).

trial while also ensuring that the accused was present to instruct and examine the evidence before them where necessary.¹⁸² To quote a respondent,

“I feel there must be a combination of both physical and virtual hearings. For the older lawyers, technology has been very daunting, whereas for the younger lawyers this has been an easy system to adapt to. While it is necessary to ensure the presence of the accused for first production, remand, evidence recording, etc., I feel that there are some procedural aspects for which the use of technology can be made to reduce the delay in trial. As for lawyers, the pleasure and joy of the art of criminal trial will not be the same as in a physical hearing, but new ways can be found.”

Such a hybrid approach was also suggested with respect to witness evidence being recorded. In the case of formal witnesses or witnesses to uncontested facts, it was felt that there might be value in recording their evidence through videoconferencing in order to speed the trial. However, for key witnesses, expert witnesses who depose on complex issues, it was felt that only a physical examination could allow for an effective examination and cross-examination of such witnesses.

Of the judicial officers interviewed, a hybrid approach, where they could conduct some routine processes through videoconferencing, but ensure the presence of the accused where evidence is to be recorded, seemed to have the most support. Some felt that compliance under s. 207/s. 208 CrPC, the framing of charge, recording of statements under s. 313 CrPC, could all be conducted through videoconferencing.¹⁸³ Their main reason for this is that it could save time, and speed the trial. Some stated that this would be especially helpful in cases where they are required to complete the trial in a time bound manner, such as cases registered under the POCSO Act.¹⁸⁴ Some however felt that framing of charge and recording of statements under s. 313 CrPC must also be in person since these are stages where the accused and the judge are required to interact directly.¹⁸⁵

2. Right to opt-in and opt-out

Some respondents were of the opinion that moving processes to videoconferencing must be a question of choice – if an accused chooses to face their trial through videoconferencing, on being informed of their rights and alternatives and in consultation with their lawyers, they must be allowed to do so. And similarly, if they wish to be present in person, then that must be granted to them.¹⁸⁶ For instance, if an accused is facing multiple trials, or if they have to travel from very far for a hearing which does not always happen due to shortage of escorts, then for such persons in order to avoid delay, they may choose to have their hearings through videoconferencing. As one respondent said,

“Given that accused are housed in prisons far away from the court, the time it takes to travel and the danger in the current pandemic makes it better to produce them through VC in some stages. Also, there is just one NIA and UAPA court designated for so many regions around here. I therefore feel that there must be an option to choose between VC and physical hearing. Also, when there are multiple cases in different districts, then perhaps bringing the accused to a neutral court (not prison), and conducting the trial there would be an easy and fair mechanism for all parties concerned.”

3. Criminal justice system is not ready for videoconferencing

A section of the respondents however believed that our systems and courts are not geared towards a

¹⁸² Kolkata (West Bengal), Senapati (Manipur), Patna (Bihar), Cochin (Rajasthan), Chandigarh.

¹⁸³ Delhi, Sikkim, Haryana, Kerala, Jharkhand.

¹⁸⁴ Haryana.

¹⁸⁵ Jharkhand, Karnataka.

¹⁸⁶ Srinagar (Jammu and Kashmir), Chandigarh, Bhopal (Madhya Pradesh).

transition to videoconferencing, and that the cost of this will have to be borne by the accused. They also believed that there are many aspects of a trial which cannot be replicated in a videoconference hearing such as observing the demeanour of the witness to decide the line of questioning, the ability to consult with the client instantaneously, the ability to be persuasive with the judge and to make complex legal submissions.

In addition to the skills of the lawyer, there are certain important functions that the presence of the accused in the court for a hearing fulfils. To quote one of the respondents,

“I don’t think VC is sufficient at any stage of trial. Production in court serves many purposes for an accused - it is a chance to meet the lawyer, meet the family, understand what is happening in court, be a part of society for those few hours they are brought to court. Lawyers are generally too busy to be able to make the trip to prison to meet their clients. And even if they can it is only between 3PM and 5 PM, and in a noisy room where it is not easy to seek instructions. I am therefore fundamentally opposed to VC hearings at any stage.”

A significant concern of lawyers sceptical of the use of videoconferencing in the judiciary also stemmed from the understanding that the criminal justice system is already suffering from neglect. Introducing something like videoconferencing technology top-down, without the necessary training, resources and fool proof equipment will only add an additional level of disruption in the system.

CHAPTER 5: SUMMARY OF FINDINGS AND RECOMMENDATIONS FOR SAFEGUARDING FAIR TRIAL RIGHTS

Videoconferencing is not a new phenomenon in the Indian criminal justice system, with different jurisdictions having experimented with it, to varying degrees. The unique challenges posed by the restricted functioning of courts during the Covid-19 pandemic have exposed both the utility and the limitations of the use of videoconferencing in criminal trials. It is apparent that there are several deficiencies in the infrastructure – be it in courts, prisons or internet capabilities. These are issues which will certainly, and rightly, draw attention from various actors in the criminal justice system. However, this study has revealed that regardless of the technological gaps endemic to the system currently, several fair trial rights are at stake in a videoconferencing hearing. The ability of an accused to effectively participate in proceedings which affect their right to life and liberty and the ability of an accused to access adequate legal assistance are primarily affected in a videoconference hearing. Unfortunately, considerations for the need to safeguard these rights have been absent with the executive, legislature and judiciary each having failed to engage with these core issues since the very inception of videoconferencing in criminal courts.

