

Taking and Sharing Photographs of Virtual Court Proceedings to Social Media: A Critical Appraisal on the Law of Contempt in Malaysia



ACADEMIC ARTICLE

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ABSTRACT

In response to the spread of the Covid-19 pandemic, virtual Court hearings in Malaysia are now conducted in a way that enables proceedings to continue, ensuring its accessibility to the public. However, the attendees of virtual Court hearings remain bound to the same prohibitions as those enforced in conventional hearings. In Malaysia, the Court bans photography of any proceedings in the Courtroom, in which, disregarding the prohibition, can cite one for contempt of Court. The excessive use of digital photography may trigger photo manipulation by creating unrealistic images, which causes a public misconception. However, Zoom Court hearings have remained a permanent feature of the Malaysian justice system post-Covid-19. This research aims to examine whether photography in Court proceedings amounts to contempt by disrupting the ongoing process. The methodology used is qualitative approach based on library and internet research. This research found that photography of Court proceedings and sharing the photographs on social media platforms give rise to the dangers of witness intimidation and prejudice to the accused person's right to a fair hearing. It suggests a need to envision a detailed guideline, clearer signage, and develop special measures for the stakeholders to use mobile phones with cameras in Court proceedings.

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“We operate on a different timeline, a different chronology. We speak a different grammar.”

[Justice Anthony Kennedy, in response to the issue about allowing cameras in the Court, 1996]

(Tony Mauro, Roll the Cameras (or Soutersaurus Rex), Legal Times, April 18, 1996, at 9; Mauro, T. (1996). Let the cameras roll: Cameras in the court and the myth of supreme court exceptionalism. *Reynolds Courts & Media Law Journal*, 1(3), 259–276. It refers to the Court as a unique institution, that can and should resist the demands of the information age).

INTRODUCTION

Taking and sharing photographs of virtual Court proceedings is equivalent to the act of photography in a Courtroom. Once entering the Courtroom, a visible sign in the public gallery mentions the prohibition of mobile phones in Court, inclusive of forbidding its function for taking photographs of any ongoing Court proceeding. It is according to the Chief Registrar’s Practice Direction No. 1/1999 embodying the brief contents on the prohibition of bringing the mobile phones into the courtroom (known as “*Pekeliling Ketua Pendaftar Bil 1 Tahun 1999 – Larangan Membawa Masuk Telefon Bimbit ke dalam Bilik Perbicaraan Mahkamah*” dated 16.3.1999 issued by Chief Registrar of Federal Court, Datuk Ramly bin Haji Ali and can be found under “Open Court Etiquette” rules from the [Official Portal of Office of the Chief Registrar Federal Court of Malaysia](#)). Due to the Covid-19 pandemic, modern technology shifts the proceedings to virtual hearings with strict court policies. This method raises new challenges to the administration of justice, since the attendees of virtual Court proceedings are not strictly monitored, causing photography or video recordings during a hearing more likely to occur. Hence, this situation has challenged the Court to enforce its policies while ensuring the public’s right to access information for their interest, promoting judicial transparency. It gives rise to the research question of how the Malaysian Courts can improve the regulation on taking and sharing photographs of virtual hearings to avoid one being cited for contempt of court.

Part I and II explain the reasons behind the prohibition and restriction on mobile phone devices in courtrooms in Malaysia and other jurisdictions. Next, Part III and Part IV differentiate between taking photographs and later sharing pictures of virtual court proceedings onto social media. Subsequently, Part V discusses the legal sanction on contempt of Court and its challenges when the use of technology is involved. Lastly, Part VI provides conclusions and recommendations for practical and more precise guidelines on the taking and sharing photographs of virtual court hearings.

This article addresses the problem of taking and sharing photographs of the virtual hearing onto social media platforms. It provides an overview of its implications with examples by procedural fairness risks. In the end, the authors formulated the recommendations for the Malaysian context to an immediate clarification about what detailed guidelines are available to the public on the circumstance when allowing and not allowing the use of the mobile phones in the court proceedings. The authors also investigated specific issues: the fair trial, improved access to justice seamlessly, protection of witness’ identity and privacy, and most importantly, dealing with the contempt of Court offence resting on the basis to prevent interference with Court’s administration.

METHODOLOGY

The research aims to investigate photography during virtual Court proceedings and whether it interferes with the administration of justice. This research was conducted using library research to gather primary and secondary sources. This study utilizes a doctrinal analysis by critically examining existing studies and connecting them to the current research. Subsequently, any challenge in the practice of allowing cameras in a virtual Court hearing with the aid of video-conferencing technology is critically analyzed. Finally, the doctrinal research method is adopted. It helps to explain the rules governing the particular scenario, identify the areas of difficulty and the arguments' challenge from the existing regulations, and unify recommendations for future development of the same legal landscape (Hutchinson, 2015).

(I) PROHIBITION ON USE OF MOBILE PHONES IN COURTS

There are signs prohibiting mobile phones all around the entrance of the Malaysian courtrooms' public galleries (Chief Registrar's Practice Direction No. 1/1999 dated 16.3.1999). Notably, the policies prohibiting photography are akin to an announcement or the Court's order to the public, restricting cameras in the Courtroom.

In general, as a guardian of the rule of law, the Court will use its inherent power to control the proceeding and to ensure a fair trial without any disruptions (*Morris v Crown Office* [1970] 2 QB 114, 129; *State v Conliff* 401 N.E.2d 469, 473 (Ohio 1978); Livingston, M. (2000)). In recognition of such policy, illegal photography in Court proceedings is a form of breaching the Court's order and disrespecting its authority. Moreover, such an act potentially disrupts the proper administration of justice, amounting to direct contempt in the face of the Court (Livingston, M. [2000]).

The increasing use of mobile phones presents a new challenge to the criminal justice system. An individual's camera phone, connected to the internet, may capture a picture, and transmit it to a third party instantly. In this case, taking any form of photographs in Court may amount to contempt of Court (*HM Solicitor-General v Cox and another* (2016) EWHC 1241 (QB)). Concerning this, intention (*mens rea*) on the part of the person capturing the picture of the Court proceeding is not an element that has to be proved to establish contempt (*R v Vincent D* [2004] EWCA Crim 1271; *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321). However, the Court considers that the effect of the specified picture may result in the actual risk in which the administration of justice is prejudiced.

