

MODERN TESTIMONY HEARING IN VIRTUAL SPACE

AUDIÊNCIA DE TESTEMUNHO MODERNA NO ESPAÇO VIRTUAL

Reza Najafloo¹

Ghafoor Khoueeni²

Abolhasan Mojtahed Soleymani³

Abstract

The judiciary, as one of the main driving powers in any country, has got some addressees who expect it meet their needs. These addressees, either those who directly and actually play roles in a case or those who are influenced by judicial decisions, expect the best performance in the shortest time using modern methods and sciences specifically in terms of testimony, which is unfortunately considered necessarily in-court due to the strict traditional view and attitude of the judges and courts. This has caused that the virtual space and the modern electronic technology have no position in the process of hearing the witnesses' testimonies in the courts. Inspired by the modern laws of the United States of America that is pioneer in applying the witnesses' testimony in virtual space and remotely, the present paper seeks to investigate its advantages and disadvantages and persuade the legislators and court judges to do their best in optimally using and exploiting these sciences in their modern fair judgment procedure based on technology progress in the contemporary era.

Keywords: witness testimony, virtual space, telephone conference, electronic judgment procedure, social networks.

Resumo

O judiciário, como uma das principais forças motrizes de qualquer país, tem alguns destinatários que esperam que ele atenda às suas necessidades. Esses destinatários, aqueles que direta e efetivamente

¹ PhD student, Department of Law, University of Kharazmi, Tehran, Iran. Corresponding Author: info@equity.ir E-mail: eza.najafloolaw@gmail.com

² Assistant Prof., Department of Law, University of Kharazmi, Tehran, Iran. E-mail: kloueeni@gmail.com

³ Assistant Prof., Department of Law, University of Kharazmi, Tehran, Iran. E-mail: soleymani@gmail.com

desempenham papéis em um caso ou aqueles que são influenciados por decisões judiciais, esperam o melhor desempenho no menor tempo possível, usando métodos e ciências modernas especificamente em termos de depoimentos, que infelizmente são considerados necessariamente em juízo, devido à estrita visão e atitude tradicional dos juízes e tribunais. Isso fez com que o espaço virtual e a moderna tecnologia eletrônica não se utilizassem no processo de ouvir os depoimentos das testemunhas nos tribunais. Inspirado pelas leis modernas dos Estados Unidos da América, pioneiras na aplicação do testemunho de testemunhas no espaço virtual e remotamente, o presente artigo procura investigar suas vantagens e desvantagens e persuadir os legisladores e juízes a fazer o melhor possível ao usar da melhor maneira possível, e explorar essas ciências em seu moderno processo de julgamento justo, baseado no progresso da tecnologia na era contemporânea.

Palavras-chave: testemunho, espaço virtual, conferência telefônica, julgamento eletrônico, redes sociais.

TESTIMONY ELECTRONIC HEARING REQUIREMENTS

Traditional judgment procedure needs no equipments and instruments thus there is no specific complicatedness in the process executing the judgment procedure and, consequently, there is no complicated equipment for hearing the witnesses' testimony; however, in electronic judgment procedure, due to existence of some equipments and facilities, there are some methods for using and keeping these equipments. In the first step, it is necessary to design the physical structure of the court in such a way that the electronic equipments can be installed, and the court should be in such form that the best use can be made of the electronic equipments, especially in terms of the area or smallness of the courtroom, so that there should be some monitors in order to cover the audience in the judgment session for confronting the witnesses, if necessary.

The second step is installation of the electronic equipments; that is, in addition to considering the courtroom space which should be architecturally and technically appropriate, the facilities should be installed in such a way that all the dimensions and angles are regarded and covered.

The third step is implementing these systems in order to be used by the experts and specialists of these fields. The experts' continuous and periodical supervision on these systems in order to check and control the appropriate productivity of the systems is of great importance.

The fourth step is related to the fact that those individuals, who are going to use these systems, including the judge, jury, and litigants, should have been sufficiently trained. For this purpose, we can hold seminars for improving the awareness and knowledge of the judges and the court authorities about this specific type of judgment procedure; however, it seems that these trainings and educations should be started from colleges and faculties of Laws or be included in a course before achieving the judgment profession, and the students should receive necessary educations on this field because in the contemporary era supposing a judge in a legal system without dominance on electronic facilities appears to be unreasonable and unconventional.

In the fifth, and the last, step it must be noted that the electronic systems should be checked and controlled and the equipments and facilities should be upgraded by new versions; in this regard, the experts' continuous supervision is necessary since maintenance and updating of these equipments is a completely technical issue so that everybody cannot do it (Lederer, *op cit*, 1830-1831).

