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Resilience of the judicial system in the post-Covid period: The constitutionality of virtual court hearings in the light of the COVID-19 pandemic

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ABSTRACT

During the 2010s, technological development created the opportunity to hold online hearings, when the parties are physically distant from each other, when their personal appearance would entail significant threat to them, or when external circumstances would impose additional barriers for interested stakeholders to appear in the courtroom. As a consequence, amongst others, the Belgian Constitutional Court heard a case concerning the constitutionality of such trials, and rejected this new form of judicial operation due to numerous constitutional concerns. Nevertheless, the context of such controversies changed significantly during the pandemic, and in the light of the public health risks several judicial bodies decided to continue most of their operations through digital means. As a result, the holding of numerous online trials was ordered. Obviously, losing parties often submitted remedies against the incorporation of these platforms into judicial work by claiming the violation of their right to fair trial. For instance, the French Constitutional Council, the Spanish Constitutional Tribunal, as well as the Supreme Courts of Austria, Norway, Costa Rica and India assessed the constitutionality of these trials during the public health emergency, and in most of the cases, the application of online hearings was upheld. Bearing in mind this tendency in the relevant case law, one should argue that the rapidly evolving technological landscape requires the reconsideration of our attitudes towards online hearings: it should be clarified which grounds are acceptable justifications for ordering online trials during ordinary periods, and how the analysis is affected by unforeseen extra-ordinary circumstances. Online, or partly online proceedings may provide

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greater flexibility for both the court and the parties, and could also support the efficiency of judicial work, however, the main fair trial safeguards should be maintained. Our contribution will conceptualize this issue, and will provide a deeper understanding of the constitutional implications of remote trials.

KEYWORDS

pandemic, online court hearings

1. INTRODUCTION

Virtual court hearings have been developed since the 1970s,[1] and their constitutional implications have been also discussed in detail over the last few decades. Numerous advantages and disadvantages have been claimed, and contextual analyses and statistical data have been published to prognosticate the impact of this technological tool on the different elements of the right to fair trial. However, in the light of the COVID-19 pandemic, this issue should be also reconsidered, as the mechanism of virtual hearings has changed dramatically.[2] Before the public health emergency, virtual hearings were widespread; however, they were reserved to exceptional circumstances, and in most cases, only some of the parties remained in the online sphere, based on public security or public health grounds. By contrast, in the post-Covid period, fully virtual hearings appear to be an ordinary scenario, and this was the only method adopted to continue judicial proceedings even during the most serious waves of the pandemic. As a consequence, our knowledge of virtual hearings has increased considerably, and the discussion regarding its implementation has been also invigorated.[3] Moreover, several scholars argue that fully virtual hearings mean not only an interim reflection on the extra-ordinary circumstances involved, but will also form part of future judicial frameworks enjoying greater weight than earlier,[4] especially in civil controversies, where online hearings may entail less constitutional implications in comparison with criminal proceedings.

This explains the primary motivation for us to contribute to this strand of literature, although from a slightly different perspective than has been conceptualized previously. As online hearings were an important, but only complementary tool of judicial work before the global pandemic, only a few constitutional controversies dealt with the subject. On the contrary, constitutional case law has also reflected on the changing role of virtual hearings in the post-Covid period, even during the first years of the new epidemic. The relevant literature understood in depth several aspects of online proceedings, especially in the light of the public health emergency; however, the role of constitutional review in the adaptation of the judicial system has not yet been conceptualized. The added value of our analysis will be to reveal the relevant constitutional/supreme court rulings from all around the world, and on this basis to discover how constitutional review could clarify the standards of virtual judicial hearings.

[1]Doret (1974) 228–56.

[2]Link1.

[3]As a brief summary from the new tendencies in the literature please see Legg and Song (2021).

[4]Jain (2023).

The constitutional case law also reflected on the fact that owing to the distinguished role of constitutional safeguards in criminal proceedings, the constitutional requirements of virtual hearings would be more demanding during these controversies than in civil matters.

2. LITERATURE REVIEW

Owing to the technological development which occurred during the second half of the 20th century, from the 1970s it was possible to involve physically distant stakeholders in judicial trials and hearings, which simplified the conduct of judicial activities, but also raised numerous human rights protection concerns. An extensive literature dealt with this issue in the United States[5] where this kind of judicial hearings are becoming increasingly common around the country,[6] while the Council of Europe also published a booklet explaining how to hold transborder cases through online means. Various steps have been made to modernize the judicial framework with the help of digitalization: for instance, in Europe, Albania, Austria, Belgium, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Norway, Poland, Romania, Russia, Spain, Sweden and Ukraine adopted regulations to open up the possibility of online judicial hearings in strongly justified cases.[7] Artificial intelligence has been also used for this purpose: the most developed examples are known from Estonia[8] and are also reported from China,[9] while other countries have also improved or are improving their AI-based judicial software, applicable also to virtual hearings.[10]

The assessment of virtual hearings in the relevant literature was controversial even before the pandemic; a broad range of different opinions have been expressed on this issue, and we are very far from establishing professional consent in this matter. On the one hand, amongst the advantages conferred on virtual court sessions, McKay stated that online hearings may support the access to justice of certain vulnerable groups such as marginalized social layers, people from the countryside, disabled persons and prisoners.[11] Moreover, according to the research by Bosland and Townend, virtual trials may also enhance the publicity of judicial proceedings;[12] and in the post-Covid environment, it could provide wider access to these proceedings through live streaming and online attendance options for the audience.[13] Apart from this, Mulcahy and Rowden considered that the widespread use of modern technology, including video hearings, should improve the efficiency of judicial work,[14] and should lead to shorter and more comfortable judicial mechanisms for all stakeholders. In the meantime, case backlogs should be reduced with

[5]For an overview from the early literature, see Lederer (1999).

