

The Legal and Practical Obstacles to Remote Trial Technique

العقبات القانونية والميدانية أمام تقنية المحاكمة عن بعد

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Abstract:

Almost all legal systems in the world have modernized justice through several measures, including videoconferencing, as well as the use of video chat, which was demonstrated in Algeria under Law 15-03 on the modernization of justice, in addition to other measures aimed at the development and modernization of the judicial system, in order to be able to reduce the distances and costs, speeding up procedures and serving public interest, especially in issues such as those that affect public morals and ethics and juvenile issues.

Despite the advantages of the above-mentioned techno technique (VCT) and its reliance on a unified technical structure and high security systems in a very special courtroom, and thus helps to preserve the privacy of some procedures in general (public privacy), it has been criticized for some legal obstacles related to the rights of the accused such as digital privacy and confidentiality, and other practical such as security and technical specialization.

Keywords:

Constraints - Justice - Modernization - Video Conference - Remote Trial - Digital Privacy – Confidentiality

ملخص:

تقريبا جميع النظم القانونية في العالم قامت بتحديث العدالة من خلال عدة تدابير منها تقنية عقد المؤتمرات عبر الفيديو، وكذلك استخدام الدردشة المرئية، وهو ما تجلّى في الجزائر بموجب القانون 15-03 المتعلق بعصرية العدالة، إضافة إلى تدابير أخرى هادفة لتطوير وتحديث النظام القضائي، وهذا سعيًا إلى أن يكون القطاع قادرا على تقليل المسافات والتكاليف وتسريع الإجراءات وخدمة المصلحة العامة، لاسيما في قضايا مثل تلك التي تؤثر على الآداب والأخلاق العامة وقضايا الأحداث.

ورغم إيجابيات التقنية المذكورة أعلاه واعتمادها على بنية تقنية موحدة وأنظمة حماية عالية في قاعة محكمة خاصة للغاية، وبالتالي فهي تساعد على الحفاظ على خصوصية بعض الإجراءات بشكل عام (الخصوصية العامة)، إلا أنها تعرضت للنقد بسبب بعض المعوقات القانونية المتعلقة بحقوق المتهم كالخصوصية الرقمية والسرية، وأخرى ميدانية كالأمن والتخصص التقني.

كلمات مفتاحية:

المعوقات، العدالة، العصرية، مؤتمر الفيديو، المحاكمة عن بعد، الخصوصية الرقمية، السرية...

Introduction:

The principle of publicity in trials is an important safeguard for the proper functioning of justice because it is an essential element of fair trial. It gives the public the right to observe debates and deliberations in court sessions to demonstrate the integrity of the judiciary.

However, the Criminal Procedure Law allows the court to order all or part of the proceedings to be heard in a closed hearing in order to respect public order or to preserve morals or, if necessary, for the emergence of the truth, as well as the fact that juvenile courts should be held in secret only other courts.

Despite the benefits of publicity, the trial has been criticized., thus although it has been decided in favor of the accused, it may harm his interests because it is a means of exposing the defects of the perpetrator and stripping him, which may prejudice his dignity. It would arouse public sentiment and influence the good conduct of trial proceedings if judgments were issued contrary to what was expected of an audience that was unaware of legal issues.

In recent years, the use of videoconferencing technology (VCT) has increasingly become common in legal systems over the world, and used to conduct administrative, civil and criminal proceedings, as well as pretrial release and sentencing hearings.⁽¹⁾

Historically, the first use of VCT in the legal system occurred in an The State of Illinois court in 1972 to conduct a videophone bail hearing and Since then, its use has spread significantly, with over half of States allowing for VCT in some kinds of

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criminal proceedings by 2002, and by 2009, the proliferation of VCT in the courtroom was over half to conduct initial appearance proceedings.

The recent amendments in the Algerian legislation carried the system of remote trial and the use of videoconferencing which have been introduced along with measures taken by the trustee ministry in order to develop and modernize the judicial system in Algeria. These techniques can reduce distances and facilitate the task for decision-makers, reduce costs and serve the public interest.

Such technique use has pros and cons; virtual courtrooms may be cheaper but they can jeopardize defendants' right to fair trial, say campaigners, thus it presents unique privacy issues, as personal information are at risk in two ways: via an unsecured online conference, and by those attending the trial,⁽²⁾ i.e. security and privacy issues are a growing concern, which require special legal consideration and logistical planning; so

What are the main constraints before the VCT use in remote trial? And to answer the problematic, we'll divide our research into two main chapters.

Section I: The practical obstacle to VCT in judiciary

The rapid technological development in various areas of life has forced the public utilities to develop modern enabling mechanisms to provide their services better and faster in light of the increasing needs of citizens;

Among the public utilities, in various countries, that pay attention to this issue, is the Justice Utility which relies on modern techniques to provide its various services, notably the technology of visual conversations during investigation and trial.⁽³⁾

Despite that VCT has advantages; it also has its numerous advantages such as it may be heavily dependent on the network connection. Bandwidth issue could lead in a bad transmission of video, sound and files, which is likely to affect the communication and cooperation. Besides, although we can use video conferencing tool to create a virtual face-to-face meeting, it is still lack of personal interaction to some extent.⁽⁴⁾

A) Issues related to judiciary sector:

1- Definition of VCT in judiciary

Many scholars attempt to present in more or less simple terms the technical aspects of videoconferencing as well as the rather daunting terminology associated with it; They add that the reader should be warned that there is wide latitude and even some confusion in the terminology used by different authors.⁽⁵⁾

Linguistically, the term "visual talks" is a translation of "video conference", an expression derived from both English and French; it's divided into two words, the word «video» and the word « conference ». The first part corresponds to "TV" which is originally a French word newly introduced into Arabic,⁽⁶⁾ a device that transmits the image and sound by different waves of communication. The second part means the gathering of a number of individuals for a discussion, lecture or dialogue whose subject is precise and specific.