In *HM Solicitor-General v Cox and another* (2016) EWHC 1241 (QB), the Court held the respondent liable for photographing their friend, Ryan Sheppard, in the dock and uploading the photo to a Facebook page. It happened during his sentencing hearing under a murder charge, which was damaging to the course of justice. There were signs at the entrance to every Courtroom at Bristol Crown Court, slightly larger than A4 size, which stated: "Notice to All Court Users. The use of mobile telephones, recording equipment and personal stereos is not allowed in the courtrooms". However, the second respondent, Parker-Stokes, denied knowing that he could not take pictures in the hearing room because he was "too worried about Ryan Sheppard to notice any signs."

Undeniably, one visible sign appeared in his photographs from the public gallery stating: "Switch off mobile phones. Please ensure all mobile phones are switched off before entering court or the hearing room." In the above-said case, the Court rejected

the second respondent's argument since the second respondent was present in the hearing. Furthermore, the second respondent was in the Court premise for some time and went into two separate Courtrooms. Therefore, the second respondent should have come across and passed with those notices in this situation. Since no one had noticed him taking the photographs, in the Court's considered view, this situation suggested that the second respondent took the pictures surreptitiously because he knew it was prohibited. Additionally, the captured signs in his photographs inferred that he wanted to demonstrate his deliberate defiance of the prohibition.

However, Cox admitted that he was guilty of contempt of Court for using his mobile phone to photograph the judge, i.e., HHJ Picton in the Court proceeding and publishing it on Facebook. Hence, this deliberate act signified that he disobeyed a Court prohibition and caused the obstruction to the sanctity of the course of justice. Moreover, this act ultimately impedes the accused person's right to a fair trial, constituting contempt in the face of the Court (Richard B. Kuhns, 1978; Sharanjit Singh, 2019; *PP v Dato' Sri Mohd Najib Hj Abd Razak* [2020] MLRHU 1064; Venugopal [2012]).

Following this case, the Malaysian Courts prohibit photography during a Court session. Breaching this prohibition may lead to someone being charged for contempt of Court. Currently, only one published case serves to express relevant contemporary concern. This case was the uploading and sharing of the Court Recording and Transcription (CRT) video on the fifth day of the SRC trial. This recording showed Datuk Seri Najib's defence counsel questioning a witness. The recording, which had gone viral on social media, was uploaded to the Facebook account of Isham Jalil (Datuk Seri Najib's former special officer). In *PP v Dato' Sri Mohd Najib Hj Abd Razak* [2020] MLRHU 1064, the Honourable Judge Tuan Mohd Nazlan bin Mohd Ghazali stated uploading Court proceedings to the public domain without the Court's permission could amount to contempt of Court.

Nevertheless, in the case mentioned above, His Lordship does not deal with this issue of contempt until after a formal application is filed to hear complete arguments later. Till now, no proper application citing contempt of Court is filed against the contemnor for the unauthorized sharing of the CRT footage on social media. His Lordship further warned the parties not to engage in any posting via social media in the future that will violate the law of contempt in defying the Court's authority. Nevertheless, this case was concluded on 28.7.2020.

The second incident that happened in the same case (*PP v Dato' Sri Mohd Najib Hj Abd Razak* [2020] MLRHU 1064) was the complaint made by the media representatives towards the accused who had taken a selfie during the proceeding on 9.5.2019 (day 16 of the trial). The prosecution raised this incident to the Court on the same day. After that, the learned High Court Judge asked the accused about this incident, and the accused replied by stating that he had switched on the selfie mode on his photo to view whether something had got into one of his eyes and denied taking selfies in Court. Therefore, the Court decided to give him the benefit of doubt. Still, it issued a general reminder to all that the Court's policy prohibits any form of photography and recording in the court proceedings.

On another occasion, a 49-year-old man was caught taking out his mobile phone to capture photographs of the Court proceeding during a Magistrates' Court session. The older man was not being cited for contempt, though the Magistrate only warned and explained the prohibition's rationale (Bernama, 2019). It appears that the initiation of contempt proceedings is perceivably the last resort against anyone who infringes on

the prohibition of taking photographs in an open Court. The challenge arises due to intelligent mobile phones that are easily carried by public members who can capture photographs with unlimited use of data coverage.

However, compared to the time before the creation of the mobile phone, illegal photography of the court proceeding only happens among the journalists, who bear the duty to bring along the camera into the physical courtroom, not the public members. Nevertheless, the journalist would have to use the photographs captured with editorial captions cautiously. It may amount to contempt of Court offence if the publication can cause the judge's mind to have a negative impression over the parties involved before commencing a fair trial (Jones, 1940); and, disclosing the identity of the defendants by publishing their photographs at the front page of a newspaper (Walker et al, 1992). It is a clear position that someone who takes a photograph of any person to any proceedings before the Court may be subjected to contempt of Court. This conduct may have interfered with the administration of justice, regardless of intent to do so.

(II) RESTRICTIONS ON CARRYING MOBILE PHONES IN COURT PROCEEDINGS

Upon closer examination, laws in other countries have handled mobile phones with a camera function in the Courtroom. The countries, for instance the UK position, Michigan Supreme Court, Maryland's Court at the United States, Australian Federal Court, and Singapore Court, are referred to as follows. This is because among others, the said institutions have emphasized the plurality of the written rules on the use of the mobile phone in Court that are accessible online easily and endorsed of 'common law' system of justice as Malaysia.