[6]Bergquist (2021).

[7]Sanders (2021).

[8]Numa (2020).

[9]Zhu (2019).

[10]Vasdani (2019).

[11]McKay (2016) 21, 25; McKay (2018) 154.

[12]Bosland and Townend (2018).

[13]Hynes et al. (2020) 7.

[14]Mulcahy and Rowden (2020) 260–61.

the help of the latest technological tools. Besides the general evaluation of modern technology's influence, reports on the expected impact on specific types of cases have been also published.[15] According to Bandes, virtual court hearings should be dominant in certain types of cases and also in low-value legal controversies,[16] in which people would invest remarkably less time, energy and money due to the lack of personal presence.

On the other hand, regarding the potential disadvantages, Ashdown and Menzel underlined that the use of video hearings may lead to unfavourable judgments for the accused,[17] especially those from more vulnerable social groups.[18] Bellone analysed that virtual presence may have a detrimental effect on the communications between the clients and their legal representatives, which may also raise several questions from a right to fair trial perspective.[19] Porter and his co-authors added that distant communication should eliminate most of the emotional elements from such interactions.[20]

Harrel noted that despite the visions of a more inclusive judicial system providing the same access to everyone, inequalities might be still present due to poor technological infrastructure and a lack of necessary skills amongst marginalized social groups.[21] Rowden detailed that the lack of personal presence may undermine the legitimacy of court rulings.[22] Abrams also concluded that social attitudes towards the judiciary would be remarkably different without physical presence in the courtroom,[23] and the prestige of the judiciary would be also questioned. Furthermore, criminal safeguards are also threatened by the involvement of virtual presence option;[24] the use of this equipment would raise more difficulties in criminal cases, where more constitutional safeguards should be provided, rather than in civil controversies with less direct impacts on fundamental rights. For this reason, Bergquist stressed the need for the courts as a whole, especially in criminal proceedings, to catch up with the times. However, with this increased use, more guidelines and rules need to be developed to incorporate virtual hearings.[25]

As an added benefit of these tendencies Bannon and Adelstein estimated that the broad use of remote technologies would reduce the costs of proceedings significantly for all stakeholders,[26] while Adams complemented this argument with sustainability considerations.[27] However, we cannot support this idea without reservations: in our view, although the fact that virtual hearings

[15]For instance, Taylor and Larsen (2005); Eagly (2014); Federman (2006).

[16]Bandes (2020).

[17]Ashdown and Menzel (2002) 106.

[18]Bowen Poulin (2004) 1104.

[19]Bellone (2013) 24.

[20]Porter (2012).

[21]Harrel (2020).

[22]Rowden (2018) 274–75.

[23]Abrams (2022).

[24]Kluss (2008).

[25]Bergquist (2021).

[26]Bannon and Adelstein (2020).

[27]Adams (2020).

might reduce certain physical infrastructural costs, the additional expense of the necessary digital equipment might also be a factor, while human resource costs would remain unchanged.

The main work, and still the most important point of reference from the period before the global pandemic, was published by Richard Suskind,[28] who envisaged the rapid evolution of modern technologies in the judicial system around the globe. Suskind provided a thorough assessment of arguments for and against virtual court options, and his approach was mainly in favour of a broad implementation of these technologies as soon as possible. One year later, when the first consequences of the public health emergency were experienced, Suskind argued that remote hearings should remain in the long term, and this would be one of the main tools to adapt the judicial framework to the new challenges of the post-Covid period.[29]

As McKeever highlighted, the role of online hearings has increased remarkably during the first years of the post-Covid period.[30] As Trahanas pointed out, technological difficulties and public health concerns have several times resulted in the adjournment of judicial proceedings, and the suspension or reschedule of investigations;[31] therefore, the global pandemic increased the demand for a more flexible and resilient judicial framework operating with modern technologies, and preserving its functionality even during periods of major crises. Legg conceptualized that courts should be resilient even during the main waves of the pandemic, and their continuity as an essential service could not be safeguarded without the proper implementation of the remote participation option.[32]

In his study, Bender seeks to answer the question of how to ensure that remote and virtual trials, such as zoom-in arraignments or trials, guarantee the same rights as traditional court trials. The author challenges the prevailing view that virtual hearings should be rejected during criminal proceedings. Virtual trials can produce better results for some defendants than traditional trials, especially in criminal proceedings.[33]

Our contribution will join this strand of the academic discourse: we will analyse further the perspectives of virtual court hearings at the beginning of the post-Covid period; however, our research will complement the already elaborated research in this field with an additional aspect. Mulcahy demonstrated that the judicial case law, including constitutional review, had a very limited reflection on the presence of video hearings before the public health emergency.[34] Since during the public health emergency, instead of the involvement of certain stakeholders remotely, fully distant hearings and trials were ordered, parties involved in judicial proceedings gained more experience from virtual hearings; consequently, more constitutional complaints have been made against this solution. Thus, recent constitutional case law is more extensive in this area than previously; however, legal scholarship has not reflected on this invigoration of the constitutional practice. So the added value of our article is to gather already existing constitutional

[28]Susskind (2019) 57.