Finally, since in this type of judgment procedure, in addition to the human individuals, the electronic facilities and equipments are considered, all the above mentioned steps and preparation of the requirements should be brought into consideration with more scrutiny in order to achieve optimal use of these up-to-date equipments.

Virtual testimony hearing methods

In some courts, due to specific conditions, the physical presence of the witness in the court session is not possible and, meanwhile, it is very difficult or not trustable to grant rogatory thus it is suggested that, maintaining the scientific and technical bounds and criteria and using the experts, the testimony is heard in absentia and in virtual space or through one of the following ways:

testimony through monitor (video conference): it is method by which the testimony is declared without physical presence of the witness; so that, in one side, there is a monitor and a microphone in front of the witness who is outside of the court and the audience can see him and, in the other side, the judge, jury, litigants, and their lawyers can see the witness through the monitor. Using the technical equipments and video conference provides the witnesses, litigants, and their lawyers with the possibility of watching each other in the virtual space.

Testimony through telephone conference in social networks: in this method the court connects lively with the witness and or the litigants and hears the litigation and testimony through the cell phone social networks such as Viber, Whatsapp, Tango, etc. In addition to reducing the notably high judicial probe costs through using these very cheap or even free networks, this method provides the possibility of testimony hearing in two forms. First, through the social networks that provide audio and video call service through which the witness, just like in video conference, can observe the court session and meanwhile the litigants can see the witness virtually and, second, through audio call by a telephone connection so that only the voice of witness is heard and no video is seen. Therefore, when it is impossible, due to bad weather or impassability of roads, for the witness to be present in the city where the court is located, the court session and the judgment procedure is not cancelled or delayed. This advantage caused that since 1983 in America numerous cases were judged through this method. The third method hearing is through social networks which send messages and provide the witness with the service of messaging. In this method, through the social networks, the witness can send his transcript testimony to the judge's phone and thus the judge and the jury can observe his testimony and, in necessary, read it aloud for the audience.

Testimony through video tape: sometimes, for some reasons, the presence of the witness in the court session becomes very difficult and the common solution for it is granting the rogatory letters or hearing the testimony by the judge's representative who fills out the transcript testimony form and then returns to the court. But in a reasonable and logical perspective, it is better that the judges hears the witnesses' testimonies personally and avoids delegating it to other person(s). But when this is not possible it is better to record the audio and video of the witness and his testimony in a video tape or CD and send it to the court for judgment. In legal terms, transcript testimony has some disadvantages that have been by the jurists and lawyers, but in video testimony the face mimics (happiness, dissatisfaction, nervousness, stress, etc) is observed by the judge(although recorded and not live) and this can help and influence the judgment procedure. Video tape is one of the positive methods which in the common law is considered as an exception in hearsay testimony; in other words, in the common law, the secondary testimony (quoted) is not acceptable unless in the above mentioned case provided that the witness is really inaccessible.

DISADVANTAGES OF VIRTUAL TESTIMONY

Conflict with judgment procedure principles: an opinion states that: “this is not the German-Roman Law method that condemns someone to death before letting him to confront the plaintiff face to face and respond him about his accusation.”

The “face to face” term has been repeated in many rules of the British Law in 16th century; of course, the common law certifies that the condition of confrontation in some circumstances cannot be executed reasonably in the cases. For example, the witness may die before trial and face to face confrontation, besides, in psychological viewpoint, face to face confrontation has important effects; for example, we can easily observe the witness’s psychological stress, face mimics, hands movements, voice trilling, and other things and also we can find out the falsehood or truthfulness of the witness’s words. This is better realized by physical presence of the witness. According to the sixth amendment of the USA Constitution, one of the principles of judgment procedure is observing the condition of the witness’s confrontation with the accused. This condition, in the ordinary laws of the US has been interpreted as: only in some exceptional circumstances the physical confrontation is not required, of course the mere confrontation of the witness and accused is not the case but in the jurists’ interpretation, the confrontation of the witness with the court authorities (judge and jury) is implicitly regarded. As for the confrontation of the litigation parties, it must be noted that in any individual three indices should be investigated: 1) sound, 2) body, and 3) voice. Among these indices voice is the penetrable one so it is more likely that when a person is lying, we can perceive this lie in his voice; however, the body organs are more controllable thus concentration of the jury members on the face mimics and body movements of the lying accused is quite useless but, meanwhile, we should notice when the trilling voice resulted by lying occurs. It is evident that when the witness confronts the litigation parties face to face, this state occurs more but in case of using videoconference the witness can lie more conveniently and thus the jury and judge may believe his words more easily.