In the UK, it is a criminal offence to attempt to take photographs, portraits, sketches and the publication of any judge, juror, witness, or party in the Courtroom, in the building, in the precincts of the building in which the Court is held. This prohibition also applies if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the Courtroom or any such building or precincts, under section 41 of the Criminal Justice Act 1925. On 15.7.2013, sub-section (1A) was inserted to section 41 of the Criminal Justice Act 1925 and sub-section (5) was inserted to section 9 of the Contempt of Court Act 1981 (UK). These insertions bring out section 32 of the Crime and Courts Act 2013 for power to provide for further exceptions. Section 32 of the Crime and Courts Act 2013 empowers the Lord Chancellor to enforce regulations permitting the questioned prohibition for photography, recording, and publication. These regulations are comprised of the recording and broadcasting of certain proceedings in the Court of Appeal, including criminal appeals at the Supreme Court (*Court of Appeal (Recording and Broadcasting) Order 2013, SI 2013/2786 and Supreme Court Practice Direction 8, paragraph 8.17.1*).

In the United States, on 8.1.2020, the Michigan Supreme Court announced an amendment that allows the public to bring mobile phones into Courthouses and Courtrooms, subject to the restrictions that prevent disruption (Aileen Wingblad, 8.1.2020). The limits include the people to silent their devices, in which they are barred from receiving any calls while the Court is in session. Additionally, they cannot communicate with any other Courtroom participant and photograph or record any juror or potential juror. Moreover, they are restricted from recording the Court proceeding without the judge's permission and recording or photographing people in the Courthouse without their consent. This amendment will form a state-wide policy to the Courts effective 01.05.2020 (John Nevin, 2020).

Maryland's Court website (Clerk's office, 2021) published a policy regarding mobile phones and other electronic devices. In this policy, these items are allowed to be brought into a Court facility to send and receive phone calls or messages and other lawful purposes under inspection by the Court's security personnel. The restriction on the possession of electronic devices is listed down vis-à-vis non-disclosure to witnesses. Individuals are prohibited from taking or recording photographs and videos in the jury deliberation room in this context. Additionally, individuals may not use these items in a manner that interferes with the work of Court personnel, which is in line with the Administrative Order regarding this policy under Maryland Rule 16–110 effective from 01.01.2011. Lastly, individuals shall turn off the electronic devices inside a Courtroom except with the presiding judge's permission or as permitted by Maryland Rule. Notably, the person who violates the rule regarding mobile phones or electronic devices may be found liable for contempt of Court.

The Australian Federal Courts' website portrays that the use of cameras, mobile phones, tablets, or other equipment to take photographs is prohibited on Court premises unless approved by the Court (W.G.Soden, 2014). Failure to comply with the prohibition results in the deletion of unauthorized photographs and recording or confiscating the device at the Court premise (Rule 6.11 of the Federal Court Rules 2011). Notably, Rule 6.11 does not limit the Court's power to punish for contempt. Additionally, the Court has discretionary authority to dispense compliance with the prohibition rule on the use of communication and recording devices in place at the hearing of Court proceedings (Rule 1.34 of the Federal Court Rules 2011).

In the Singapore Judiciary, the State Courts' website displays the information for the visitors (at para 4, FAQs). It mentions that the individuals may bring mobile phones into the building, but the camera function in the mobile phones must not be activated within the State Courts unless specified. However, the individual may use notebooks, tablets, mobile phones, and other electronic devices in the Courtroom to take notes of evidence during the hearings or communicate with external parties during hearings in open Court unless the presiding judge disallows it (State Courts Singapore, 2021).

Pursuant to the above, this article recommends the reforming of comprehensive guidelines in the Malaysian context for the use of mobile phones during virtual court proceedings. The policy on mobile phones is important to prevent any making and transmission of photographs to be shared via social media platform without the court's permission which amounts to an act of contempt of court. Indisputably, this is an unsettled position in the virtual Court. The act of taking and sharing photographs of virtual court proceedings to social media is like a coin that has two sides. If a rigorous approach is adopted as the act is strictly prohibited, it may infringe the open justice rule by preventing the court proceedings to be conducted in a transparent manner out of sight of the people. If a lenient approach is adopted by allowing the people to use mobile phone functions and share the photograph taken from the court proceeding onto social media platforms, it violates the right to a fair trial as it may distort the testimony of the witness and any doctored photograph may cause prejudicial effect to the verdict as a result of the publicity and discussion. This will leave a vacuum, giving rise to uncertainties and conflict in the fair trial and affect the rights and interests of the parties involved in the administration of justice. This issue never fades. The arising concern comes from taking and sharing photographs of the virtual hearing that may cause the appearance of injustice. Therefore, the issue needs to be addressed to provide a viable solution following the advent of zoom court hearing technology to safeguard the right to a fair trial and public access to the court record, in order to defend the

maxim “justice should not only be done, but should manifestly and undoubtedly be seen to be done” (R v Sussex Justices; ex parte McCarthy [1924] 1 KB 256).

In Malaysia, there is no specific legislation regulating the prohibition on mobile phones in Court hearings. As mentioned earlier, signs are displayed as notices prohibiting mobile phones inside the Courtroom. However, there is no clear information on the violation of this prohibition. Under the “FAQ-Open Court Etiquette” rules from the Official Portal of Office of the Chief Registrar Federal Court of Malaysia, mobile phones, pagers, and other electronic devices are to be switched off, and no recordings are allowed.

In particular, the Chief Registrar’s Practice Direction No. 1/1999 (**Pekeliling Ketua Pendaftar Bil 1 Tahun 1999**) specified the prohibition on mobile phones in the Courtroom, but not the Courthouse in general. The Malaysian Court assumes that mobile phones with cameras can be brought to Court buildings, albeit they must be switched off in any ongoing proceedings. It leads to the possible conclusion that taking photographs outside the Courtroom but within the building is allowed. Moreover, there have been no complaints against local reporters who took pictures or video recordings within the Court building. Nevertheless, there is no clear direction on the website as discussed above at other judiciaries, which provide exceptions for users to use their mobile phones or any other electronic devices. This idea is specific to taking pictures or recordings in hearings, for example, with permission of the presiding judge and restrictions while using mobile phones to not interfere with the court proceedings.