[29]Susskind (2020).

[30]McKeever (2020) 6.

[31]Trahanas (2020).

[32]Legg (2020) 479.

[33]Bender (2021).

[34]Mulcahy (2008) 469.

rulings concerning video court hearings, and to preview the future of these tools in the judiciary, as well as to call for in depth constitutional standards to safeguard their daily operation.

3. METHODOLOGY

We first identify the main advantages and disadvantages of remote court operations as highlighted by the literature, and also evaluate the impact of the COVID-19 pandemic on the emerging role of online trials. Then, we will focus on the already delivered case law: the most important constitutional controversies will be mentioned from all around the world during the recent years of the public health emergency related to the constitutional requirements of remote hearings. We will group the case law on a continental basis to consider whether regional tendencies might be also perceptible in the constitutional field. We are aware of the fact that, on the global level, we are comparing significantly different legal cultures with various sets of constitutional values and principles. Our reason for conducting such an overarching review lies with the global pandemic: the epidemic caused very similar difficulties in the same period for a broad range of legal systems, which offers unprecedented perspectives from which to analyse comparative constitutional law which is also valid for online hearings. We understand the post-Covid period as starting on 11 March 2020, when the World Health Organization declared the COVID-19 pandemic to be a global phenomenon.

This study is limited to decisions issued by national constitutional/supreme courts after 11 March 2020, in which the constitutional approach to virtual court operations was addressed. With the formal dogmatic analysis of relevant constitutional case law, we present the various potential arguments employed when the constitutionality of remote trials should be contested; we will then analyse which factors might determine the outcome of these legal controversies.

The case law was collected from the existing open access databases available online;[35] in addition to this, we are currently working on an English language online database which will soon be available for all interested stakeholders; therefore, we have recently approached several collaborators from numerous countries.[36] During the preparation of the present academic study, we also relied on the information provided by these experts.

4. RESEARCH

4.1. Europe

We start with a selection of European cases – from Austria, France, the Netherlands, and Norway –, where constitutional decisions were taken on online hearings during the COVID-19 pandemic. These judgments explore primarily, but not exclusively, the relationship between virtual court hearings and due process rights.

One of the most detailed and earliest judgments on the links between virtual court proceedings and the COVID-19 pandemic was delivered by the Austrian Supreme Court (*Oberster*

[35]Link2.

[36]Kálmán and Szentgáli-Tóth (2022).

Gerichtshof, OGH).[37] The defendants, in an arbitration conducted by the Vienna International Arbitration Centre (VIAC) in Vienna, challenged the arbitration tribunal's decision to hold an evidentiary hearing by videoconference on 15 April 2020. The VIAC decided to do so in the light of the spread of the COVID-19 pandemic and the need to comply with travel restrictions. However, the defendants would have preferred an in-person hearing at a later date. After the VIAC rejected the objection, the case was referred to the Austrian Supreme Court. The Supreme Court found that holding a remote hearing over a party's objection did not meet the high threshold of serious procedural irregularity. Remote hearings are generally permitted under Austrian arbitration law, and the arbitration tribunal has wide discretion in the organisation and conduct of the proceedings, while the alleged deficiencies of remote hearings can be remedied. The Austrian Supreme Court therefore rejected the defendants' objection. One should highlight that this case dealt with an arbitration procedure, which differs remarkably from ordinary civil trials; however, the judicial nature of these hearings, and the court-like functioning of arbitration courts subject to fair trial safeguards is beyond doubt.[38]

According to the commentaries, the case is of particular interest for several reasons.[39] It addresses the legal framework related to remote arbitration hearings, including the relevance of Article 6 of the European Convention on Human Rights (ECHR). In addition, the OGH [Austrian Supreme Court] provides useful guidance on practical questions as to whether a hearing should be postponed or proceed remotely if an in-person hearing is not possible, including whether different time zones must be considered in organizing remote hearings, and how to address concerns that witnesses could be unduly influenced in a remote setting.

The duty to treat parties fairly applies to all stages of the arbitration proceedings, including the determination of the date of the hearing and decisions on requests to postpone. This includes an obligation to ensure that both parties have a fair opportunity to participate in the hearing. However, the OGH ruled that in the circumstances of the case the tribunal's decision not to postpone the in-person hearing in light of the current COVID-19-related restrictions but to conduct the hearing remotely at the scheduled date did not amount to a breach of the tribunal's duty to treat the parties fairly. The OGH noted that videoconferencing technology (both for the taking of evidence and the conduct of hearings) is widely used in judicial proceedings before state courts (citing a range of procedural laws on the domestic and European level) and that this is also relevant for arbitration proceedings. The OGH emphasized that the Austrian legislature has expressly promoted the use of videoconferencing technology during the COVID-19 pandemic to ensure that judicial proceedings could be advanced; and it recognized that commentators have similarly endorsed the use of remote hearings in arbitration proceedings during the pandemic. Importantly, the OGH then expressly confirmed that, as a general rule, remote arbitration hearings are not only permissible if both parties agree, but also over the objection of one of the parties. For this, the court relied on Article 6 ECHR.[40]

[37]18 ONc 3/20s *Oberster Gerichtshof*. Link3.