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Idiomatically, Videoconferencing (or video conference) means conducting a conference between two or more participants at different sites by using computer networks to transmit audio and video data.⁽⁷⁾ In judiciary, it's an audiovisual communication technology, a modern means or mechanism for initiating criminal investigation or proceedings. In some cases, it is used to hear witnesses and collaborators with justice to expose the vagueness of serious crimes, especially the organized ones. It extends to a trial of the accused, despite his existence in custody.⁽⁸⁾

It is also defined as an audiovisual technique that is used by direct transmission of voice and image between courts of different stages and competencies and penal institutions within a legal framework, in order to interrogate an accused, a witness, a civilian party or an expert who cannot be present at the Court because of their criminal status of impalement or for other reasons such as the assignment of movement to the seat of the trial court.⁽⁹⁾

2- The VCT origin in justice sector

3- At the international level:

The basis for the use of videoconferencing technology in justice sector at the international level dated back to the European Convention on Mutual Assistance in Criminal Matters, adopted by the EU on November 30th, 2000,⁽¹⁰⁾ amending the European Convention on Mutual Assistance in Criminal Matters of 1959,⁽¹¹⁾ which approved the use of this technique in the remote criminal investigation, limiting it thereof to hearing witnesses and exchanging reports of experts between the EU and the contracting States in judicial field cooperation, and making its use in this regard linked to the case of necessity when it is proved that it is not appropriate or impossible for the witness or expert to be transferred to the requesting State before its judicial authority.⁽¹²⁾

At the domestic level:

As for domestic laws, the legal basis, several countries legislations that have used this technique exist. The Italian law has been adopted by Decree No. 306 of 1992, as amended by Law No.356 of 1992, approved that technique by including modalities of VCT in criminal investigation, thus The Italian judicial bodies could hear witnesses and various other statements concerning collaborators with the justice system orally and by TV, and this to fight the mafia gangs. This law was issued to protect witnesses and collaborators from the risk of retribution and as a guarantee for the protection of all those who contribute to the criminal investigation, particularly when using video conference.⁽¹³⁾

The technique has been used also by USA in large-scale judicial proceedings both in the international sphere through international judicial assistance or in criminal matters included in concluded international agreements⁽¹⁴⁾ on the use of such technology in the criminal or domestic sphere through the issuance of legislations by majority of states that allow the use of this technique in remote investigation and trial,⁽¹⁵⁾ taking into account the reduction of psychological and mental stress that may be exposed to the child during his summons to testify, especially when confronted with the accused or the victim.⁽¹⁶⁾

In general, most developed countries have used this technology by incorporating it into their domestic laws after ratifying the treaties and international conventions they recognize. Some other countries have only applied it at a local level in some regions and in certain cases often have a relationship with the children's psychological status ; while the third world countries are far from using this technology because of its weak technical capabilities and high cost, but at the beginning of the second decade of this millennium, some developing countries began to use this technology and introduced it in legislation and practically in their legal systems, even if only in a limited manner.⁽¹⁷⁾

4- The justifications for the use of VCT in justice sector

The introduction of this technology to the justice sector was not merely a coincidence or a legislative tradition. It was necessary on the basis of many legal and practical justifications for the justice system. This use is only in a specific legal framework that guarantees the integrity of the process on one hand and the rights of the litigants in another one as enshrined in the provisions of Law 15/03 mentioned above.

- Coping with the comparative systems developments witnessed, particularly in the field of modernization of justice sector and the introduction of modern technologies, a translation of the international texts and conventions that approved the use of this technology to facilitate litigation and support international cooperation to combat crime.⁽¹⁸⁾
- Relieving pressure on the courts and on the corps charged with transferring the accused, as the conduct of the remote trials ensures greater speed of litigation proceedings with less effort and perhaps at a lower cost.
- Reducing distances for witnesses in remote locations, in order to encourage the participatory role of citizens through cooperation with the judiciary to reduce crimes and eliminate the crime of covering up criminals.
- Making use of the expertise of experts in areas not found at the level of jurisdiction of some courts.
- Deciding on case or completing investigation procedures within reasonable timing.

In Algeria, the use of VCT technology has been delayed until Law 15/03, on the modernization of justice in 2015, which aims to modernize the justice sector through a number of procedures, including the use of remote video conference technology in judicial proceedings.⁽¹⁹⁾ It presents an extension of the ratification under reservation of the UN Convention against Transnational Organized Crime, adopted by the UN General Assembly on November 15th, 2000, by virtue of Presidential Decree No.02-55 of 2002, which provided for the possibility of using this technology in the field of Combating crime in support of international cooperation.⁽²⁰⁾

B) Issues related to quality principles:

1-Sound and image quality

Despite its air of novelty, videoconferencing with different fields is not a new idea. The first major experiments were performed in the 70s in interpretation: the Paris – Nairobi (" Symphonie Satellite ") by UNESCO in 1976 and the NewYork-

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Buenos Aires experiment by the UN in 1978. In both cases and also in similar experiments in the 80s, the lessons can be drawn from these tests are:

- The loss of visual information because of inadequate image quality
- Remote work with sound only is not workable for conference purposes under any circumstances.⁽²¹⁾
- The psychological state and reaction of the offender is an issue to be neglected before the judge, because it differs in VCT from face-to-face trial (real audience).
- VCT can be sometimes quite expensive; however its cost must be weighed against its effectiveness.⁽²²⁾

In considering the drivers for VC technology, it is helpful to balance the views with some of the restraining influences which make it less attractive. For example, although the quality of video conferencing systems has improved immeasurably over the last 20 years, they are still subject to technology mediated vulnerabilities (breaks in connection, picture low quality, poor synchronization of video and audio, ...)⁽²³⁾ especially in developing countries.