The experiences of lawyers and judicial officers reflect the reality of using videoconferencing in criminal trials, and offer a window to the complexity of the issues involved. These must inform the direction and extent to which videoconferencing is integrated into the criminal justice system, going forward. **Vital stages of a criminal proceeding – first remand, police custody remand, framing of charge, recording of evidence of key witnesses, final arguments on conviction and sentencing in complex cases – are not replicable on a videoconferencing hearing, regardless of the efficiency of the technology used. Thus, existing rules and guidelines must restrict the use of video conferencing for these hearings, and affirm the mandate for physical hearings in each of these stages.**

Videoconferencing is not a quick fix solution to reducing the length of a criminal proceeding, as often portrayed, but instead an additional hurdle for an accused to cross. This is especially true of persons who are not used to the highly technical nature of judicial processes, and those who are already vulnerable in the social fabric. However, with the informed and express consent of the accused, videoconferencing has the potential to save time, especially where used for hearings such as compliance with s. 207 or 208 CrPC, committal proceedings, examination of formal witnesses, recording evidence of witnesses who will not otherwise be possible to depose in person, and miscellaneous hearings.

The CrPC as it stands cannot be applied to videoconference hearings, without crafting rules specific to this context. The Model Rules for the use of videoconferencing were necessary to meet the immediate need of the hour in light of the near absence of rules in most jurisdictions at the time of the lockdown. However, it is now time to recalibrate, and frame rules which are mindful of the implications of a hearing conducted through videoconferencing, the limitations of the technology in place, and the unique concerns of every region where they apply.

In addition to these fundamental changes in the architecture of the law and technology, it is equally important for procedural safeguards to be recognised and implemented by the judicial officers, court staff, lawyers and prison officers in the everyday functioning of videoconferencing hearings. Technical officials who can assist courts and prisons in the smooth functioning of videoconferencing systems, and who are independent of the prison system must be ensured as part of the process of a videoconference

hearing. Periodic training and sensitisation of judicial officers, court staff and lawyers is equally important to ensure that the justice system delivers.

The next section lays down vital safeguards that need to be integrated into existing practices while using videoconferencing for non-vital criminal proceedings. These are then followed by an iteration of stage-wise and stakeholder wise recommendations.

A. SAFEGUARDS FOR PROTECTING FAIR TRIAL RIGHTS OF ACCUSED

The Supreme Court e-committee, as well as the various High Courts must amend the existing Model Rules and other guidelines for the use of videoconferencing, to ensure that the rights of an accused, are protected throughout the hearing. In light of the practices which have emerged from the conversations with the respondents to the study, the following safeguards, are proposed:

1. Right against arbitrary arrest and ill-treatment

- With the threat of the virus reduced, it is imperative to ascertain that all first production hearings and hearings from police custody, or for police custody remand should be physical productions. Remand hearings as permissible under s. 167(2)(b) of the CrPC may continue to be conducted through videoconferencing, though should integrate the various safeguards listed below.
- If, however, it is exigent that first production and police custody remand hearings are conducted through videoconferencing, that the follow basic minimum guarantees must be ensured:
 - ✓ The magistrate must ensure that he/she can clearly see the whole body of the accused and not just the face;
 - ✓ In the event of any doubt, the magistrate must direct the police to produce the accused in person while maintaining social distancing norms;
 - ✓ Production of accused must not be from inside the police station but from a videoconferencing facility inside the court;
 - ✓ If the accused does not have a counsel, a legal aid counsel must be assigned immediately, and provided an opportunity to communicate with the accused in private either personally or through telephone/videoconference before the hearing;
 - ✓ If the accused has a counsel, the magistrate should ensure that the police have informed them of the date, time and place of the hearing in a timely manner.

2. Right to effective participation in hearings and the right to be present at the hearing

- In order to ensure that the accused is effectively able to participate in the proceedings, the prison authorities or their lawyers or representatives from the District Legal Services Authority must explain to the accused the manner in which they can use the videoconferencing system during hearings.
- The accused must be provided access to the audio/video device of the videoconferencing system and where that is not possible, control of the device must be in the hands of the videoconference coordinator at the prison end, to enable immediate intervention by the accused as required.
- The court must ensure that:
 - ✓ The accused is able to see the entire court, including the judge, lawyer and witnesses (if any);
 - ✓ Similarly, the court is also able to see the accused effectively;
 - ✓ The audio-video system has been checked for technical issues before every hearing;
 - ✓ The audio system of the accused, is functional throughout the hearing, to ensure that the accused is able to hear the entire proceeding;

- ✓ Accused persons are produced one at a time for their hearing through the prison videoconferencing system, unless they are being tried together;
- ✓ Accused/their lawyer have been provided advance copies of all relevant case documents.