[38]Papanikolaou (2020).

[39]Scherer et al. (2020).

[40]Scherer et al. (2020).

From the French jurisdiction we will summarise two cases decided by the French Constitutional Council (FCC). In the first case,[41] the FCC was seized on October 16 2020 by the Court of Cassation (Criminal Division) of a priority question of constitutionality. The question relates to the conformity with the rights and freedoms guaranteed by the Constitution of Article 5 of the ordinance adapting the rules of criminal procedure to emergency measures in order to deal with the COVID-19 epidemic. Article 5 of the ordinance[42] provided that audiovisual telecommunication might be ordered by a criminal court even without the consent of the parties. If it is technically or materially impossible to use such a means, the judge may decide to use any other means of electronic communication, including telephone communication, that ensures the quality of the transmission, the identity of the persons involved and guarantees the confidentiality of the exchanges between the parties and their lawyers. In these cases, the right to defence and the publicity of the proceeding should be respected. The petitioner criticized these provisions for allowing the investigating chamber to rule by videoconference on the extension of pretrial detention, without the possibility of opposition by the detainee, which could have the effect of depriving the latter, for more than a year, of the possibility of appearing physically before his judge. This would result in an infringement of the rights of the defence that the objectives of the proper administration of justice and the protection of public health could not suffice to justify.

As regard the merits of the case, the FCC underlined the constitutional bases of the right to defence,[43] and held that in the special context of the public health emergency trials through audiovisual communication might be ordered even without the consent of the parties except for criminal proceedings concerning the most serious crimes.[44] So in the ruling, the FCC acknowledged the broad use of audiovisual technologies during the public health emergency for judicial purposes; however, it refused to recognize such trials as equal safeguards with in-person hearings. This is the reason why, in the most serious criminal cases, virtual trials should not be accepted even in the context of the global pandemic.[45]

In the second case, the FCC was again seized by the Court of Cassation (Criminal Division), and also by the Council of State. The questions related to the conformity of Article 2 of the ordinance adapting the rules applicable to the jurisdictions of the judicial order ruling on criminal matters to the rights and freedoms guaranteed by the Constitution.[46] The contested rules authorized criminal courts to implement audiovisual technologies without the consent of the parties, but ensuring that the right to defence should be respected.

The applicants, joined by the intervening parties, argued that these provisions are similar to those that were declared contrary to the Constitution by the FCC in its ruling mentioned above. According to them, these provisions would disregard the rights of the defence for the same reasons as those stated in that decision. The claimants considered that these rules provide a discretionary margin of decision for courts to operate with audiovisual technologies; no

[41]JORF n°0014 of January 16, 2021, text n°70, ECLI:FR:CC:2021:2020.872.QPC, link4.

[42]Link4.

[43]Link4.

[44]Link4.

[45]Goudjil (2021).

[46]JORF n°0129 of 5 June 2021, text n° 83, ECLI:FR:CC:2021:2021.911.QPC, link5.

compelling reason is required to launch remote criminal trials even in the most serious cases. Regarding the merits, the FCC agreed with the applicants and stated that the challenged provisions failed to duly specify the requirements for involving audiovisual technologies in the judicial proceedings; therefore, these rules are unconstitutional and shall be annulled with an *ex nunc* effect.

Our last example comes from Norway, where the Supreme Court had to decide on an appeal in a detention-case.[47] The case concerned an appeal against an order to be remanded in custody. The defendant complained that the court had decided to arrest him at a remote hearing, which could violate his right to be tried on remand, as provided for in Section 183 of the Norwegian Code of Criminal Procedure. The accused was charged with attempted murder or complicity in murder, arrested on 23 April 2020, and the application for pre-trial detention was lodged the following day. A pre-trial detention hearing was scheduled for 25 April 2020. Prior to the hearing, the prosecution and the district court requested a remote hearing under Section 2 of Provisional Decree on Simplifications and Measures within the Judiciary to Mitigate the Effects of the COVID-19 Epidemic (Corona Decree) and Section 2 of Provisional Law on Regulatory Powers to Mitigate the Effects of the COVID-19 Epidemic (Corona Law). After the accused and his counsel were given an opportunity to make a statement and objected to the video hearing, the district court nevertheless decided to hold the video hearing. The district court's decision was reasoned, and the record of the court's decision is included in the transcript of the recall hearing. The hearing took place with the judge sitting in the courtroom while the defendant was present via video link from jail with his defence attorney. The prosecutor appeared via video link from his home office. On 25 April 2020, the Oslo District Court issued the following order: 'The defendant may be remanded in custody until a different decision by the prosecution or the court, but not later than 23 May 2020. He will be subject to restrictions on correspondence and visits and will be held in partial isolation for the entire period of his detention. Correspondence and visits to his parents will be subject to control.' The accused then appealed the district court's order at the Court of Appeal. The Court of Appeal in Borgarting dismissed the appeal on 30 April 2020. The defendant then appealed to the Supreme Court.[48]