As it is, there is no hard and fast rule that photography of proceedings amounts to contempt of Court. Drafting a comprehensive guideline is necessary to stipulate the condition for seeking leave from the Court concerning taking photographs or using mobile phones in virtual Court proceedings, as it deems fit and appropriate. Therefore, contemplating the use of technology in our daily lives, the Courts have the power to grant the use of the devices in the proceedings with restrictions to ensure no obstruction to the administration of justice.

(III) TAKING PHOTOGRAPHS OF VIRTUAL COURT PROCEEDINGS

In early 2020, the Covid-19 pandemic has compelled many to be creative by innovating virtual meetings or online marketing. It is widely recognized that the Malaysian Courts have embraced technology and moved towards an online Court by introducing the Chief Justice’s Practice Direction No.1/Year 2021. However, the drastic change has affected the Court process, which leads to the insertion of section 15A, Courts of Judicature (Amendment) Act 2020, and section 101B, Subordinate Courts (Amendment) Act 2020. These amendments, which have been enforced since 22.10.2020, ensure ongoing public access to the wheels of justice. Furthermore, these amendments enable the Court to conduct proceedings through remote communication technology of any cause or matter, civil or criminal, or hold any inquiry in the interest of justice. Notably, the new insertion of these sections exposes cyberspace, virtual place or space for video and teleconferencing of the Court proceedings (Section 101B (4), Subordinate Courts (Amendment) Act 2020 and section 15A (4), Courts of Judicature (Amendment) Act 2020).

Contrary to popular belief, the Covid-19 pandemic has inspired the court to expand the use of remote hearings and facilitate the court operation service for the

administration of justice¹ (Michael Legg & Anthony Song, 2021). A virtual Court will not restrict the individuals' number compared to a physical courtroom with limited space. Malaysian Courts adopt video conference hearings to reduce the need for physical attendance and maintain social distancing by allowing more individuals to access Court proceedings. It aligns with the open justice principle (*R v Sussex Justices, supra* (1924) 1 KB 256). In essence, a court's function is to provide the opportunity to the parties arguing and present their pieces of evidence. This idea is followed by the judge who evaluates and assesses their submissions according to the prescribed law before determining a verdict (Frederick I. Lederer, 1998).

Therefore, the Court's physical existence does not matter if the judge is efficient in keeping its business moving and prevents any delay in the administration of justice (Department of Health & Social Care (UK) 2020). It is important to note that the law (section 15A, Courts of Judicature Act 1964) was passed for the virtual hearings to take place, which also recognizes that the judge is efficient in keeping its business moving via such a virtual court. In support of the virtual hearing, the Attorney General Chambers has pioneered a virtual office system called Chambers Virtual Office (CVO) for the officers' easy access to the uploaded and retrievable documents online (Tan Sri Idrus bin Harun, 2022). The CVO ensures the work continues in innovative ways. Further, the Malaysian Bar President also approved in principle the concept of virtual offices in August 2021 to respond well to the online platform by inventing the legal practice with this increased reliance on virtual hearings. The legal profession is a people-centric service and this enables the lawyers to deliver their legal services during the pandemic and in post-pandemic times to adopt the virtual courts technology (A G Kalidas, 2022). This also increases the efficiency of the court process by saving time and money for traveling as a means to offer an affordable and greater individual's access to justice.

In all Malaysian courts, virtual hearings are currently adopted and remain even post-Covid. The Chief Justice of Malaysia observed the efficiency-enhancing technology has brought to the courts, which embarked on the emergence of the virtual court. The virtual proceeding is not merely to subsist the coronavirus pandemic but also signifies a permanent feature of the Malaysian justice system (Anis Hazim, 2022). In essence, virtual courts are the way forward and necessarily inevitable in the interest of justice. This virtual hearing applies to civil cases, criminal applications, and criminal appeals. However, a physical hearing is allowed for criminal trials upon application made by the parties based on a special circumstance or in the exercise of the Court's discretionary power (Malaysian Chief Justice's Practice Direction No.10/2021). It is also stressed that the e-court platform will be the new norm and marked as the Malaysian judiciary's substantial progress to improve the individual's access to justice and the level of advocacy via this innovative use of screen-sharing technology (The Sun, 2022). Therefore, the screen-sharing technology has greatly assisted the judges with reference to documents, and with the virtual hearings, it enables the court to be easily accessible by the public with the click of a few buttons away from ritualism and logistical burden to focus more on substantive justice aspect of the case itself (The Right Honourable The Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat, 2022). It can also be easily enforced in the event of emergency measures.

1 Through this remote hearing, it allows the evidence to be taken from the witness overseas, freeing up court resources by eliminating the burden for the court staff to travel, and improving accessibility of remote appearances of the counsels, witnesses and public both domestically and internationally, by reducing unnecessary adjournment and costs.

According to the above, the participants that appear via a virtual Court hearing must be mindful of the Courtroom decorum and regulations. Moreover, they must behave according to the conventional Courtroom and respect the Court as a public institution, even in a digital space. Judicial services are provided by the judges who hear and decide the case before them but do not rest on the Courtroom's environment (*R v Beaugard* [1992] 2 SCR 56). The stance has been taken in the case of *State of Maharashtra v Praful Desai* [2003] 4 SCC 601 that observed the advances in science and technology, which opened the possibility of a virtual Court similar to a physical Court.

A virtual court proceeding may be held via Skype for Business, Microsoft Teams, Zoom, or Cisco WebEx Meeting. Currently, the Malaysian Courts adopt Zoom hearings in their judicial process. Therefore, the participants receiving the unique link or meeting ID may join and view the virtual Court proceedings (*Malaysian Bar, 2020*)² without being supervised physically by the Court personnel. Nevertheless, communication and recording devices with a camera during the online hearings have become a critical concern. In this sense, any unauthorized recording or photography taken by the participants may have the potential to be misused.