3. Right to effective counsel

- It is necessary that whenever remand hearings take place through videoconferencing, a remand lawyer must be present in order to defend the interests of the accused. Where a lawyer is not assigned, the magistrate must explain the accused of their right to legal representation; assign a legal aid counsel and permit the counsel to communicate in private with the accused.
- A legal aid lawyer or a paralegal volunteer must be assigned at the prison-end of the system, who can assist the accused to understand the on-going proceedings, and to liaison with the remand lawyer at the court-end.
- Private lawyers should be permitted to make a request to the court to allow presence of a lawyer from their team to accompany the accused at the prison-end of the system.

4. Right to confidential communication with counsel

- The High Court should ensure that a facility to enable the private communication between the accused and their counsel before, during and after hearing is made available in each court room where criminal proceedings are conducted through videoconferencing.
- The accused or the lawyer must be permitted to request the court at any point during the hearing to speak to each other in private.

5. Right against bias and protection for the vulnerable

- Specialised measures may be taken by the prison authorities, the district legal services authorities, lawyers or the court to inform an accused with special needs about the procedures in a videoconference hearing. This must be explained in a language and manner relatable to them.
- Interpreters and special educators, where necessary, must be provided during videoconference hearings.

6. Right to open court hearing

- In all videoconference hearings, the court room must be open to the public viewing, unless there is a specific direction for the hearing to be held *in-camera*.

7. Right to speedy trial and opt-in/opt-out rights

- It is imperative the videoconference hearings are not forced upon the accused, and the informed consent of the accused is taken to conduct these hearings, both for hearings during the technical stages or non-substantive stages of a trial and first production hearings, hearings from police custody, framing of charge, recording of evidence of key witnesses, statements under s. 313 of the CrPC, final arguments and sentencing hearings.

B. SAFEGUARDS TO BE INCORPORATED AT VARIOUS STAGES IN A VIDEOCONFERENCE HEARING

The safeguards included in this section are based on the feedback received from various judicial officers, police officers, prison officers and lawyers who participated in the Bureau of Police Research and Development (BPRD)'s "Training on Video Conferencing between Courts and Prisons", organised across various regions in the country in 2017. These trainings were attended by participants from Meghalaya, Manipur, Mizoram, Tripura, Orissa, Assam, Arunachal Pradesh, Nagaland, Sikkim, Bihar,

West Bengal, Karnataka, Kerala, Chhattisgarh, Andhra Pradesh, Telangana, Tamil Nadu, Rajasthan, Gujarat, Maharashtra, Madhya Pradesh and Daman & Diu.

S. No.	Suggested Safeguards	Actor Responsible	Brief Description
1. General Safeguards			
1.	Provisions should enable request for physical production of accused when required.	Magistrate/Sessions Judge	There must be a provision to seek in person production in cases where accused seeks to file a complaint against custodial violence or any similar grievance either directly or through their lawyer. In case the court on its own feels that the accused should be produced in front of them, they should order them to be produced within 24 hours to the court or to the residence of the magistrate/Sessions Judge.
2.	A clear basis for deciding mode of production should be included in existing rules and guidelines.	Supreme Court e-Committee/High Courts	The basis for determining mode of production should be formulated and circulated by the High Court of each state. Security concerns, the nature of the case, the history of offender, the request/consent of the accused, the earlier mode of productions, could be some of the parameters to consider. Further, the reasons for deciding production through videoconference should be mentioned in the production warrant.
3.	Rules should specify role of each stakeholder and also provide checklists for presiding officers to ensure adherence to safeguards.	High Court	Duties of presiding officers, prison and police officers must be clearly specified in guidelines and rules regulating video conference hearings. High Courts must provide detailed guidelines for conducting trials through videoconferencing to supplement the general rules on videoconference hearings. A check-list can be made for assistance of the presiding judge to ensure that all safeguards are adhered to at each hearing via videoconferencing.
4.	Measures to ensure presence of the presiding judicial officer should be introduced.	High Court/National Informatics Centre (NIC)	Biometric checks may be put in place to ensure presence of magistrates when convening the videoconferencing session. This is to address concerns raised regarding video conference remands been conducted by clerks in some jurisdictions.
5.	Rules should provide for transcribing and recording of videoconferencing sessions.	High Court	Need for clear rules and procedures regarding transcribing and recording of audio-video content, especially in matters of witness testimonies, victim statements in rape and other sensitive cases, prisoner grievances about jail or police authorities, etc. It should be strictly ensured that the privileged/private session of the accused with their lawyer, co-accused and family members is not recorded. Preferably, a different system should be used for this purpose, which as a matter of testified fact (on affidavit by the prison superintendent) shouldn't contain the facility of recording at all.
6.	Placement of the recording device	High Court/NIC	The recording device should not be placed at the remote point location, but at the court point instead, to ensure that the court has first access to any recordings.