The videoconferencing system should be set up in such a way that the persons (accused, judge, registrar...) concerned are provided with an accurate and clear picture of what is happening in the foreign side (jail, courtroom). Concerning the quality of the visual and audio connection, sufficient account should be taken of the interests of the persons concerned to avoid sub-optimal solutions. Consequently, the videoconferencing system should be of high quality. Only then will a hearing conducted through videoconferencing provide a reasonable alternative to a face-to-face hearing. **I.e.** that sounds and images need to be aligned accurately and reproduced without any perceptible delay. Furthermore, the external appearance, facial expressions and gestures of the persons concerned should be clearly perceptible.⁽²⁴⁾

From the defendant's side, both substantive and procedural due process concerns also arise due to the remote and sometimes perceived impersonal nature of video proceedings, thus the defendant's physical presence in the courtroom is critical for making judgments of his or her credibility and competence, as well as physical and psychological wellbeing which are most apparent when considering conducting a full criminal trial using videoconferencing technology, so "Given that the defendant's freedom prior to trial is a matter of great consequence, there is at least a serious argument that procedural due process requires the defendant's physical presence at a bail hearing".⁽²⁵⁾

2- Technique and training

Planning for wiring infrastructure must start early in the design process. The proper integration of the infrastructure requirements into the courthouse requires an understanding on the part of the entire design team of the requirements of these systems at the earliest phases of design;⁽²⁶⁾ so the organizations and courts depend on hardware and installation that is provided by others: from videoconferencing apparatus, to internet bandwidth and systems training. The implementation of

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videoconferencing covers such a broad arsenal of technical requirements that it becomes an obstacle in terms of costs and user friendliness. Thereby, videoconferencing users want an easy, preferably one touch system, which need no extra training or manuals. Adequate training sessions need to be planned first when it is implemented, new potential users need to be trained and also stimulating personnel.⁽²⁷⁾

The usability of videoconferencing equipment plays a core role in the practical preparations. It's always a needed to have contacts between the technical experts of the respective courts, jails or other videoconferencing locations in good time before the videoconference, in order to be sure that VCT equipment (cameras, microphones, screens,...) is functioning in good manners. It is also advisable to the experts to test the equipment and the connections at least one day before the VCT.⁽²⁸⁾

The training is not limited to personnel only, but it extends to judges, thus in a survey made in the courts of appeals in USA, the extent to which judges had experience with videoconferencing was a factor in their perceptions of the technology. The survey found that judges with more videoconferencing experience noted that the decreased personal interactions were less of a problem, suggesting that at some point they become accustomed to this mode of interaction. The more experienced judges encountered technical problems than did judges with less experience, perhaps due to the fact that those judges have had more opportunities for things to go wrong.⁽²⁹⁾

In that survey, many judges we interviewed, among them many had used videoconferencing for more than oral arguments and, again, felt positively towards the technology, largely due to the reduction in travel time that resulted. However, the positive response toward VCT voiced in these interviews suggests that the technology can be beneficial, when used correctly, in the courts of appeals. In the words of one judge, "Videoconferencing is the wave of the future."⁽³⁰⁾

3- Skilled Staff

Specialized staff is based on a managed technical service which allows court participants to focus on their prime responsibilities (investigations, trial ...), so the service should be with an appropriate security certification) by the supplier, in a centralized video infrastructure. For example, in a USA state, the service is essentially comprised of three core elements: Managed video service, delivering secure video links to remote locations, an operator assistance, to provide assistance for court staff to connect a video link to and external locations.⁽³¹⁾

As with any equipment, training is important for anyone operating or supporting video telecommunications equipment. Operator knowledge was a concern voiced by many judges and representatives. Several judges say that they felt uncomfortable operating the equipment (judge did not understand how to operate the camera, the image is small of him...) so they could not operate the system and had to stop and call for support several times during the hearing. All of these issues can be corrected with proper user training methods.⁽³²⁾

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Drawbacks of VCT technology are lack of access or experience with the technology,⁽³³⁾ discomfort with using the technology, system errors that can significantly impede communication, and poor visual or audio quality, the matter that suggested remedies for these potential inadequacies include training for court personnel and technological upgrades.⁽³⁴⁾

Some experts suggested that jurisdictions may choose to formalize training for individuals who operate or engage in videoconferencing systems in courts and jails, thus they staff training on the use of VCT equipment. In some instances, training was listed as a requirement for judges, prosecutors, and defenders, in order to operate videoconferencing technology in their courts where employees had no formal training or education in managing the systems. Experts added a recommendation that judges set up peer-training sessions to discuss factors important to their participation in videoconferences, such as communication and maintaining decorum of the courtroom.⁽³⁵⁾

Section II: The legal obstacles to VCT use

The Algerian legislator's dedication to modern technologies in the justice sector, such as the videoconferencing technology, is a significant step towards the development of the judicial system and the best conduct of its various units and services, especially if this codification is accompanied by a clear process both at the investigative or trial phase or even in other aspects such as international cooperation against organized crime or in internal and external training for justice sector personnel⁽³⁶⁾ in order to increase the profitability of human resources, which positively affect the performance of the facility in general.⁽³⁷⁾

The above-mentioned technology continues to pose legal issues as obstacles and challenges to its use, among them those related to the procedures themselves and others related to defendants', witnesses' and victims' fundamental rights and principles enshrined in most legal systems, particularly regarding the right of defendants to confront and cross-examine witnesses, privacy,⁽³⁸⁾ confidentiality and security, obstacles that have not yet been overcome in many national jurisdictions.