One of the issues that can be considered as a disadvantage of face to face confrontation is whether testimony through videoconference, social networks, or video tape falsifies the in-court testimony or not. In order to answer this question we should know whether we should consider the in-court testimony as a subject or as a method. If we believe that the main objective is to execute justice and perform a just judgment procedure, then it won’t differ whether the testimony is presented in presence or virtually. And if it is possible to have a conversation and negotiation between the witness, litigants, and court, then we must consider the in-court testimony as a method. In any case, disadvantage of the face to face

confrontation seems to lack sufficient reasonable and legal bases to be able to completely falsify the legitimacy of remote testimony.

Another judgment procedure-related objection is the objection of the remote testimony hearing regarding the openness of the judgment procedures. Critics have stated that free presence of the people in court session prevents the self-arrangement of the judgment board members while this is less observable in remote testimony hearing. In other words, free presence of the people in court session and physical presence of the witness and other litigation parties adjust the judgment procedure errors. Of course, by accepting this reasoning, it can be said that testimony hearing in virtual space has got no contradiction with the openness principle of the judgment and people can freely, either in presence or through internet, participate in the court session and observe the judgment procedure. When we should regard specific prohibitions of the presence of some individuals in the court session of family litigations and protecting the mental and physical security during the testimony hearing in virtual space, then the given objection and disadvantage will not be able to completely prohibit the virtual testimony.

TECHNICAL PROBLEMS

One of the possible problems that may be expressed is that when the litigants' attorneys or the litigants themselves want to ask some questions from the witness, the witness is not physically present and thus his voice and image may be displayed by some pauses and, also, may be disconnected due to various problems such as power outage or disruption of virtual networks, therefore they cannot defend themselves. Of course, it must be accepted that this technical problem is merely a probability just like the conditions in which the witness cannot testify personally or perform an in-court testimony due to incidents such as fainting or even he cannot participate in the court because of problems such as flight cancelling or impassability of the roads which lead to the court. Another notable objection to this method is the possibility of forging the electronic reasons and evidences including CDs or electronic memories which contain the electronic testimony contents. This means that a testimony which has been recorded in a film may be forged through technical techniques. A similar forging may be done in transcript testimonies. In this case, we suggest appointing some connoisseurs as specialists and experts for distinguishing between the counterfeit and genuine files in order to help the judge to make a just and fair judgment. In any case, we cannot ignore and deny usefulness of the electronic files, videotapes, CDs, and social networks only due to these

objections and problems because avoiding the use of up-to-date and modern sciences in the judgment procedure can result in reduction of desirable quality of the judgment and also can disturb the judgment procedure in the courts.

ADVANTAGES OF VIRTUAL TESTIMONY HEARING:

Judgment procedure acceleration: Although disregarding the condition of confrontation is considered as one of the disadvantages of this method, it must be noted that in some cases, which are not few, testimony through virtual space can prevent suspension of the judgment procedure due to impossibility of the witness's presence in the court; as know prolongation of the judgment procedure is one of the main disadvantages and shortcomings of the judgment procedure.

Prolongation of the procedure causes that the plaintiff cannot gain serenity ad the defendant feels abeyant. In the legal system of some countries the time limitation has been regarded for this problem but it must be noticed that time limitation is not an appropriate solution for preventing the prolongation of procedure, because prolonged procedure has its own negative effect anyway and time limitation, relative to the civil claims, can weaken the possibility of judicial remedy in multiple dimensions, in addition to being altered. In this regard, using and exploiting the modern technology and virtual space for testimony hearing can remarkably accelerate and facilitate the judgment procedure and also can prevent prolongation of the judgment procedure and, consequently, result in the people's satisfaction of the judicial system.

Economic value: One of the components of the human life is economic welfare. In this regard, the judicial systems usually attempt to provide the best services with the least costs in order to minimize the pressure of the expenses which are paid by the lawsuit parties and achieve a reasonable and appropriate efficiency; because, traditional testimony requires the witness's presence in the testimony location in the cases in which the place of testimony is different from the place of court, so this involves huge expenses. Therefore, regardless of the risks and dangers to which the witness is exposed, in economic terms, too, it is not cost-effective and expedient for the one who wants to rely on the witness's testimony to pay the costs of the witness's transportation to the testimony location. As previously stated, in contemporary era the presence of social networks which provide low-cost and, sometimes, free accessibility services for people in different places and even provide the service of audio & video-conferencing through which the costs of judgment procedure are reduced can outstandingly help achieving a low-cost and cost-effective justice.