7.	Preparation of schedule for managing of videoconference hearings in each court complex.	Office of the District and Session Judge	A schedule must be prepared by the office of the District and Session Judge, mentioning the video conferencing time slot for each court on a daily basis in order to cater to the requirement of all courts and to enable smooth functioning of the video conferencing facility. If enough systems are not available, more must be requisitioned.
8.	Regular inspection of videoconference rooms in jails	Oversight Committee (to be constituted)	An oversight committee comprising a team of lawyers (excluding public prosecutors) should be formed by each District and Sessions Court to visit and inspect the videoconference rooms at the jails once a month and record their finding in a register which should be reviewed by the District and Sessions Judge of that court periodically.
9.	Ensuring quality of proceedings	Co-ordinator	To optimise viewing, while the videoconferencing room must be well lit, the monitors should be placed in a darkened area of the room and be of sufficient size and number to allow convenient viewing by all participants.
10.	Nodal agency for ascertaining infrastructural requirements for each court complex to be decided.	Supreme Court e-Committee	The e-Committee must decide the nodal agency responsible for catering to infrastructural requirements of videoconferencing system in the states.
11.	Periodic trainings for technical staff should be conducted.	NIC	Periodic trainings should be conducted by NIC for technical staff at the court and the prison on videoconferencing technology. Also one person should be deputed (from NIC) for every district/ court complex for any hardware or software issues. There must be a technical expert in the Board of Visitors who can also monitor the functioning of the videoconference setup in the jails.
12.	Applications to be permitted to be filed against any adverse orders issued as a result of technical difficulties.	Presiding court	In the event of an adverse order owing to technical difficulties, defense lawyers must be permitted to file applications to bring this on record and ensure that the hearing is declared incomplete and seek a re-hearing.
13.	Training of judicial, prison, police officers and lawyers to be conducted jointly by State Judicial Academy, State Police Academy, State Prison Training Institutes etc.	Supreme Court e-Committee	Ensure regular training programmes for judicial officers, court staff, prison officers and technical staff on the best practices for videoconference hearings.
14.	Procedures to be introduced to ensure that accused are produced one at a time.	Co-ordinator	Accused must be produced one at a time in the prison videoconferencing room, unless they are being tried together.

2. Basic Equipment Required			
15.	A computer with high-speed internet connectivity should be available at each remote location.	High Court/Sessions Court	Production via videoconference is completely dependent on the smooth functioning of the videoconferencing equipment, the internet connectivity and the audio-video-linkages. Low speed of internet connectivity would impact the quality of the production and the judge and the accused would not be able to see each other.
16.	Video camera of appropriate audio-video relay quality should be installed.	High Court/Sessions Court	360-degree cameras should be installed specially at the remote point so that the court can inspect any part of the room and the prisoners with better control and accessibility.
17.	Printing and Scanning Facility to be made available.	High Court/Sessions Court	For obtaining signature of the accused or the witness wherever required in a videoconference session, a printing and scanning facility shall be available at both the points. The plea can be typed and read to the accused or witness, then signed or thumb impression can be taken, and then scanned and sent to the court, where it will be printed and marked as a scanned copy.
18.	A separate chamber for lawyer-client interaction to be created at the court as well as prison end.	High Court/Sessions Court	The videoconferencing setup in the court must include a separate chamber, with complete sound insulation and privacy, from where the counsel can talk or video chat with the accused. Headphones must be available in such rooms.
19.	Quality slip generation system may be considered to enable record-keeping of data on connection, bandwidth, audio clarity, visual clarity etc.	High Court/Sessions Court/NIC	At both the remote point and the court point, the computer system should generate a live slip of various quality measures of the videoconferencing session, so that disputes and concerns over the quality can be addressed.
20.	Facilities to ensure proper display of documents for all parties should be installed.	High Court/Sessions Court	Document visualizer should be available at both the remote point and court point.
21.	Headphones for optimum audio and microphone quality may be used when required.	High Court/Sessions Court	Headphones with inbuilt mic should be available at the remote point and the court point, atleast for the defence and prosecution lawyers, judges, accused, and witness if any. This will ensure optimum quality as speakers might echo in closed rooms and there may be sound leakage outside.

22.	Power back-up system for videoconference setup should be made available.	High Court/Sessions Court	There should be a separate power back up system, especially at the remote point for the videoconference setup so that power failure doesn't cause time delays and hindrances. Any kind of interruption in the videoconference session on the part of the remote point might be a vulnerable situation for the accused as during this time the court cannot access the happenings at the remote point.
23.	CCTV camera should be installed at the entry gate of the videoconference room.	High Court/Sessions Court	There should be a CCTV camera at the single-entry point to the videoconference room at the remote point and a register should be maintained detailing the particulars and reasons of each and every person entering the videoconference room.

3. Specialised Personnel Required at the Videoconference Facility

24.	Coordinators should be appointed at the remote end, and measures to ensure privacy, safety and a coercion free environment for the accused should be included.	High Court/Sessions Court	There should be clear rules regarding the presence of coordinators at the remote point. Most importantly, they shouldn't be allowed to be present inside the remote point room when the accused is having a private interaction with the lawyer, making any grievances against the jail authorities or the police authorities, or any other similar situation that fits reason. This is important since the Model Rules provide that the superintendents can also be the coordinators at remote points.
25.	A full-time technician should be appointed at the Prison-end.	High Court/Sessions Court	There should be a full-time technician at the prisons end to trouble shoot any problems during the videoconference hearings in order to reduce delay and ensure good technical maintenance of the system.