More attention should be given to the security and confidentiality setting of the virtual hearings to ensure the court conducts the remote proceeding by keeping an eye on the solemnity of the court process. It is essential to avoid the making and transmission of any doctored photograph or video clip of the proceedings (*Celcom (Malaysia) Bhd & Anor v Tan Sri Dato' Tajudin Ramli & Ors and Another Case (No. 2)* [2022] 4 CLJ 381). This issue is specific to the participant's ability to capture photographs with mobile phones or other electronic devices. In this context, there is a potential for the individuals to rebroadcast or photograph shared evidence such as written confidential documents or the witness' personal information (*Albert Fox Cahn & Melissa Giddings, 2020*), infringing the privacy and security issue. Considering this issue, the Malaysian Courts only broadcast live-streaming of virtual hearing in a selected case (*Nurbaiti Hamdan, 2020*), though not in every case. With the new norm of online hearing cases, it has become increasingly challenging to determine if someone is illegally recording or taking photographs of the virtual Court proceedings (*Shelly Banjo, 2020*). The Court Registrar as the host, cannot stop the participants from using the screen recorder software or their mobile phones to take photographs of the proceedings when they are turning off their video on the Zoom meeting. Not only this, there is no feature on Zoom to prevent the participants from taking screenshots since the screenshot is made with their personal electronic device but not with Zoom.

This paper highlights that sharing photographs of virtual proceedings must come together with the act of capturing them. In this case, taking photographs of virtual hearings will be known by the Court only if they are uploaded onto the social media platforms. For this purpose, this article observed the delimitation between the act of taking photographs in the physical Courtroom and the virtual Courtroom. In the physical Courtroom, it may be a distraction for the Court participants when photographing is at the premise. However, the Court participants might not even be aware of it

² It is noted that the Malaysian Judiciary has recently implemented "e-Appellate" system starting on 03.08.2020 at Federal Court and 17.08.2020 at the Court of Appeal. This system is supported by Zoom which is to ensure the copies of all the relevant documents referred by the parties during proceeding are available at their laptops to enable smooth usage of Zoom's "Share Screen" to share the document with the Judge. This system is conducted for the purpose of going to a paperless proceeding where the physical copies of the documents are no longer required by the parties (*Bar Circular No. 265/2020; Pejabat Ketua Pendaftar Mahkamah Persekutuan Malaysia., 31.10.2020*).

if the photographs are taken in the virtual hearing. However, the key challenge here is when the explosion of social media may manifest against the sharing photography of the Courtroom, regardless of whether it is taken in a physical or a virtual proceeding. The photographs are likely to be uploaded and connected with other social media users by posting text, stories, or tagging someone. As a result, contemporary social media platforms may cause the loss of control over the exploitation of the involved parties' identity without obtaining their consent and lack of reasonable expectation of privacy to the intent of the user to disseminate the information (Slater, 2018).

Therefore, the participants shall be prohibited from taking photographs of the virtual hearing based on physical court proceedings. Nevertheless, technology may change the nature of digital photographs taken from the virtual proceeding, which poses the danger of persuading people powerfully with any possibility. In other words, a social media user can do unlawful action by manipulating one's image and immediately sharing the digital image globally (Zachariah, 2009). One example is when the actual event, *suo motu* contempt proceeding against the advocate, was initiated by the Calcutta High Court. This incident occurred when the advocate shared a screenshot of the virtual hearing on LinkedIn, which came to the Court's knowledge (Apoorva Mandhani, 2020).³

(IV) SHARING PHOTOGRAPHS OF THE VIRTUAL COURT PROCEEDINGS ONTO SOCIAL MEDIA

In the Malaysian Judiciary, virtual hearings take place in criminal cases. For example, on 09.07.2020, a convict was escorted from Kota Kinabalu Prison to Kota Kinabalu Court Complex. The panel judges heard the matter via video conferencing from the Palace of Justice Putrajaya (Sira Habibu, 2020). Therefore, as a matter of precaution, the Court must ponder the possibility that the convict's photograph was taken when he appeared on the screen and subsequently disseminated via various social media platforms. It should be deemed crucial considering that a convict's photograph may provide a dramatized display and illustration, which incites an unrealistic image. Hence, it is the paramount duty of the Court to assure a fair virtual proceeding for the convict or the accused.

Furthermore, sharing photographs and posting status on social media potentially invite comments and attract other users to discuss the case. This phenomenon may interfere with the Court proceedings by manipulating the parties and witnesses through the user comments on social media during the pending lawsuit. Until proven liable, innocence presumes to uphold in the event where the accused has yet to be found guilty. There are cases riddled with criminal nature in virtual proceedings through case management, appellate hearings, or criminal trials⁴ (Anjelica Cappellino, 2020; Rebecca Ratcliffe et al., 2020; *Leong Ann Ping v Insp Mohamad Haslee bin Sapiee &*

³ After that, the advocate Shiv Ratan Kakrania had filed an affidavit as asked by the court to tender an unconditional apology and accepting that publishing a screenshot of the court proceedings without the Court's permission was incorrect. Justice Mantha therefore dropped the contempt proceeding against the advocate with a warning and asked Mr. Shiv Ratan Kakrania not to repeat such conduct in future.

⁴ For instances on 11.08.2020, Judge Nicholas Chu of the Travis County Misdemeanour Court in Austin, Texas presided over a Class C misdemeanour traffic violation jury trial using Zoom where all participants – the judge, prosecutor, defence attorney, defendant and jurors were shown on the screen in tiled video feeds and broadcasted live on YouTube; The accused was convicted of drug-trafficking and sentenced to death in Singapore through video-calling.

Ors [2021] MLJU 188). Hence, it is imperative that the Courts are ensuring the accused person's constitutional right to a fair trial following Art 5(1) of the Federal Constitution (*PP v Gan Boon Aun* [2017] MLJU 258, FC). The right to a fair trial is essential to ensure the individual enjoys his fundamental right of access to courts and to be treated as innocent until proven guilty for the offence charged (Shahrul Mizan Ismail, 2016).

On this premise, the act of taking photographs in an online Court session would distract the accused person's access to justice. It is inevitable to admit one material fact where the accused may be innocent at the end of the hearing. A stolen photo of the accused in the dock before the hearing can potentially circulate online throughout the hearing. This predicament would have embarrassed the accused and negatively reinforced the public's attitude through social stigma or criminal labelling (Ariana Tanoos, 2017). Mobile phones are ubiquitous in capturing photographs, concealing their intrusive nature against criminal proceedings, virtual or physical state. Specifically, the photographing is sensitive, especially involving child offenders or witnesses (section 15(2) of Child Act 2001). Given these points, the Court proceeding shall be ordered to be carried out "in camera" in the interest of justice. This approach is idealized to ensure the testimony's reliability when considering a child's mental and emotional condition.