A) Issues related to procedures:

1- The use of VCT in investigation

Article 15 of the Law on the Modernization of Justice provides that: "The investigating judge may use remote video conference to interrogate or hear a person and to conduct confrontations between several persons. It could also be used to hear witnesses, civil parties and experts. The trial body dealing with misdemeanors may resort to the same mechanism to receive the statements of a detained defendant if the person concerned and the Public Prosecution agree."⁽³⁹⁾

Here, the provisions of article 15 refer to the use of this technique at the investigative stage and even at the trial.⁽⁴⁰⁾ Some scholars have considered that the criminal investigation by using this technique a departure from the general rule in the

investigation sessions taking place within one geographical area.⁽⁴¹⁾ This poses several procedural problems, namely, the issue of jurisdiction, contradictory,⁽⁴²⁾ adversarial system, morality and codification. However, there are many views that these issues are not presented in view of the fact that the presence of a voice and a picture is an actual presence in which the court investigate or prosecute. The question of codification has already been required to record statements literally under the provisions of article 14 of the same law.

Generally, the investigating judge, in the event that the hearing, interrogation or confrontation of unencumbered persons, whether witnesses, experts or parties, as necessary, has the possibility of using the mechanism from the seat of the court closest to the person, to ensure confidentiality on the one hand, in order to facilitate the task of confrontation or interrogation, in addition to proving the identity of the person and the incident in general, in the presence of the competent public prosecutor and the registrar to record the evidence previously mentioned in accordance with the use conditions.⁽⁴³⁾

In the event of a public action against an accused in another case,⁽⁴⁴⁾ the investigating magistrate will summon the accused in a normal manner. After the summons, the accused's lawyer submits a request to notify the examining magistrate that the accused is emailed in another case. After that the investigating judge has ascertained the criminal status of the accused through via a request to the public prosecutor, the procedures of using the video conference technique start to investigate the detained accused by another application submitted to the public prosecutor of the competent court, who in turn shall correspond to the procurator of the court whose jurisdiction falls within the penal institution in which the accused is present. Hearing will be done in accordance with the previous-mentioned conditions.⁽⁴⁵⁾

What's noticed about the use of this technique in the investigation phase is the lack of precise and quick procedures that ensure that it is used as a substitute for normal contradictory investigation, and since its use is guaranteed by written procedures, correspondence and approval requests, this may limit its practical usefulness.⁽⁴⁶⁾

5- The use of VCT in trial

First, the Algerian legislator did not use the phrase "remote trial," but rather used a general term for the investigation and trial, as it is evident from the title of chapter IV of Law 15/03, "The use of videoconference during judicial proceedings."⁽⁴⁷⁾

The use of videoconferencing technology is limited to cases of misdemeanors only and under clear conditions of the consent of the accused person on the one hand and the Public Prosecution on the other hand,⁽⁴⁸⁾ knowing that term «competency» may not necessarily mean a court of misdemeanors alone, but extends to a criminal court when it considers a case of a description or qualification of a misdemeanor.

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Therefore we are wondering the possibility of adhering to the text of the article stating that the trial judge can resort to this technique to receive statements only, without continuing to broadcast the entire hearing in front of the accused or that the Algerian legislator intended to conduct a full trial guaranteeing the defendant the right to see what is going during trial.⁽⁴⁹⁾

Based on the trials that have been done in this way, the case file reaches the trial judge carrying the phrase - under arrest for another reason - the judge shall ascertain the criminal status of the accused by submitting an application to the public prosecutor. In the proven case of impalement and the presence of justifications enabling the use this technique, the judge shall submit a request to the procurator of the Court, who in turn notifies the competent Public Prosecution to ascertain the consent of the parties, and scheduling a session of receiving the statements with the same conditions and procedures followed in the investigation phase.⁽⁵⁰⁾

For the Algerian experience, the VCT technology was used at the level of the judicial facility initially to hold training meetings and symposia for justice personnel, and then for the first time in litigation proceedings. The first trial using this technique was conducted on September 30th, 2015 at Kolea (Tipaza) court, held in public in the presence of the defense, and was open to citizens.

A courtroom equipped with audiovisual facilities was set up by the penal institution of Kolea⁽⁵¹⁾, the trial began immediately on a large visible screen in the competent court and on the other hand, the accused "Z.G" in the Kolea jail, where the he was confirmed by the judge through the fingerprint after his consent to be tried by this technique to forward the trial proceedings normally. Two other persons were tried in the same penal institution on the same day at the Kolea court in a remote trial session, hoping that it would be circulated to the rest of the other courts by the Algerian legislator under Law 15/03.⁽⁵²⁾

3- Storage and record of statements and documents

The use and storage of videoconferencing data was identified as having important implications and effects for videoconferencing implementation because it can be used later, so the responsibility for ownership of data is for an important consideration because it has real cost implications. In some settings, videoconferencing data are not stored. The expert workgroup discussed the role of videoconferencing data as part of the court record—some identified videoconferencing data as part of the record and others indicated it is not part of the official court record. Thus, the legal requirements to preserve and save data are different across jurisdictions.⁽⁵³⁾

In USA there are courts of record require verbatim records of their proceedings. In general terms, courts can be divided between those which use stenographic or stenomask court reporters to generate the record and those which use some form of electronic voice recording. The record is of importance to both trial and appellate courts and to the attorneys and parties involved.⁽⁵⁴⁾

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In Algeria, article 14 of Law 15/03 stipulates that statements or stages of trial must be recorded by using the video conference technique on an electronic platform or CD-ROM to ensure its safety.

In the Algerian legislation, the last paragraph of the same article 14 provided that « statements must be written in full and verbatim on the record signed by the appointed judge and the registrar; and perhaps the direction of the Algerian legislator not to overlook the writing, is originally due to the possibility of damage to the electronic devices, so that statements and investigation procedures will be confirmed by written records for reference.

Recent developments in court record technology demonstrate how quickly we are developing the infrastructure necessary for a virtual trial. Most court reporters have been using modem technology for many years, generating computer-assisted transcription.