4. Safeguards while using Videoconference for Remand Proceedings (Pre-Proceedings)

26.	Magistrate to maintain reasons for conducting videoconference hearing.	Magistrate	The magistrate must record the reasons for conducting proceedings through videoconferencing, in writing, along with any objections of any of the parties.
27.	Maintain a daily checklist for quality check.	Court and Prison	In order to ensure accountability, a daily checklist for quality check of instruments should be maintained and submitted to the District and Sessions Judge every month. The court room officer shall be responsible for ensuring that the videoconferencing equipment is ready and functioning properly in advance of any hearing, so that there will be no interference with commencement of the proceedings.
28.	Ensure video-linkage camera is setup in a manner that the accused is fully visible.	Prison/presiding judge	The video linkage cameras should be setup in a manner that magistrates can check for any injuries or harm to the accused. Not just the face, but the entire body of the accused should be visible to the magistrate.

29.	Ensure that orientation sessions for accused/prisoners are conducted to apprise of procedures of videoconference hearings.	Prison/DLSA	The accused must be given sufficient opportunity to understand the equipment and the courtroom procedure prior to a videoconference hearing. This orientation should be given either by the prison officer, the legal aid authorities or the paralegal volunteers in the initial days of entry in prison so that they are aware about the technology. An informative poster or flyer with necessary information may be made available at the prison. (See Annexure C)
30.	Ensure availability of room for confidential lawyer-client interaction in the prison and court.	Presiding judge	The videoconference proceeding must be preceded by private, confidential communications between the accused and their lawyer. A means of confidential communication between the accused, who is in a jail, and the lawyer in the courtroom, must be provided and must be available during the course of the proceeding as well.
31.	Ensure that lawyer has had the opportunity to communicate with their client in custody.	Magistrate	Check whether the lawyer and accused have communicated. Record reasons, if not. The magistrate shall record the presence or absence of the defense lawyer and whether they have used the private channel of communication to talk to the accused.
32.	Submit report on health of each accused to be produced from prison, for perusal by presiding judicial officer.	Prison	The officer-in-charge of prison should submit to the court a report about the health condition detailing injuries, if any, of the accused before the videoconference starts through e-mail, so that if the court deems it fit, it can verify the health status of the accused with the report submitted by jail authorities or police. This will also prove as a record of the accused person's health status between two videoconference sessions.
33.	Ensure copies of documents necessary for the hearing are shared with the accused.	Court	Court documents, that the parties or judge will rely upon during the course of the hearing, must be sent to the accused prior to commencement of the hearing.

**5. Safeguards while using Videoconference for Remand Proceedings
(During proceedings)**

34.	Procedures to verify the identity of the accused must be included in the process.	Magistrate	The judge shall verify the identity of the accused with the case records. It should also be the responsibility of the prison superintendent to verify the identity.
35.	Description of proceedings and persons present to be made to the accused.	Magistrate	The proceeding must commence with the judge introducing themselves, the defense lawyer, the prosecutor, the witness and any other relevant person in court, to the accused. The magistrate should assure the accused that they can communicate to them without fear or threat.

36.	Presence of lawyers (private or legal aid) at the accused/prisoners end should be permitted.	Bar council/Legal Services Institutions (SLSA/DLSA)	Appointment of legal aid lawyers by the legal services authorities to be present in each jail during remands by videoconference.
37.	Means to ensure proper audio and visuals of persons present during the proceedings	Magistrate	The judge should assure that any person who is permitted to be a part of the court room and is speaking to the court during a videoconference proceeding is within camera view and microphone range, so that the person can be seen and heard by other persons at the remote location, as well as by individuals in the courtroom.
38.	Discretion to discontinue proceedings must be enabled.	Magistrate	The judge conducting the proceeding should have discretion to discontinue any proceeding in which there are technical issues which detract from the fairness of the proceeding, or if there are matters which occur during the proceedings which would warrant conducting the proceeding with the defendant's personal appearance in the courtroom.
6. Safeguards while using Videoconference for Remand Proceedings (Post proceedings)			
39.	Quality slip generation system may be considered to enable record-keeping of data on connection, bandwidth, audio clarity, visual clarity etc.	Court/NIC	The court room and the remote point should have a software that would generate a slip at the end of every videoconference session detailing all the technological qualitative statistics that indicate the audio and video quality of the session to evaluate the quality of videoconference proceedings. In case the quality goes below the minimum standards as suggested by a technical expert any of the parties may apply for another session or a physical production.

ANNEXURE A: QUESTIONNAIRE FOR LAWYERS

Basic intake

- a) Date of interview
- b) Name
- c) Jurisdiction of practice
- d) Private/prosecutor/legal aid lawyer
- e) Years of experience