With digital photography as part of our daily lives, there is a need to protect the interests of witnesses and victims involved in civil and criminal cases. An open justice system must be realistic, albeit it becomes meaningless when the witnesses' and victims' interests are prejudiced at the expense of giving a public understanding of the judicial process. In this article, the challenge discussed is the danger of disclosing the identities of the witnesses attending the virtual trial of both civil and criminal matters. Furthermore, this predicament ordinary witnesses to online intimidation. It gives rise to anyone who takes part in the Court proceedings later, including the expert witnesses,⁵ the prosecutors,⁶ the victims,⁷ or the friends and family members of the accused persons. The witnesses may be afraid that their photographs are taken during the Court hearing in this situation. The witness intimidation problem is prevalent in the age of social media, and in severe cases, may threaten their lives and their families.

Despite the Malaysian Witness Protection Act 2009, the only available mechanism is identity change to fit into a whole unique environment. However, as rightly pointed out by Sarvinder Kaur (2011), it becomes difficult for the relocation of identity to

5 Alyce La Violette – a counsellor and psychotherapist for battered women who served as defence expert witness in the Jodi Arias murder trial case in year 2013 had testified that Arias had been controlled, abused physically, sexually and emotionally by Alexander where among others, tweets and other social media posts posted the expert's office telephone number and website, wrote negative reviews of La Violette's book on Amazon.com, posted photos on Facebook of La Violette out for dinner with members of Arias' defence team during trial (Browning, 2014).

6 K.C. an assistant district attorney in Dane County District Attorney's office was stalked by Michel Moller as Moller was unhappy over the prosecution by K.C. of his wife Lynn Moller's conviction related to child abuse, among others for the images posted online such as 'a photograph of K.C.'s home with her name and address written on it, a "booking photo" of a Barbie doll with a black eye and holding a sign bearing K.C.'s name, birth date and the words "solicitation" and "Dane County Jail", photograph of K.C.'s daughter modified to make her eyes reddened similar to the ruptured blood vessels in a victim of shaken baby syndrome bearing the file name "theyshakeme.jpg" (*State v Moller*, No. 2013AP2147-CR, 2014 Wisc. App. LEXIS 512, at *1 (Wisc. Ct. App. June 26, 2014); Browning, 2014).

7 Seven teenagers of Grafton, Massachusetts were friends of the accused person charged with committing the crime, had been arrested in January 2014 on an alleged count of cyber-bullying the victim on Facebook and Twitter over several months by making threats (Browning, 2014).

occur in a small country like Malaysia. This predicament will be at greater risk if the witnesses' photograph under the witness protection program has gone viral on social media platforms. Therefore, it is necessary to look beyond the open justice concept, which draws attention to provide absolutely no prejudice nor undue distress during proceedings conducted before the Court (*Scott v Scott* [1913] UKHL 417). Thus, the most perceptibly effective solution is banning mobile phones with camera functions during Court proceedings.

In the 21st century, technological advancement has enabled almost everyone to possess a mobile phone to access the internet and work conveniently. For instance, the judges and litigants would require a tablet, laptop, or mobile phone to access the cause papers during a court proceeding. The authorities cited that the Malaysian courts have digitalized the justice system in this context. Such robust reliability on technological devices creates a doubt against the Courts' ban on using mobile phones in the first instance.

For the time being, individuals who bring the mobile phones to Court can also find the relevant information online when required, store the required information on the device itself, or apply for the Court to stand down to make a call for immediate assistance. In that event, the use and collection of data in the mobile phones create a right to privacy, implicating the individual has the freedom to carry the mobile phone for communication and seeking information warranting legal protection (*Riley v California* 573 US 373 [2014]). Other than that, the individuals are free to use their mobile phones to express their opinions, report news, and deep participation in the community to exercise influence on gathering information (Diamond, 2010). Similarly, mobile phones are significant to the litigants and judges in this aspect of enhancing information-sourcing as having a greater chance of being better informed in the legal realm (Cooper, 2002).

However, individuals have a traditional concern to have direct access to judicial proceedings. As clarified by Judge Moriarty (as he then was), "this is a people's court, and the people have a right to know what is going on and how it is conducted" (Charnley, 1950). On this account, the "open justice concept" is apparent to be interpreted as encompassing an individual's right to information. This idea includes photography or recording to understand the activities during the Court hearings. Lastly, they have the right to share them online and discuss informed details of the Court proceedings with others publicly (Cunliffe, 2012).

(V) LEGAL SANCTION AGAINST THE INDIVIDUALS WHO HAVE DISOBEYED THE PROHIBITION

The Malaysian Judiciary revised and issued the Practice Direction in 1999 ("*Pekeliling Ketua Pentadbir Bil 1. Tahun 1999*") to urge the restriction signage displayed in the Courtrooms. These signs exhibited the prohibition of mobile phone usage during Court proceedings. This Practice Direction elaborates that the rationale behind the ban is to reduce the distraction, which is due to the phones ringing during a Court session. The idea provides an attachment that stipulates the guidelines for implementation. The Court proceeding's attendees shall surrender their mobile phones to the security personnel at the Courtroom's entrance as an alternative. In this context, whenever they are in the Courtroom, the mobile phones shall be switched off and kept inside individual envelopes detailed with their particulars. It eases the burden of the security personnel to directly return the device following the envelope particulars

to the respective owner when leaving the Courtroom later. However, it is impossible for the security personnel to mitigate the issue related to the virtual Court hearings' attendees' mobile phone usage within the online space.