Recording is related to the trial itself and to evidence which normally consists of witness testimony and actions documents, charts, photographs or other images, and physical objects. If all evidence can be given electronically, the core components of a virtual trial are present.

Videoconferencing systems differ in regard to how remote hearings are stored and if they serve as a court record. Some courts may allow a recording of the videoconference, a transcript, or audio recording to serve as a court record while others have no standard method for archiving these hearings.

Court records can be either digitally audio recorded or transcribed, thus some States and counties have moved away from court reporters as the standard method of creating a court record, others use the videoconferencing recording as the hearing or trial record despite that it's just a process to share information and that the official trial or hearing record is still recorded by a clerk.⁽⁵⁵⁾

Presenting documentation in court becomes difficult when videoconferencing is involved. Specifically, that vendors struggle with ways to set up systems to sign, review, and exchange court documents. So as courts are moving toward videoconferencing, the need for an electronic document management system intensifies which led to that the defendant at the detention facility has to have the documents in a timely manner and must have access to the documents during a proceeding in a secured manner.⁽⁵⁶⁾

B) Issues related to the fundamental rights and principles:

1- The consent of the accused and approval

First, VCT brings to bear the literature from other fields, particularly communications and social psychology. That body of literature suggests that videoconferencing may have a negative impact on the way the defendant is perceived by those in court as well as the representation the defendant receives and the way in which he experiences the criminal justice system. Scholars argue that courts should not extend their reliance on VC further and instead must undertake studies to explore the impact of this technology in criminal proceedings. In addition, they advocate that the courts take steps to ameliorate the negative impact of VC through design of

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systems and training of those who participate in VC proceedings, they also suggest that courts make VC equipment available for communication between incarcerated defendants and their attorneys.⁽⁵⁷⁾

The accused appearing before a court is entitled to certain minimum guarantees such as the right "to be tried in his presence",⁽⁵⁸⁾ and the right "to be confronted with the witnesses against him", but this right is interpreted as meaning that an accused has the right to be physically present, this right, however, is not absolute as an accused can waive or forfeit the right to be physically present at trial which is the case in VCT. This is based on to guard against the possibility of parties challenging the legality of the use of VC as a way of receiving evidence or conducting trials.⁽⁵⁹⁾

In many jurisdictions, accused persons in custody may appear in any proceedings either by consent, or at the direction of the Court. However, all remands of persons in custody will be conducted by video link unless otherwise ordered by the Court, as in Algeria, where the last paragraph of article 15 of Law 15/03 stipulates that the accused who is a jailer of a penal institution in cases of misdemeanors⁽⁶⁰⁾ must agree to use this technique to initiate the proceedings of his trial and so for the Prosecution. In case of refusal by one of the parties,⁽⁶¹⁾ the use of this technique would be forbidden in the remote trial or to receive statements from a jailer in a penal institution.

There are different legislative views regarding the consent issue, among which:

- Persons in custody may appear in any proceedings either by consent, or at the direction of the Court. However, all remands of persons in custody will be conducted by video link unless otherwise ordered by the Court.
- A direction will not normally be made unless every party entitled to be given notice and to be heard at the hearing has consented to the use of VCT.
- Physical appearance in court is not required for a number of stated applications, including bail, adjournment, subsequent remands in custody, arraignment (not on trial date), or status hearing in committal proceedings.
- Physical appearance in court is required (unless the court directs otherwise) for the first appearance after arrest (unless the accused consents to appearance by way of VCT), inquiry into fitness to stand trial, committal hearing, trial, sentence hearing, appeal.
- The court may direct videoconferencing evidence in any case if it is consistent with justice and reasonably practicable. All parties' consent is required unless the court is satisfied that exceptional circumstances exist.
- Conducting VCT where defendants and their legal representative consented to the use of the technology.⁽⁶²⁾

VCT may be made of it on the basis of the consent of all and on the direction of the judge.

It should be noted that in some jurisdictions such as Australia, there are costs and fees must be paid prior to the date of the conference, thus the party is responsible for the cost of each video link transmission is set out in the Video Link. The

conference will be cancelled without notification if the fee is not paid within this time. The Court's Videoconference Coordinator will provide support, costs may be incurred for administration and Audio Visual Technical unusual support requirements.⁽⁶³⁾

2- Strict confidentiality

Confidentiality is a principle of any system as well as a right, that client-lawyer consultation should be confidential, but consultations on video are frequently overheard by others because the booths/rooms in which they are held are not properly soundproofed, and because either or both sides sometimes need to shout to be heard, because of the poor sound quality of the line.⁽⁶⁴⁾

Concerns have not been allayed about confidentiality, thus majority of lawyers in courts expressed concerns about the confidentiality of the video and phone consultations they had held, whether because they suspected their conversations of being actively monitored or overheard. These concerns have not been allayed; the links currently used are in theory secure, but cyber security is a growing challenge since the frequent lack of confidentiality is a barrier to trust in lawyer-client relationships and threatens the legitimacy of the process for all parties.⁽⁶⁵⁾

Confidential communication between an attorney and a defendant is a common concern and of great importance when the two parties are communicating remotely, thus other defendants waiting for their hearings can overhear the discussions. There may be complaints about the way and the quality of representation and also the inability to have private conversation with the defendant during remote hearings, the matter that led to suggest providing locations with private phone lines in detention facilities to enable private attorney-client communications.⁽⁶⁶⁾

Communication confidentiality and honesty should be ensured by the means used, i.e. that this type of conversation is not conducted through social media or through unprotected networks, but through a special network developed in the justice sector called «The sectorial network of Ministry of Justice»,⁽⁶⁷⁾ where this network takes into account the privacy and sensitivity of information in justice sector, and ensures electronic communication and immediate and secure exchange of information between the different interests of the sector according to the system of intranets, where all the judicial and penal institutions have been linked to each other in addition to the Supreme Court and the State Council.