Pre-trial procedures

1. Have any of your clients been produced through VC for a remand hearing?
2. If yes to the above, what has been your experience? Were you able to gauge if your client has been physically or otherwise intimidated? Is your presence secured when such production takes place?
3. When remand production is through VC, how does the magistrate determine the physical condition of the accused?
4. Have any of your clients had confession statements under s.164, CrPC recorded through VC?
5. If yes to the above, what was your experience? Were you present at the time of recording of this statement?
6. Have any of your clients been part of a TIP through VC?
7. If yes to the above, what was your experience? Were you present at this stage?
8. Have any of your clients been produced through VC at the time of framing of charge?
9. If yes to the above, what was your experience?
10. Are there any other stages of pre-trial in which you client has been produced through VC? What was your experience?
11. Are there stages at pre-trial where production of the accused through VC is sufficient, such as compliance under s.207 CrPC?
12. Are you able to seek instructions from/communicate with your client when production in any pre-trial procedure is through VC?
13. Is there effective communication between the judge and the accused when production is through VC at any pre-trial procedure? Please share your experience.
14. Are you able to gauge if your client is under any form of intimidation when produced through VC at any pre-trial procedure?
15. Are the special needs of your clients capable of being addressed when produced through VC? Eg: language barriers, mental health conditions

Trial procedures

16. Have any of your clients been produced through VC at the time of recording of chief evidence of witnesses relevant to them?
17. If yes to the above, what has been your experience?
18. Have any of your clients been produced through VC at the time of recording of cross-examination of a witness relevant to them?
19. If yes to the above, what has been your experience?
20. Have any of your clients been produced through VC at the stage of recording statements under

s.313 of the CrPC?

21. If yes, to the above, what was your experience?
22. Have any of your clients been produced through VC at the stage of final arguments?
23. If yes to the above, what has been your experience?
24. Have any of your clients been produced through VC at the stage of sentencing?
25. If yes to the above, what has been your experience?
26. Are you able to get instructions from/communicate with your client when production is through VC at any stage of trial? Please share your experience.
27. Is there an effective chance of communication between the judge and the accused when production is through VC at any stage of trial?
28. Are you able to gauge if your client is under any form of intimidation when produced through VC at any stage of trial?
29. Are the special needs of your clients capable of being addressed when produced through VC? Eg: language barriers, mental health conditions
30. Is there a legal aid lawyer or paralegal present in the prison alongside your client, for providing of any basic legal assistance during VC hearings?

Technical aspects

31. Is there sufficient clarity on the time slot and court room in which your matters are to be taken up via VC?
32. Are there technical issues with connection through VC in the court?
33. Is there efficient linkage to the VC in prison?
34. Is the court open to public when trial is conducted through VC?

Covid related pre-trial procedures

35. Have any of your clients been produced before a magistrate for the first time upon arrest through VC?
36. If yes to the above, what was your experience? Are you able to gauge if your client has been intimidated?
37. When first production is through VC, how does the magistrate determine the physical well being of the accused?
38. Have any of your clients been produced through VC for a police custody remand hearing?
39. If yes to the above, what has been your experience? Is your presence secured when such production takes place? Are you able to gauge if your client has been intimidated?
40. Have any of your clients been produced through VC for a judicial custody remand hearing?
41. If yes to the above, what has been your experience? Is your presence secured when such production takes place? Are you able to gauge if your client has been intimidated?
42. When remand production is through VC, how does the magistrate determine the condition of the accused?
43. Have any of your clients been produced through VC at the time of framing of charge?
44. If yes to the above, what was your experience?
45. Have there been any other stages of pre-trial where your client has been produced through VC from prison? What has been your experience of the same?

46. Have there been any other stages of pre-trial where your client has appeared through VC after bail? What has been your experience of the same?
47. Are there stages at pre-trial where production of the accused through VC is sufficient, such as compliance under s.207 CrPC?
48. Are you able to seek instructions from/communicate with your client when production in any pre-trial procedure is through VC from prison? Was there any mechanism for you to communicate with your client in prison since physical mulaqaat was prohibited?
49. Is there effective communication between the judge and the accused when production is through VC at any pre-trial procedure?
50. Are you able to gauge if your client is under any form of intimidation when produced through VC at any pre-trial procedure?
51. Are the special needs of your clients capable of being addressed when produced through VC? Eg: language barriers, mental health conditions

Bail hearings during Covid

52. Have you argued any bail applications?
53. What was the mechanism of getting the bail application filed and listed for arguments? How long did it take?
54. Were you able to communicate with your client before applying for and arguing for bail? Please share your experience.
55. What were the issues concerning sureties and release of accused upon securing bail?

Trial stages during Covid

56. Has any court initiated trial related procedures through VC during Covid? For eg. recording of evidence, recording of statements under s.313 of the CrPC, etc. Could you please share your experience?
57. Is there a legal aid lawyer present along with the accused in prison when produced through VC?

Technical aspects

58. On what platform did the hearings take place?
59. What were the technical issues faced on the platforms used for VC production?
60. Have any of your clients been able to join a hearing through VC upon securing bail?
61. Were there SOPs/rules drafted for this purpose and circulated effectively?
62. Is the court open to public when trial is conducted through VC?