Notably, the Practice Direction did not specify the rationale behind the prohibition of using mobile phones in court proceedings. However, with the capabilities of mobile phones, individuals can use the device to take photographs and instantly publish them on the internet (*R v Vincent D (Contempt of Court: Illegal Photography)* [2004] EWCA Crim 1271). Hence, to solve illegal photographs during court proceedings, prohibitions are enforced to safeguard the administration of justice. Similarly, the attendees cannot use their mobile phones' photo-taking or video-recording abilities during the virtual hearings.

Nonetheless, the Practice Direction is intended only to be a direction for the administrative purpose from the court (*Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor* [1995] 3 MLJ 465). On this note, there is no statutory authority implicated from such Practice Direction. Therefore, it cannot be exalted into the rule of law to impose a legal penalty for the reason of non-compliance with the Court's direction (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; *Jayasankaran v PP* [1983] 1 MLJ 379).

However, the Courts possess inherent powers to commit contempt of Court when the person breaches the prohibition. This innate power has existed from time immemorial, leaving the justice system to provide the public with the confidence that justice is efficiently administered (*A-G v Times Newspaper Ltd* [1992] 1 AC 191). In the instant discussion, the prohibited act of taking the photographs in Court proceedings is a form of interference with the due administration of justice, and thus, categorized as criminal contempt (*A-G v Newspaper Publishing Plc* [1987] 3 All ER 276). Furthermore, given mobile phones' technical capabilities, their cameras potentially obstruct sights and cause a perceived distraction during Court hearings. This issue is especially critical when the witnesses provide their testimony, which ultimately impedes the administration of justice (*Attorney General of Malaysia v Mohd Kassim bin Mohd Hamid* [2020] MLJU 1292).

In Malaysia, the Malaysian Court preserves the standard law provision under section 3 of the Civil Law Act 1956. In this sense, the common law of contempt's principle, as held in *R v Gray* [1990] 2 QB 36, is accepted and applied by Malaysian Courts (*AG v Arthur Lee Meng Kuang* [1987] 1 MLJ 207). Furthermore, it is a settled law enshrined in Art 126 of the Federal Constitution, repeated in section 13 of Courts of Judicature Act 1964. This law is extended in para 26 of the Third Schedule to the Subordinate Courts Act 1948, giving the Court the power to punish any contempt of itself. On this basis, the Malaysian Courts' vital function is to ensure the proceedings are conducted with fitting dignity and decorum, safeguarding the party's constitutional right to a fair hearing.

Allowing photography in Court proceedings causes distraction to the parties involved. In this case, individuals are subconsciously mindful of their actions. Therefore, they will be preoccupied with the photography and constantly think of their gestures or expressions during the course. Consequently, the issue can affect their ability to concentrate on the proceeding instead of the tasks before them, namely, the prosecutor, litigator, and witness (Youn, 2012). Accordingly, the Courts have reasoned that photography during Court proceedings would be condemned as a "nuisance and often constitutes an unwarranted interference with the orderly functioning of the Courts" (*Berg v Minneapolis Star & Tribune Co* 79 F. Supp. 957 [D. Minn. 1948]), undermining the hearings' integrity (*Zainur bin Zakaria v PP* [2001] 3 MLJ 604).

As mentioned earlier, the Court has the inherent duty to protect the proceeding from any disturbance or disorder, including illegal photography during its proceedings. It is not the act itself that constitutes contempt, but the risks created on the intimidation of the witnesses, lawyers, prosecutors, and judges (*R v Vincent D (Contempt of Court: Illegal Photography)* [2004] EWCA Crim 1271). Thus, illegal photography in the hearing is regarded as contempt in the face of the Court. Specifically, the contempt is applied to the breaching of a Court's direction after noticing the signs at the Court's gallery, which prohibit the use of the mobile phone (*HM Solicitor-General v Cox and another* (2016] EWHC 1241 (QB)). On the other hand, without the signs displayed in virtual Courts, one shall also be liable for contempt of Court if found to infringe such a prohibition.

More pertinently, the Courts face difficulty determining whether illegal photography happens during the Zoom hearings. Moreover, the host has no notifications about participants who took any illegal screenshots or photographs. Additionally, the Zoom application can only disable the photo, screen, and URL sharing for the Zoom participants (Nelson Anguilar, 2020). Nevertheless, the Courts must identify the problems that may risk the administration of justice through illegal photography. Notably, individuals are aware that their actions are prohibited (*Re Kumaraendran, an Advocate & Solicitor* [1975] 2 MLJ 45).

At another point, every re-post or sharing of the photographs via social media taken in Court proceedings is deemed a new publication, which is said to be new contemptuous conduct. With careful consideration, each new contemptuous conduct must be answerable, as if it originated with the publication that has endorsed the same content. Accordingly, the authors take a helpful insight from the *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham* [2012] 7 MLJ 301 vis-à-vis the relevant republication rule.

From the latest ruling in the case of *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2021] 2 MLJ 652, it was held that the owner of the website is held liable for contempt of Court. The issue occurs 'if third-party comments on the impugned photographs' are left on the platform. The third party is not liable. However, the Court decided that the website owner cannot be ignorant and shall know the existence of the offensive comments. This situation is due to the undisputed fact that the owner can delete the third-party comments when he is aware of the calculated comments to interfere with the lawful process of the Court.

In the end, the contemptuous conduct will be known when the photograph of the virtual Court proceeding is taken, uploaded, and left on the social media platforms without leave of the Court. There is no doubt that the virtual Court proceedings' image publication may not be categorized as contempt in the face of Court. However, inevitably, such publication is directly caused by illegal photography, constituting the contempt of court (*HM Solicitor-General v Cox and another* (2016] EWHC 1241 (QB)). Furthermore, publication of postings is a contempt of Court as it can cause disturbance to the essential dignity of the proceedings. These postings especially may become a distraction to witnesses when providing their testimony and manipulate the public's opinion in prejudicing the right to a fair trial (David W. Robertson, 1959).