For the Algerian case, in 2006, all judicial and penal institutions were supported by local networks. These local networks of courts, Supreme Court councils, the State Council were also linked to the development of local networks at two pilot sites, the Algiers District Council and Oran, in 2004. The Central Administration since the beginning of 2007, and finally in the framework of cooperation with the European Commission has been linked to a parallel network called the «network help» working by satellite VSAT technology,⁽⁶⁸⁾ allowing contact with anyone from any site to testify; and with the issuance of Law 15/03, the network has been restructured and developed to secure video conference.

3- Security and privacy

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For the court, network security is important that the technology not allow opportunities, chances and gaps for unauthorized outside access. Security depends on the infrastructure set-up of the court or other institution involved in the VC. For instance, the use of wireless microphones and the installation of cabling in publicly accessed areas are examples of practices that may result in signals not being confined to the courtroom space.⁽⁶⁹⁾

Looking to conduct videoconferencing hearings has to take in concern cyber security, so ensuring a safe transmission of videos and records contribute in delivering fair trial while maintaining its privacy (of all parts),⁽⁷⁰⁾ otherwise, the physical safety of those in the room or those in prison as well as the safety of the equipment are compromised.⁽⁷¹⁾

Special security issues needed to be considered where an inmate is appearing before a court by way of video conference so as to ensure the inmate is able to give evidence without interference.⁽⁷²⁾ Courts will at all times have the ability to control the camera view at prison video conference sites. The magistrate or judge can have a view of the entire room and of all persons present at any time during the hearing. The magistrate or judge will also have a head and shoulders view of the witness at the remote point.

Security contributes in the protection of the private life of the parties (litigation parties, a third party) so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

As sensitive data may be exchanged via VC, it makes sense to ensure that it is secure. To this end, secure networks should be developed to cope with the key principles of data protection, one of which is also the idea of proportionality: the measures put in place must be proportional to the sensitivity of the data that is being handled. For instance, extra care should be applied when dealing with suspected persons (as opposed to sentenced persons) during handling and storing.⁽⁷³⁾

Experts indicated that planning for VC requires serious consideration and protection of civil liberties for defendants, and while ensuring the rights of defendants are met, jurisdictions that use VC must also take into account the rights and needs of victims who may not want to appear via a video. It is important that courts maintain the victim's privacy and protect the victim's identity, especially in cases involving children or sexual assault victims.⁽⁷⁴⁾

Conclusion:

Most of judicial systems over the world suffer from important deficiencies in terms of access and efficiency, and since the modern technology and globalization effect this sector, it was necessary to develop mechanisms and tools to cope this modernization through creating the so-called e-justice.

One of the main forms, of that development in reforming the justice sector and improving its performance, is the use of videoconferencing technique in criminal, civil and administrative matters in order to reduce waiting times and transport costs.

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Despite the advantages of VCT, it appears to pose a number of legal and practical challenges mainly the need to become familiar its use in a court setting, the legal nature of evidence collecting, face-to-face confrontation, privacy, security and confidentiality as rights in the context of modern communications technology, as well as the cost and quality of the equipments, storage of personal data and the judicial staff.

Bearing the above observations in mind, in the digital age, to overcome those theoretical and empirical shortcomings, it's needed to engage all legal and technical communities, to ensuring that these technologies are used to deliver real justice with enjoyment of human rights.

In this regard, The Algerian legislator, after the promulgation of Law 15/03 on the modernization of justice, has taken a great step towards e-justice, recognizing the use of several electronic technologies, such as e-authentication and videoconferencing as a result of the process of Algeria's signature on several international conventions that allow its use.

Findings:

- ✓ Researches and experiences from use of VCT in criminal justice indicate potential advantages and disadvantages.
- ✓ The good quality and **the cost of** reliable technology equipment will continue to remain an issue for some developing countries, so others suggest mobile videoconference instead since it is more versatile.
- ✓ VCT technique fails in developed countries such as USA, let alone the underdeveloped countries.
- ✓ VCT hinders some fundamental rights such as e-evidence, face-to-face and adversial trial, privacy and security.
- ✓ A recent report has raised concerns about disproportionate impact on particular vulnerable groups such as children.
- ✓ Absence of liability provisions in case of failure of this technique.
- ✓ The provisions of 15/03 are brief and don't precise the procedures for their exercise.

Recommendations:

- ✓ Amendment of the legal texts related to technology and support them with professional codes of conduct and code of ethics.
- ✓ The need to strengthen the law 15/03 with regulatory texts that include the best procedures for the use of video chat technology as seen in the comparative systems in this area.
- ✓ Choosing skilled elements capable of managing and using such technology at the level of the justice sector including the judges.
- ✓ Extending the use of technology to all types of cases, not just misdemeanors, and not just criminal matters.
- ✓ Giving judges greater discretion to use this technique, taking into account the e-privacy.

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- ✓ Strengthening the protection of witnesses, experts and victims and the third party.
- ✓ Further discussion and in-depth study of issues needed in accordance with the international legal framework.