Section 2 of the Corona Decree, which provides for the possibility of a decision on a remote hearing 'if necessary and not objectionable', must be interpreted and applied in the light of Article 5(3) of the Convention and Article 94(2) of the Constitution. The Corona Decree does not provide for an extended possibility of derogation from the right to be brought before a judge in connection with provisional detention, in so far as it is protected by the Constitution or the Convention. To underpin this, the Norwegian Supreme Court has interpreted a number of ECtHR decisions on the merits.[49] In the light of the above, the Norwegian Supreme Court held that lower courts cannot review the ECtHR's interpretation of the ECHR human rights law. In other words, a procedural error had been made which required the order of the Court of Appeal to be set aside. As the order of the district court contained the same errors and it was

[47]Supreme Court's Appeals Selection Committee, HR-2020-972-U (case no. 20-065997STR-HRET), criminal case, see link6.

[48]Supreme Court's Appeals Selection Committee, HR-2020-972-U (case no. 20-065997STR-HRET), criminal case, link6.

[49]*Medvedyev and Others v France* (2010) Application No 3394/03; *Brogan and Others*, § 58; *Brannigan and McBride v. United Kingdom* (1993) Series A no. 258-B; *Aquilina v. Malta* (1999)-III; *Dikme v. Turkey* (2008).

more appropriate to have a new hearing in the district court, the order of the district court should also be set aside. Finally, the Supreme Court invited the district court to consider whether it would be inappropriate to hold a physical hearing in this case for infection control reasons. If not, the defendant should be tried as soon as possible.[50]

The case from the Netherlands[51] did not directly relate to the virtual hearings, instead, it concerned a ruling of a District Court that was not made public through a so-called disclosure session, but was only sent to parties and made available online for others interested, because the Court building had been closed due to anti-COVID-19 measures. The question arose whether this practice violated the principle of public disclosure of judgments. The Division [of the Council of State, Raad van State] ruled that this practice was acceptable and did not undermine the essence of the principle of public justice, considering the current exceptional circumstances caused by the Corona crisis.[52]

Overall, there were only a very few constitutional challenges to online court hearings in Europe during the COVID-19 pandemic. This is partly because the procedural laws of many countries already allowed video hearings before the pandemic,[53] and most of the courts were already prepared for the use online/IT technology to go on with the cases. On the other hand, at the time of the lockdowns, the parties did not object to the transitional rules adopted by parliaments or governments to allow the court hearings to take place. The role of constitutional review was to set the limits on the option of a virtual judiciary to avoid too widespread an application of these facilities.

4.2. Asia

Owing to its rapid high-tech industrialization over the last few decades,[54] Asia was one of the major powerhouses of remote judiciary even before the global pandemic, but the public health emergency represented a major step forward in that continent, as well. China launched its first internet courts, where people could access the judiciary via electronic means; India set up the SUPACE Portal (Supreme Court Portal for Assistance in Courts) to reduce the overwhelming backlog.[55] As a result, millions of cases have so far been heard through remote communication around India. Malaysia also introduced artificial intelligence into its judicial system, while based on the Malaysian sample, the Supreme Court of the Philippines is also developing a platform at the moment, where video trials will be possible. Apart from this, Australia had long experience with remote hearings even before the pandemic, which also facilitated the adaptation of the judicial system to the demands of the post-Covid period. From the most recent years, serious endeavours have been reported from Vietnam to extend the possibilities of remote hearings for the long-term, with around 4,000 high-level online judicial proceedings already taking place,

[50]Medvedyev and Others v France (2010) Application No 3394/03.

[51]Raad van State, ECLI:NL:RVS:2020:992, see at link7.

[52]Lange et al. (2022).

[53]See, for example, Sanz and Guimaraes-da Silva (n.d.); Sanders (2021).

[54]Felipe (2018).

[55]Shekhar (2021).

also including criminal investigations.[56] The Asean Council of Chief-Justices has recently discussed adopting a common guideline from video court hearings.[57] In Hong Kong, online judiciary has recently been considered the new normal, and should remain so in the long term, too.[58]

From the western part of the continent, Saudi Arabia should be highlighted, where the first artificial intelligence application, which was able to manage virtual hearings, was introduced in March 2022,[59] while The United Arab Emirates has recently confirmed similar ambitions.[60]

Despite this vibrant environment, the relevant case law is less extensive in Asia in comparison with Europe or the American continent. The main reason for this is the reluctance of Asian countries to adopt the European/North American interpretation of constitutional review:[61] only a limited number of constitutional courts exist in Asia, while supreme courts with constitutional review competences often show deference when assessing the constitutionality of laws. Only one relevant case from India, and one from Singapore were found.