General

63. General comments and experiences

Annexure B: Questionnaire for Judicial Officers

Basic intake

- a) Name
- b) Jurisdiction and designation
- c) Years of service in the judiciary

Pre-trial procedures

1. Have any accused in your court been produced through VC for a remand hearing?
2. If yes to the above, what has been your experience? Were you able to gauge if the accused has been physically or otherwise intimidated? How do you determine the same?
3. If there are any technical issues with connectivity at the time of remand on VC, is a date given or is the accused directed to be produced in person?
4. Have you recorded any confession statements under s.164, CrPC through VC?
5. If yes to the above, what was your experience? How were you able to gauge the independence of the statement?
6. Have you been part of a TIP through VC?
7. If yes to the above, what was your experience?
8. Have any of your cases proceeded through VC at the time of framing of charge?
9. If yes to the above, what was your experience?
10. Are there any other stages of pre-trial in which the accused was produced through VC? What was your experience?
11. Are there stages at pre-trial where in your opinion production of the accused through VC is sufficient, such as compliance under s.207 CrPC?
12. Are you able to communicate effectively with the accused when production in any pre-trial procedure is through VC?
13. Are you able to gauge if the accused is under any form of intimidation when produced through VC at any pre-trial procedure?
14. Are you able to gauge special needs of accused when produced through VC? Eg: language barriers, mental health conditions
15. How are lawyers allowed to communicate with the accused when they are produced through VC?
16. Is there a legal aid lawyer or paralegal present in the prison alongside the accused, for providing of any basic legal assistance during VC hearings?

Trial procedures

17. Have any accused been produced through VC at the time of recording of chief evidence of witnesses relevant to them?
18. If yes to the above, what has been your experience?
19. Have any accused been produced through VC at the time of recording of cross-examination of a witness relevant to them?
20. If yes to the above, what has been your experience?
21. Do the accused have an opportunity to interact with you directly when evidence is being recorded

when their presence is secured through VC?

22. Have any accused been produced through VC at the stage of recording statements under s.313 of the CrPC?
23. If yes, to the above, what was your experience?
24. Have any accused been produced through VC at the stage of final arguments?
25. If yes to the above, what has been your experience?
26. Have any accused been produced through VC at the stage of sentencing?
27. If yes to the above, what has been your experience?
28. Are you able to effectively communicate with the accused when production is through VC at any stage of trial?
29. Are you able to gauge if the accused is under any form of intimidation when produced through VC at any stage of trial?
30. Are the special needs of accused capable of being addressed when produced through VC? Eg: language barriers, mental health conditions
31. How are lawyers allowed to communicate with the accused when they are produced through VC, especially if they state that they need to confer with their clients?
32. Is there a legal aid lawyer or paralegal present in the prison alongside the accused for providing of any basic legal assistance during VC hearings?

Technical aspects

33. Is there sufficient clarity on the time slot and court room in which your matters are to be taken up via VC?
34. Are there technical issues with connection through VC in your court?
35. Is there efficient linkage to the VC in prison?
36. Is the court open to public when trial is conducted through VC?

Covid related pre-trial procedures

37. Have any accused been produced before you for the first time upon arrest through VC?
38. If yes to the above, what was your experience? Are you able to gauge if the accused has been intimidated? How do you determine the same?
39. Have any accused been produced before you through VC for a PC remand hearing?
40. If yes to the above, what has been your experience? Are you able to gauge if the accused has been intimidated? How do you determine the same?
41. Have any accused been produced before you through VC for a JC remand hearing?
42. If yes to the above, what has been your experience? Are you able to gauge if the accused has been intimidated? How do you determine the same?
43. If there are any technical issues with connectivity at the time of remand on VC, is a date given or is the accused directed to be produced in person?
44. Have any accused been produced before you through VC at the time of framing of charge?
45. If yes to the above, what was your experience? Are you able to effectively communicate with the accused?
46. Have there been any other stages of pre-trial where accused have been produced before you through VC from prison? What has been your experience of the same? Are you able to effectively

communicate with the accused?

47. Have there been any other stages of pre-trial where accused have appeared through VC after bail? What has been your experience of the same?
48. Are there stages at pre-trial where in your opinion production of the accused through VC is sufficient, such as compliance under s.207 CrPC?
49. Are there any stages of trial that have taken place through VC?
50. If yes to the above, what has been your experience? Were you able to effectively communicate with the accused?
51. Are the special needs of the accused capable of being addressed when produced through VC? Eg: language barriers, mental health conditions
52. How are lawyers allowed to communicate with the accused when they are produced through VC, especially if they state that they need to confer with their clients?

Bail hearings during Covid

53. Have you heard any bail applications through VC?
54. Does the accused participate in the bail hearings before you?
55. How are lawyers allowed to communicate with the accused, especially if they state that they need to confer with their clients?

Technical aspects

56. On what platform did the hearings take place?
57. What were the technical issues faced on the platforms used for VC production?
58. Were there SOPs/rules drafted for this purpose and circulated effectively?
59. Is the court open to public when trial is conducted through VC?

General

60. Have there been any training programmes for the use of VC in criminal trials?
61. Do you have any suggestions for safeguards to be built into VC hearings?

VIDEO CONFERENCE HEARINGS & YOU

What is a Video-Conferencing or 'VC' hearing?

Video Conferencing is the technology that allows you to attend your case hearing in Court, from the prison premises.

Where is the VC hearing held?

VC hearing is held in a 'VC room' set up in the prison. A VC room usually has a computer or a TV-like screen, camera, microphone and speakers. A similar VC system is installed in the Courtroom.

How will you appear before the Court?