End Notes:

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- (1)- For more details see Robin Davis et al., **Research on Videoconferencing at PostArrest Release Hearings: Phase I Final Report**, ICF International, May 29th, 2015, p.04.
- (2)- Dealing With Privacy Issues In Your Next Video Conference, on:
<https://www.casamo.com/dealing-with-privacy-issues-in-your-next-video-conference/>
- (3)- Debbah Smail, **the videoconference technique in the Justice sector in Algeria**, International Scientific Forum on the Legal System of the Public Electronic Utility, university of Msila, Algeria, 2018, p.01.
- See also, Abdelhamid Amara, **the use of videoconferencing technique in the investigation and criminal procedures**, Dirassat & Abhath journal, University of Algiers 01, volume 10, issue 03, 2018, p.59.
- (4)- Main Advantages of Video Conferencing, on:
<https://www.eztalks.com/video-conference/advantages-of-video-conferencing.html>
- (5)- P. Mouzourakis, **videoconferencing: techniques and challenges**, European Parliament, Brussels, March 1996, pp.01-02.
- The reader has a general knowledge of Video Conferencing systems, see: Video Conferencing Standards and Terminology, on:
<https://www.c21video.com/technical-papers/videoconferencing/videoconferencing-standards---terminology>
- (6)- Almaany Arabic dictionary, available on:
<https://www.eztalks.com/video-conference/advantages-of-video-conferencing.html><https://www.almaany.com/ar/dict/ar-en/video-conference/>
- (7)- See also Definition of video conferencing», Collins Dictionary, available on:
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- (8)- Debbah Smail, op.cit., p.02.
- Nemmor Mohamed Said, **the Foundations of Criminal Procedures, Explanation of the Code of Criminal Procedure**, Dar al-Thaqaf edition, Jordan, 2013, p.327.
- (9)- Article 15 of Law 15/03 on the modernization of justice dated 10/02/2015, Official Journal No.06, issued in february 10th, 2015.
- (10)- See Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01), Official Journal of the European Communities C 197/1, 12.7.2000.
- (11)- See Council of Europe, European Convention on Mutual Assistance in Criminal Matters Strasbourg, 20.IV.1959, European Treaty Series - No. 30, p.01.
- (12)- See Council of Europe, European Treaty Series - No. 73, Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15.V.1972.
- (13)- Council of Europe, Third High-level multilateral meeting of the ministries of the Interior, **Fight against terrorism and organised crime to improve security in Europe**, Poland, 17 -18 March 2005, p.19.
- (14)- The use of VCT in federal criminal trials in the U.S. with international criminal trials in various tribunals such as the ICTY and ICTR, see Riley A. Williams, **Videoconferencing: Not a**

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- Foreign Language to International Courts*, *The Oklahoma Journal of Law and Technology*, Volume 07, number 01, 2011, p.01.
- (15)- See Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, *The University of Chicago Law Review*, 74:1581, 2007.
- (16)- Abderrahim Amara, **using remote Video conference in investigation and criminal Trial**, *Journal of Studies and Research (Arab Journal in Humanities and Social Sciences)*, No. 10, September 2018, p.62.
- (17)- See the CTOC Secretariat, **The technical and legal obstacles to the use of videoconferencing**, Fifth session, Vienna, 18-22 October 2010, CTOC/COP/2010/CRP.2.
- (18)- See article 14 of Law 15/03 on Modernization of Justice.
- (19)- See article 1 of Law 15/03 on Modernization of Justice.
- (20)- Decree no.55/02, dated 05/02/2002, Official Journal No. 09, dated 10/02/2002, See also articles 18 and 36 of the same ratified Convention.
- (21)- P. Mouzourakis, *op.cit.*, p.10.
- (22)- P. Mouzourakis, *Ibid.*, p.16.
- (23)- During a murder trial, *State of Florida v George Zimmerman*, an expert witness was examined remotely via video conference when the line failed, the parties agreed to use Skype which itself was increasingly interrupted, or “bombed”, so the court resorted to a conference telephone, see James Lambert, **Courtroom Video Conferencing in a Small Jurisdiction: a Case Study**, *J & G Law Review*, June 2016, p.18.
- (24)- The General Secretariat of the Council of Europe, **Guide on videoconferencing in cross-border proceedings**, Luxembourg: Publications Office of the European Union, Brussel Belgium, 2013, p.18.
- (25)- Robin Davis *et al.*, *op.cit.*, p.06.
- (26)- Ralph Mecham, **Courtroom Technology Manual administrative office of US courts**, August 1999, p.04.
- (27)- Sebastian Hamers, **Preconditions and characteristics of videoconferencing**, master thesis, universiteit Twente, 2010, pp.09-61.
- (28)- The General Secretariat of the Council of Europe, *op.cit.*, p.10.
- (29)- Meghan Dunn and Rebecca Norwick, **Report of a Survey of Videoconferencing in the Courts of Appeals**, Federal Judicial Center, 2006, pp.16-17.
- (30)- Meghan Dunn and Rebecca, *op.cit.*, p.17.
- (31)- James Lambert, *op.cit.*, pp.09-10.
- (32)- Center for legal and ourt technology, **Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings**, a draft report to the administrative conference of USA, August 10th, 2014, pp.59-60.
- (33)- In USA, more than a third of videoconferencing systems (37%) experienced recurrent equipment failures, and more than a fifth of videoconferencing failures were due to other widespread and chronic problems – such as inadequacies in the training of equipment operators; scheduling problems; and outright operator errors, see Eric Bellone, *op.cit.*
- (34)- Robin Davis *et al.*, *op.cit.*, p.06.
- (35)- Robin Davis *et al.*, *Ibid.*, p.15.
- (36)- In the framework of the so-called E-justice, see Ouenzar Laid, **Justice: between modernity and reform**, *Arabic Newspaper Selections*, November 1st, 2017, p.30,
- (37)- See Walid Hassini, **New values of public communication in the electronic utility**, the first International Conference on : The legal aspect of the electronic public facility, university of M’sila,
- (38)- Articles of the ECHR (principally 8 and 10) impact on the concept of open justice, balancing the need for judicial accountability with the need for the privacy of the individual.