Within the Asian Continent, the engagement of India with virtual judiciary has been outstanding, the paperless court has become an aspiration,[62] while certain appellate courts have moved fully into the online sphere. In the case handed down by the Supreme Court of India in April 2022, the Supreme Court heard a petition submitted by two organisations of Indian lawyers, who opposed the ruling of the Karnataka High Court to retain in person hearings without providing potential exemptions, when remote hearings or at least a hybrid participation regime should be allowed.[63] The petitioners argued that right to a virtual court proceeding should be considered a fundamental right closely linked to access to justice, and the right to an effective remedy; the ruling of the Karnataka High Court infringed all these fundamental rights. Furthermore, with the exclusion of remote, or at least hybrid options, several persons were denied access to the courtroom, which clearly goes against the public nature of the judicial process and the freedom of expression of the persons concerned. The Supreme Court acknowledged that the holding of virtual hearings, especially in extraordinary circumstances, touches several fundamental rights; nevertheless, the blocking of the Karnataka ruling was rejected, the favourable public health conditions did not justify the urgent request for an online hearing. The Supreme Court highlighted that although remote hearings should represent a fundamental right for all stakeholders during the main waves of the epidemic, it was adopted as an emergency measure which should not be mandatorily provided unless required by a pressing social need.[64] Video court hearings were tested around India during the pandemic, and ensured the continuation of the judicial proceedings. However, their functioning was quite controversial; therefore

[56]Mến (2023).

[57]Panaligan (2022).

[58]Wu (2022).

[59]Fatima (2022).

[60]Writer (2022).

[61]Ginsburg (2008).

[62]Link8.

[63]Supreme Court of India (29 April 2022), WPC No.941 of 2022.

[64]Link9.

in the absence of a convincing public health justification, such a request should be rejected as unfounded.

The second case was from Singapore, where a woman submitted a request to the High Court to overturn the lower court's decision which rejected her request for online testimony.[65] The claimant held that her online participation would not infringe the rights of the defendants, as all participants in the trial could question her with the same conditions as with a personal presence.[66] The High Court shared the lower court's argumentation and upheld the ban on online testimony, since the request was not grounded on sufficiently compelling reasons to justify the necessity of a video hearing. The High Court outlined that a simple reference to the global pandemic and the travel restrictions linked to the public health emergency might be a proper basis to underline an online testimony request during the first waves of the epidemic. However, once the public health circumstances are less onerous for the society, more specific arguments should be brought by the claimants to submit an online testimony request. The simple reference to the pandemic and the travel restrictions are insufficient, but when the claimant could explain why the presence of the virus or the related restrictions cause severe difficulties to her the petition might be successful. The High Court mentioned a concrete example: when the petitioner demonstrates that she belongs to the most endangered groups based on her old age or her existing illnesses, this demand might outweigh the social interest to hold trials primarily in person.[67]

4.3. The Americas

Virtual court technologies have been used for decades in the United States, and this country has the widest experience in the continent of implementing modern technologies in its judicial system.[68] Conversely, the highly decentralized framework of constitutional review in the United States[69] leads only to lower court judgments in these matters; the Supreme Court still has to clarify its approach at the highest level. In the meanwhile, several Latin-American countries have decided to implement virtual technologies into the courtroom, including software based on artificial intelligence, but the constitutional standards have not been elaborated with sufficient depth to maintain the integrity of judicial proceedings.[70] As a result, a relatively high number of supreme- and constitutional court rulings have dealt with the constitutional implications of video trials, as will be demonstrated below.

The first case is a Chilean one, relating to the right to a fair trial.[71] A person who was prosecuted before the Criminal Court turned to the Constitutional Court in order to declare that one particular expression in Law 21.226 is unconstitutional. The Chilean Congress enacted Law

[65]The High Court of the Republic of Singapore, [2022] SGHC 54, Suit No 636 of 2020 (Summons No 5185 of 2021), see at link10.

[66]General Division of the High Court, Suit No 636 of 2020

[67]Link11.

[68]Bandes (2020).

[69]Sadurski (2011).

[70]Corvalán (2019); Ast (2020); Cáceres (2008) 54–57; IALAB (2020); Gutiérrez et al. (2019).

[71]Chile, Constitutional Tribunal, 12 January 2022, Rol. 11.647-2021, see at link12.

No. 21.226, which established a special legal regime for judicial proceedings in the context of the pandemic. According to this law, criminal proceedings against convicted persons could only be suspended if it was 'absolutely impossible' for one of the parties to exercise his rights. According to the applicant, the phrase 'absolute impossibility' was contrary to the Constitution because it forced detained persons to act virtually in the context of criminal proceedings, jeopardising their right to a fair trial and depriving them of the benefits of due process. In the applicant's view, if a prisoner under criminal proceedings is restricted in the exercise of his rights, but these restrictions do not constitute a 'total impossibility', then a suspension of proceedings cannot be requested. Therefore, his right to due process and a proper trial were violated. According to the Court, carrying out criminal procedures through virtual means was not contrary to the due process and fair trial, although the Court stated that the mentioned rule is contrary to the Constitution.[72] In general, it cannot be said that the virtual procedure is contrary to the Constitution. The need for a virtual meeting should always be assessed on an individual basis.