CONCLUSION AND RECOMMENDATIONS

Journalists report the information related to the virtual Court proceedings to inform society about what happens. In this sense, the Court attendees are not supposed to

take photographs of Court proceedings and share them online with their comments attached. Instead, with the presiding judge's permission, the journalists can broadcast or report the Court proceeding for the public's use. In the event, it is clear that the journalists report the most accurate court process and the context of the court decision to the public benefit. A fair and accurate report will ensure the court administers justice impartially. For this purpose, justice must be done and must be seen to be done. This idea conforms with the foundation values of public accessibility and judicial accountability (*Named Person v Vancouver Sun* [2007] SCC 43, para 1; [2007] 3 SCR 253).

In conclusion, the present prohibition signs on mobile phones are inadequate. Moreover, this idea is relative to individuals in the modern era, including the judges and litigants, who use their devices for working and communication. Therefore, this idea suggests that the Malaysian Courts may allow mobile phones in Court hearings with the restrictions. These restrictions entailed that the phones ought not to be used in a manner that interferes with Court proceedings. However, the regulation imposed by the Courts in the Practice Direction (*Pekeliling Ketua Pendaftar Bil 1 Tahun 1999*) is silent on exceptions against individuals using mobile phones in court proceedings, violating the said prohibition.

The above discussion indicated that the Practice Direction should be improved and enhanced. In this circumstance, the right to a fair trial cannot be compromised, regardless of technological convergence. Thus, the recommendations for the virtual Court proceedings are as follows: -

- i.** A detailed guideline is enacted to explain the following parts, which is readout or share-screened before the Zoom hearings commence:
 - a)** The general ban on using camera functions on mobile phones in Court Proceedings;
 - b)** Definition of Court Proceedings;
 - c)** Restriction conditions on using mobile phones;
 - d)** Discretion of the presiding judge in allowing the use of the mobile phone. For example, one cannot activate the mobile phone to take any photograph or recording of the Court proceedings unless the presiding judge grants permission;
 - e)** Permission of presiding judge must be obtained in allowing the sharing of the photographs even after the act of taking photographs of the court proceedings;
 - f)** Sanctions imposed as a result of the violation of the prohibition. For example, this violation includes whether a direction to leave the Court proceedings, a direction to the Court security personnel to confiscate the mobile phones on the spot, and contempt of Court;
 - g)** An individual who contravenes this policy may be prosecuted for contempt of Court, a criminal offence that must be explained.
- ii.** To clarify the signage displayed in the Courtroom related to the prohibition of using mobile phones and their functions in Court proceedings. It is suggested that adding words to the signs inform several illegal actions. These prohibited actions include using a camera and recording function on mobile phones in court proceedings, in which its violation may be punished under contempt of

Court. The enhanced signage is to be set as Zoom background of the Registrar as a notice for the involved parties.

- iii. As amended regarding mobile phone usage in its proceedings, the Court's policy must be outlined in the Malaysian Court's portal website. This policy should not only apply to switching off the mobile phones, and barring any form of recordings, either audio or visual. This enforcement is too general, as it is silent on illegal photography and sharing the proceeding onto social media platforms.
- iv. Special measures are taken for trials held online, requiring the litigants to have the option of applying for security measures. In this case, they can arrange for security personnel present at the police station to be closer to the witnesses' residential location (laypeople). The Court's personnel can supervise the witness when giving evidence and inspect if any illegal photography or recording has occurred. It is a significant concern when conducting a criminal trial. Similarly, this idea can be applied to the clients who attend the Zoom proceedings without the presence of their solicitors. Other than that, it is best to suggest the clients shall observe the Zoom proceedings at their solicitors' office under their supervision for guidance if any unauthorized photography has happened.

Alternatively, a supervising solicitor (from a third-party firm) can be appointed to oversee the witness giving their testimony or with the client (civil cases). This idea will not require the Court security personnel to be present. Accordingly, the appointed supervising solicitor must fill in a form to the presiding judge with the details, firm, and declaration after reading the relevant guideline vis-à-vis the usage of the mobile phones. This idea ensures that the appointed supervising solicitors understand their responsibility. In this context, the solicitors' primary responsibility is to supervise the coaching of a witness or any unauthorized photography during the virtual proceedings.

- v. The solicitors must remember that they uphold the duty not to hinder the administration of justice and should set a good example as a matter of pride for the profession. Furthermore, they should advise their clients, witnesses, and amateurs accordingly. Moreover, the amateurs could follow in their solicitors' unlawful footsteps, seeing that they can take and share the photographs of online Court proceedings without being penalized.
- vi. Media representatives are allowed to join the Zoom hearing provided they must submit their names and institution details applying for permission of the sitting judge. Meantime, they must fill up one unsworn declaration subjected to the penalty if found to have shared the photographs of the virtual court proceeding without leave. Media representatives as the 'eyes and ears' of the public bear the utmost vital duty to report what had been transpired from the Court proceeding to the knowledge of the public when reading the news publication (Jason Bosland and Judith Townend, 2018); and
- vii. It is suggested to have offered a specified platform for the public members to watch the live stream of the virtual court proceeding. To continue watching, it requires the public to fill up an automated online attendance sheet form on the website with the names and certain personal information. It is also essential to click on 'agree to the rules'. Prohibition of taking and sharing photographs of the virtual proceeding must be included in the regulations, as the public who clicked are bound to the rules posted on the website as enforceable contract

(Femminella, 2003). It is because the individual must enter the website to watch the streaming court before having the chance to capture the photograph. Further, they must be aware the portal owner can trace it back from the list of the public attendance sheet linked to those who posted the said photographs on its social media site. When entering the website, public participation with terms and conditions is allowed to observe the court proceeding, in line with the principle of open justice, which is opened to public scrutiny (*Grollo v Palmer* (1995) 184 CLR 348). In the terms and conditions, the public must be made aware that sharing the photographs will be deemed an offence for contempt of Court.

Consequently, the present recommendations focus on the tension between sharing photographs of the virtual Court proceedings onto social media and the substantial risk that the said photographs created to the course of justice. Given the nature of the virtual Court hearings, as presented, it draws the importance of ensuring people's continuous access to justice, as in the conventional Court proceedings. Finally, this article expresses concern highlighting the guidelines issued to preserve procedural fairness within the virtual Court process.

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The authors have no competing interests to declare.

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