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- (39)- A regulation that provides for hearing witnesses, experts and suspects during the preliminary investigation using videoconferencing has been in place in Belgium since 2002 under Criminal Code § VII, article 112/317, see Evert-Jan van der Vlis, **Videoconferencing in criminal proceedings**, Braun, S. & J. L. Taylor (Eds.), Guildford: University of Surrey, 2011, p.14.
- (40)- Some suggest limiting videoconferencing to pre-trial matters, especially administrative matters and could be limited to civil, not criminal, cases, see Eric Bellone, *op.cit.*
- The article didn't indicate specific procedures for the use of this technique during the investigation stage with non-jailers. It should be noted that the Algerian justice sector has not yet reached the application of this procedure (ie, the interrogation by videoconference of non-jailers).
- (41)- Safouan Chidikat, **Investigation and Criminal Trial by VCT**, Dirassat journal, Sharia and Law Sciences, Volume: 42, No.1., 2015, p.354.
- (42)- Hoogstraten points out the risk that the parties involved will stare at the image instead of having actual eye contact (monitor capture or TV watching), see Evert-Jan van der Vlis, *op.cit.*, p.18.
- (43)- The use of videoconferencing as a mean of hearing witnesses, experts and parties, should not in any way contradict with fair trial guarantees in general and the principles of defense rights in particular, see Khaled Moussa Tony, **Procedural Criminal Protection of Witnesses**, Comparative Study, First Edition, 2010.
- See the French Law n°. 2011-267 of March 14th, 2011 of orientation and programming for the performance of the internal security.
- (44)- As in the first case, investigating a detained person is no less ambiguous than the other. The Algerian legislator didn't specify the precise procedures followed in this case, but he limited this to the investigation of cases of misdemeanors only.
- (45)- Debbah Smail, *op.cit.*, p.08.
- (46)- Practical and legal issues may arise specifically in those cases where the videoconferencing is used as a means of mutual legal assistance between two different jurisdictions, see the CTOC Secretariat, *op.cit.*, p.04.
- (47)- The first section of the chapter includes the conditions while the second one includes the procedures; The means used shall ensure the confidentiality, privacy and integrity of the transmission.
- See Abderrahim Amara, *op.cit.* pp.66-67.
- (48)- See the second paragraph of Article 15 of Law 15/03.
- (49)- For more details see Harold Shapiro, **Right to a Public Trial**, Journal of Criminal Law and Criminology, volume 41, issue 06, article 04.
- (50)-Debbah Smail, *op.cit.*, p.09.
- (51)- Skynews, "**For the first time... Algeria on remote trial of an accused**", October 19th, 2015, 01:07 Abu Dhabi time, on: <https://www.skynewsarabia.com/middle-east/781095>
- (52)- Two other persons were tried in the same penal institution on the same day at the Kolea court in a remote trial session, hoping that it would be circulated to the rest of the other courts by the Algerian legislator under Law 15/03, see Mourad H., **a trial of three accused for the first time in the history of the Algerian justice**, Ennasr newspaper, October 1st, 2015.
- (53)- Robin Davis et al., *op.cit.*, p.26.
- (54)- Lederer, Fredric I., **The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms**, South Carolina law review, Vol.50:7, 1999, p.808.
- (55)- Robin Davis et al., *Ibid.*, p.19.
- (56)- Robin Davis et al., *Ibid.*, p.18.
- (57)- Anne Poulin, **Criminal Justice and Videoconferencing Technology: The Remote Defendant**, Tulane Law Review, Vol. 78, June 14th, 2004, available on: [ps://ssrn.com/abstract=555882](https://ssrn.com/abstract=555882)
- (58)- See for instance, articles 21(4) and 21(4)(d) of the Statute of the International Tribunal.

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- Article 6 of the ECHR requires that, in the determination of a criminal charge, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

(59)- The Kenyan High Court has allowed the taking of evidence in a criminal trial by video conference, see for example, *Livingstone Maina Ngare v Republic* [2011]eKLR High Court of Kenya at Nairobi, Criminal Revision No. 88 of 2011 The Hon. Mr. Justice Fred A. Ochieng, July 28, 2011.

(60)- Recent statistics in USA showed that the great majority of cases are criminal proceedings. Of those criminal cases, 28.8% revealed privacy issues between a defense attorney and their client when they communicated via videoconferencing see Eric Bellone, **the perils of videoconferencing in criminal courtrooms**, scholar strategy network, Cambridge, September 28th, 2016.

(61)- In Europe, when using VCT, all parties’ consent is required unless the court is satisfied that exceptional circumstances exist, see the committee on videoconferencing, report, January 2005.

(62)- The Committee on Videoconferencing, the Irish Minister for Justice, **Equality and Law Reform**, Ireland, January 2005, p.14.

(63)- The Committee on Videoconferencing, *Ibid.*

(64)- Penelope Gibbs, **Defendants on video – conveyor belt justice or a revolution in access?**, Transform Justice campaigning, October 2017, p.12.

(65)- The Committee on Videoconferencing *op.cit.*, pp.15 and beyond.

(66)- Robin Davis *et al.*, *op.cit.*, p.18.

(67)- Bouachri Amina and Salem Berkahem, **Administrative Reform in Algeria**, Scientific Journal of the University of Algiers 3, volume: 06, issue 11, January 2018, p.210.

(68)- For details see Gerard Maral, **VSAT Networks**, 2nd edition, John Wiley & Sons Ltd, England, 2003.

(69)- Ralph Mecham, *op.cit.*, p.09.

(70)- European Convention on Human Rights, article 5(1) provides that everyone has the right to liberty and security of person.

(71)- Robin Davis *et al.* *Ibid.*, p.16.

(72)- The Supreme Court of Tasmania, Video Conferencing Guidelines, on:

<https://www.supremecourt.tas.gov.au/the-court/technology/>

(73)- EU Member States, Council and Commission, Informal Working Group on Cross-border Videoconferencing, D1 final report, Austrian Federal Ministry of Justice, March 2nd, 2014, p.19.

(74)- See Jamie Cameron, **Victim Privacy and the Open Court Principle**, Policy Centre for Victims Issues, Research and Statistics Division, March 2003.

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- 16- ECHR (Articles 08 and 10).
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