The next case is again a Chilean proceeding, which relates to a law that established the use of virtual hearings as a general rule with regard to COVID-19.[73] Article 9, Law 21.226 had established an exceptional regime for court proceedings due to the effects of the epidemic. According to this provision, virtual trials are the general rule and should not be suspended unless an absolute violation of due process was proven. The defendant presented an unconstitutionality requirement and requested an exemption from the application of the mentioned rule. The hearing therefore had to be conducted by videoconference (as no absolute impediments to the exercise of the right to defence were proven) which violated his right to due process. He also argued that principles such as immediacy, contradiction and the principles of orality would be violated or omitted. The Court upheld the claim, but pointed out that the virtual hearings (or digital justice) are not unconstitutional. The Court also found that during the COVID-19 epidemic, digital justice was the only mechanism that guaranteed access to justice and effective remedies, not only in Chile but in many countries around the world. In relation to Article 9, Law 21. 226, the Court found that it is unconstitutional, because the norm obliged judges to advance criminal proceedings even when the right to defence was excessively affected. Finally, the Supreme Court ordered the lower Tribunals to make a reasonable interpretation of Article 9, and it considered that given the impact of a virtual hearing on the defendant, due process had to be analysed case by case.

In the third relevant Chilean case there was no proper legal basis for conducting the hearing by videoconference.[74] In this case, the appellant sought annulment of the trial and judgment on the grounds that his right to a fair trial had been infringed. The trial hearing, which led to the conviction of the appellant, was conducted via videoconference without sufficient legal basis to use this technology. The applicant's argument was based on the fact that Article 329 of the Chilean Code of Criminal Procedure provides for the use of videoconferencing only in exceptional and specific situations which did not apply in his trial. The appellant therefore argued that

[72]'The expression "absolute impediment" was indeed a degradation of the right to due process, given that it was validating violations to due process that were not tantamount to an absolute impossibility.' See at link12.

[73]Chile, Supreme Court (2021) No. 10. 588-2021.

[74]Chile, Supreme Court (2020) Rol. No. 112.392-2020.

the conduct of the hearing by videoconference could only have been considered lawful if all parties had agreed to the use of that mechanism. According to the Supreme Court, it must be demonstrated how and in what way the right to a fair trial was violated in order to uphold the claim. On the contrary, the appellant put forward only general arguments as to how the conduct of the trial by videoconference could violate his rights and guarantees of a fair trial. Finally, the Supreme Court rejected the appeal because the petitioner failed to strongly justify the violation of his due process rights. There was no sufficient basis to declare the trial and judgment null and void.

In the fourth case, which comes from Costa Rica,[75] the defendant joined by videoconference a proceeding that was otherwise conducted in person. For the reason that the accused could not have been in the same place as the parties to the proceedings, the accused considered that his rights to defence, to due process and the principle of bilaterality of the hearing were violated. Hence the defendant filed a writ of habeas corpus. The Court indicated its support for the use of videoconferencing in criminal proceedings, in particular in the context of the pandemic. Additionally, the Court pointed out that the courts had to ensure the efficient conduct of proceedings in the context of various public health restrictions and that the courts had to adapt to the new circumstances created by the COVID-19. For this reason, the judicial system had created a series of protocols and guidelines to implement video conferencing in criminal proceedings efficiently. Finally, the Court rejected the accused's claim and found that the law allowed hearings to be held remotely in the context of the COVID-19 pandemic.

Finally, the last legal controversy to be presented comes from Guatemala.[76] In this case the plaintiff – who was an elderly person and was subject to a criminal proceeding for the crime of ideological falsehood – filed an *amparo action*. As a background, the judicial limitation periods were suspended, and the trial was scheduled for 25 August 2021. But in the meantime, the limitation periods for this type of proceeding were reset by the Judicial Branch Presidency, so the hearing was rescheduled to 30 September 2020. Due to these circumstances, the plaintiff submitted an *amparo action* and insisted on keeping the original schedule. The basis of the plaintiff's argument was that at the end of the summer period in August 2021, there would be a greater probability of favourable public health circumstances, so that his right to health, life and effective judicial protection would be better guaranteed. The plaintiff further argued that the maintenance of the hearing at the end of September would not be secured, neither in person nor online. In the case of virtual hearing, he would not be able to participate because he does not have a computer; and in the case of a face-to-face hearing, he would not be able to attend because as he is an elderly person, he should not be exposed to the risk of COVID-19. The plaintiff's claim was dismissed. The Constitutional Court pointed out that the hearing could have been held virtually, to avoid the personal presence of the parties in the proceedings. As the plaintiff did not have a computer and therefore objected to the virtual hearing, the decision to hold an in person hearing should be upheld, given that the Court had granted medical and social distancing measures. The Constitutional Court added that this decision did not infringe the applicant's right to health, life and effective judicial protection. The Court indicated that

[75]Costa Rica, Supreme Court of Justice (2022), Resolution No. 3474-2022.

[76]Guatemala, Constitutional Court (2021), Expediente 516-2021.

the judicial authority wanted to protect the plaintiff's rights as much as possible by allowing the hearing to take place virtually.