Prevention of time wasting in judicial system: Following the traditional system of testimony hearing requires that in the cases that the place of testimony is far from the court, the testimony hearing process can be achieved by granting the rogatory letters or by the judge's personal presence in the place of testimony or referring it to the bailiffs. As you know, performing each one of these actions requires, regardless of huge costs, spending a long time by the judicial system and its involving agents and representatives, and, specifically in unimportant and low-price cases, spending such long time by the judicial authorities is not reasonable and prevents the court from handling and investigating the important cases. However, by accepting the testimony hearing through virtual space we can avoid spending long times for investigating the less important cases and, thus, the court can investigate and judge the cases which are more important; because, in today world, the time element is one of the most important rational (intellectual) components of the judicial investigation.

Lengthy maintenance and easy transportation: In the traditional system hearing the witness's testimony and recording his statements in the testimony minutes, especially when there are multiple witnesses and there are lengthy and detailed testimonies, increases the file volume and, besides, these minutes will be destroyed after ten years due to the space limitations. But in virtual testimony hearing, the file containing the witness's testimonies is an electronic file and it needs a very small space, thus it can be maintained for a long time even if the main file is destroyed; moreover, if the testimony is needed to be reused in another case or another place, this file can be easily sent using the social network software. Therefore, resending the electronic file is not too difficult to be ignored while in traditional method of testimony hearing sometimes the judge is forced to refuse sending the judicial authority the case containing the witness's testimonies.

Protecting the weak and disabled witnesses: There are some cases in which, based on the reasons of protecting the witnesses who are commonly the abused children, the virtual testimony must be accepted. This issue is important to the extent that, according to a quotation in 1985 in Oklahoma, about 5400 child abuse have been reported. In most of these cases, the virtual testimony has been accepted despite not regarding the condition of confrontation in order to support and protect the child. In a lawsuit about child sexual abuse, a one-way video was presented and the accused individual objected to his condemnation and lack of physical confrontation and, thus, the condemnation was revised and cancelled. Two years later in another lawsuit⁴, the nonphysical confrontation was accepted (the child sexual abuse in the same previous

⁴ Maryland V. Graiy

case) and the reason for this acceptance announced to be the general policy which has been taken in this field. That is, it was stated that despite the court's sentence in the previous case in the current case an opposite sentence would be announced; these are due to the judicial policies which mainly support children in order to protect them against mental damages. In another case⁵ related to raping three young girls, the victims' fear from the accused person caused that using a two-way video was accepted both in the base court and the court of appeals. Also in another case⁶, a man was accused to voluntary manslaughter of his three girls, so a two-way video was used which resulted in the acceptance of the sentence by both the base court and the court of appeals. In another case⁷ related to kidnapping and raping an 11-year-old boy and a 2-year-old boy, just like previous cases, remote testimony hearing was accepted by the judge and the jury in order to protect the children.

As it can be seen, use of the virtual testimony hearing in the protective philosophy of the legislator is an effective way for protecting the children and the weak and disabled individuals; besides, in some cases, despite the possibility of the witness confrontation with the litigants, the court can hear the testimony remotely through the virtual space and without face to face confrontation in order to support and protect the witness's mental and physical status.

CONCLUSION

With regard to the speed of growth of technology and the simplicity of communication through virtual space, it seems that the testimony laws in the world need a great change and application of the traditional method of positive reasoning and evidences appears to be unreasonable and illogical because it needs high costs and wastes time of the litigants and the witness. Of course, in order to achieve the best implementation and operation of this idea, it is necessary to equip the courts with modern communicational systems alongside with using the experts to help the judges for preventing hacking and technical failures. It is notable that the disadvantages of this method of testimony hearing apply to the traditional method too, but in the contemporary age acceleration of the procedure, the economic value of testimony encouragement through virtual space, protecting the weak and disabled individuals such as abused children

⁵ USV. Carrier 1993

⁶ USV. Quintero 1994

⁷ USV. Weekly

and prevention of their confrontation with the litigants, and also prevention of time wasting in the specially for less important cases all indicate this modern method can remarkably help accelerating and changing the judgment procedure with lower costs, besides it can reduce some problems and difficulties of the procedure; of course, accuracy and precision shouldn't be ignored because this method can potentially have some technical disadvantages and shortcomings so the connoisseur experts should reduce the possible undesirable effects by introducing their scientific opinions and viewpoints. ,

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