Through audio and video shared via the camera and microphone attached to the computer or TV-like screen in the VC room setup in the prison.

Will your lawyer also attend VC hearing?

Yes, it is mandatory that your lawyer is present in Court during your VC hearing.



What generally happens before the VC hearing?

- ▶ You will be **informed** by the prison authorities that you would be produced through VC on the day and time decided by the concerned judge.
- ▶ **Before the VC hearing**, you would be asked to sit/stand before the computer or the TV-like screen with an attached camera.
- ▶ **If you are having trouble** in seeing or hearing the Court on the screen, ask the person-in-charge of the VC room in the prison to help you.
- ▶ **You should try and communicate** with your lawyer either through telephone or through your family (where facility is available in the prison) or other permissible means to understand any specifics of the hearing or share any instructions you may have for your lawyer.

Can you request for a physical hearing in Court?

Yes, you can request for a physical hearing in Court either through an application filed by your lawyer or through an application filed through the prison legal aid clinic stating reasons for seeking a physical hearing. If your VC hearing has resulted in an adverse order in your case, this can also be a ground for seeking a physical appearance in Court. However, the Judge may decide to allow or disallow your application.

If you have a complaint or feedback regarding the VC hearing, who can you approach?

- You have the right to share your complaints or feedback** regarding the VC hearing. You may submit your complaint/feedback to the Court, where your case is pending, through:
- ▶ your lawyer, or
 - ▶ the prison legal aid clinic or a representative of the District Legal Services Authority, or
 - ▶ the prison authorities, or
 - ▶ your family/friends, or
 - ▶ directly to the Court during the hearing requesting permission to share your complaint/feedback.



Will you be allowed to speak to the judge during the VC hearing?

Yes, you have the right to speak to the judge during the VC hearings, with their permission. You must inform the judge:

- ▶ if you do not have a lawyer and need a legal aid lawyer to be appointed;
- ▶ if you cannot see your lawyer on the screen and wish to ensure his/her presence on-screen;
- ▶ if you think that your lawyer has misrepresented you during the hearing;
- ▶ if you haven't been able to communicate with your lawyer and wish to discuss something confidentially before or during the hearing;
- ▶ if you are not able to follow the Court proceedings, you can seek clarifications and copies of documents produced;
- ▶ if you have any problem in prison or you are facing any form of threat or coercion in prison, you should request the judge that you wish to discuss something confidentially.
- ▶ any other issue that you wish to inform the judge.

For any other doubts or queries regarding Video Conferencing hearings, please talk to your lawyer or legal aid lawyer/paralegal volunteer at the jail legal aid clinic or representative of the District Legal Services Authority.



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CHRI Programmes

CHRI seeks to hold the Commonwealth and its member countries to high of human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. Its research, publications, workshops, analysis, mobilisation, dissemination and advocacy, informs the following principal programmes:

1. Access to Justice (ATJ)

Police Reforms: In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme in India and South Asia aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In Tanzania and Ghana, CHRI examines police accountability and its connect to citizenry.

Prison Reforms: CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting systematic failures that result in overcrowding and unacceptably long pre-trial detention and prison overstay, it engages in interventions and advocacy for legal aid. Changes in these areas can spark improvements in the administration of prisons and conditions of justice.

2. Access to Information

* **Right to Information:** CHRI's expertise on the promotion of Access to Information is widely acknowledged. It encourages countries to pass and implement effective Right to Information (RTI) laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana and Kenya. In Ghana, CHRI as the Secretariat for the RTI civil society coalition, mobilised the efforts to pass the law; success came in 2019 after a long struggle. CHRI regularly critiques new legislation and intervenes to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. It has experience of working in hostile environments as well as culturally varied jurisdictions, enabling CHRI bring valuable insights into countries seeking to evolve new RTI laws.

***Freedom of Expression and Opinion- South Asia Media Defenders Network (SAMDEN):** CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia. This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media professionals who have experienced discrimination and intimidation, SAMDEN has developed approaches to highlight pressures on media, issues of shrinking media space and press freedom. It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with RTI movements and activists.

3. International Advocacy and Programming

Through its flagship Report, *Easier Said Than Done*, CHRI monitors the compliance of Commonwealth member states with human rights obligations. It advocates around human rights challenges and strategically engages with regional and international bodies including the UNHRC, Commonwealth Secretariat, Commonwealth Ministerial Action Group and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for SDG 16 goals, SDG 8.7 (see below), monitoring and holding the Commonwealth members to account and the Universal Periodic Review. We advocate and mobilise for the protection of human rights defenders and civil society spaces.

4. SDG 8.7: Contemporary Forms of Slavery

Since 2016, CHRI has pressed the Commonwealth to commit itself towards achieving the United Nations Sustainable Development Goal (SDG) Target 8.7, to 'take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.' In July 2019 CHRI launched the Commonwealth 8.7 Network, which facilitates partnerships between grassroots NGOs that share a common vision to eradicate contemporary forms of slavery in Commonwealth countries. With a membership of approximately 60 NGOs from all five regions, the network serves as a knowledge-sharing platform for country-specific and thematic issues and good practice, and to strengthen collective advocacy.



**FRIEDRICH NAUMANN
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South Asia

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