5. DISCUSSION

The constitutional standard for online court hearings in Europe is based on a careful consideration of the circumstances of the cases examined and takes into account the requirement for a European judicial dialogue. The latter means that the European consensus in ECtHR practice in fair trial cases is taken as a starting point and a common minimum by national courts, which then consider the relationship between the pandemic situation and the personal hearing in the light of this consensus. On this basis, they assess whether the restrictive measures taken in the light of COVID-19 have imposed a necessary and proportionate restriction on the constitutional right to due process. The outcome of the assessment will also be influenced by whether the case involves detention, criminal, administrative or civil proceedings or arbitration. Based on the cases examined, constitutional concerns have been raised, in particular in criminal proceedings. In the 21st century, the right of everyone to a modern trial (e-trial and online courts) is emerging, but in the European judicial practice the protection of a balanced fundamental right to a fair and modern trial adapted to specific circumstances (in our case, the risks of a pandemic) has been outlined.

Regarding the Asian approach, the online trial is seen as an important, but at the moment still extraordinary element of the judicial system which should not be provided automatically. In one sense, if one cannot take part in an online proceeding when public health or other circumstances exclude any other form of judicial work, this represents a serious violation of the right to access to justice and the right to an effective remedy. But in another sense, when someone insists on the virtual option without raising very convincing arguments before the court to prove the necessity of such an arrangement, these requests should be rejected. Owing to the resilience of the Asian high courts, the priority of in person trials is still maintained, and virtual hearing is far from being adopted as the new normal in the constitutional practice.

Considering the case law from the American continent, in no cases were virtual hearings considered to violate the defendant's rights to defence. Indeed, the courts have stressed that virtual trials should be seen as an opportunity for effective access to justice rather than being an obstacle to the accused's right to an effective defence.[77] Of course, the courts have assessed the circumstances of the particular cases and whether the holding of virtual hearings would not violate the right of the defence and other rights and principles. Nowadays there is a tendency to rely on virtual hearings for the long term instead of seeing them as a temporarily necessary measure for access to justice in the context of COVID-19. The development of guidelines for virtual hearings shows that the benefits of their use are increasingly being recognised across the American continent.

[77]For example: the Florida Supreme Court entered a series of orders cancelling most in-person proceedings, suspending rules that prohibit the use of audio-visual equipment for remote hearings in the courtroom. See link13.

The advantages include, amongst others, faster resolution of cases and easier access to justice.[78] The benefits of virtual judiciary are demonstrated when the courts require other state bodies or public service providers to use virtual administration.[79] In Colombia, for example, it is regulated by law that virtual justice must guarantee the right to equality, so that vulnerable populations, or those parts of the country where there is no internet connection, are guaranteed access to judicial services. Similarly, in the United States, there is a new legal initiative to provide legal services in poorer regions. This is The Tennessee Justice Bus which 'is a mobile law office that brings technology to rural and underserved communities'.[80]

Going further towards the full implementation of virtual hearings, on 15 February 2023 a Colombian court hearing was held in the metaverse, making it the first legal trial in the metaverse.[81] This hearing used Horizon World technology to simulate an unified virtual space. The court used different avatars to represent each of the participants in a traffic dispute.[82] Colombia is among the first countries worldwide to test legal hearings in the metaverse.

The Colombian judicial system is emerging as a frontrunner in the adoption of cutting-edge technology, and the metaverse court hearing came hot on the heels of a Colombian judge using the artificial intelligence application, ChatGPT, involving it in the preparation of a judgment.[83]

6. CONCLUSIONS

Between March and July 2021, a survey was conducted around the United States, asking questions about access to courts during the pandemic and respondents' experiences with new strategies adopted by courts to continue hearing and processing cases. Court staff were more positive than lawyers about the ability of individuals to participate in the justice system during the pandemic. The study showed that judging whether and under what circumstances online court proceedings are needed once the pandemic is over requires careful consideration of the pros and cons, and a balancing of various competing factors. Courts and researchers need to carefully assess which specific types of proceedings are best suited to the online format and find ways to ensure that all litigants, including people with disabilities and those with limited English proficiency, can participate while safeguarding their constitutional rights.[84]

The findings of this survey might be a proper point of reference for further endeavours in this field; however, it should be also kept in mind that although the fact that the exact implementation of virtual court hearings depends mostly on the legal culture concerned, the main

[78]And a survey showed that virtual hearings have enabled lawyers to achieve a better work-life balance.

[79]Colombia, Constitutional Court (2021), Sentencia T-195/21. In this case the Ministry of Health and Social Protection created a decision requiring healthcare providers to offer their services virtually or by telephone. See link14.

[80]'It's a passenger van outfitted with computers, tablets, a printer, internet access, video displays, WiFi and other office supplies. Lawyers and other volunteers will be able to provide on-the-spot access to legal help and meet Tennesseans where they are.' Gibbs (2022).

[81]Woodford (2023).

[82]Johnson (2023).

[83]Henderson and Pugh (2023).

[84]Mazzone et al. (2022).

constitutional challenges are quite similar everywhere. From an organisational perspective, online court hearings offer several advantages, while from a human rights approach, their effects are more controversial, with special regard to criminal proceedings. Despite the already published guidelines and other soft law documents both at the supra- and infra-national level, the legal framework is still to be elaborated; therefore, in our view, further global or regional legal instruments should be enacted to maximize the benefits and minimize the risk factors of online court hearings. As a general conclusion, despite certain important steps having been made in this direction, we are still very far from acknowledging virtual hearings with the same constitutional legitimacy as in person trials, at least in terms of the constitutional assessment.

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