The Italian Route towards Digitalisation of Criminal Proceedings. The Latest Developments in the Field of Remote Justice

O caminho italiano para a digitalização do processo penal. Os últimos avanços no campo da justiça remota.

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Abstract: The development of the remote justice paradigm plays a key role in the digitalisation of criminal proceedings as provided for by Legislative Decree n. 150 of 2022. Taking advantage of the experience gained during the COVID-19 pandemic, when audiovisual links demonstrated their potential in terms of time savings and efficiency for the judicial system, the legislator decided to make participation by videoconference a stable and general alternative to in-presence participation for a wide range of acts and hearings (including the taking of evidence) provided that persons concerned give their consent. After reviewing the milestones in the evolution of the meaning and scope of remote justice within the realm of the Italian criminal procedure the paper attempts to answer two questions: how does the new legislation fit into the academic and jurisprudential debate developed on the subject over the years? Is the current framework able to combine efficiency and guarantees in a satisfactory way?

Keywords: Remote justice; participation by videoconference; virtual hearing; defense rights; right to confrontation.

Resumo: *No caminho rumo à digitalização do processo penal promovida pelo Decreto Legislativo n.º 150 de 2022, o aprimoramento do paradigma da justiça*

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remota desempenha um papel fundamental. Ao aproveitar a experiência adquirida durante a pandemia de COVID-19, quando as conexões remotas demonstraram seu potencial em termos de economia de tempo e eficiência para o sistema judicial, o legislador decidiu tornar a participação por videoconferência uma alternativa estável e geral à participação presencial para uma ampla gama de atos e audiências (incluindo procedimentos de produção de provas), desde que as pessoas envolvidas afirmem o seu consentimento. Após uma visão geral dos marcos na evolução do significado e do escopo da justiça remota no âmbito do processo penal italiano, o artigo procura responder a duas perguntas: como o novo diploma legislativo se encaixa no debate acadêmico e jurisprudencial desenvolvido sobre o assunto ao longo dos anos? O atual quadro é capaz de combinar de maneira satisfatória eficiência e garantias?

Palavras-chave: *Justiça remota; participação por videoconferência; audiência virtual; direitos de defesa; direito ao confronto.*

1. Introduction

In 2022 the Italian legislator promulgated an ambitious reform (the so-called "Cartabia reform") aimed at meeting three demanding imperatives: to reduce by 25% the so called "disposition-time", i.e. the average time needed to adjudicate the case; to reduce the backlog in the courts; to simplify and rationalise the criminal justice system[2].

One of the pillars of the reform is digitalisation, with a wide range of measures aimed at making criminal proceedings faster, more technology-oriented and possibly "paperless". In addition to the implementation of the digital dossier and notification mechanisms which largely take advantage of the digital domicile the consistent expansion of remote justice stands in this perspective. As has been noted in literature, this is one of the most sensitive aspects of the reform as it calls into question the rights of the defence and the adversarial nature of criminal proceedings. At the same time, it is clear that the push towards remote participation in acts and hearings may well satisfy the demands for efficiency on which the new legislation is based.

[2] Legislative Decree no. 150 of 2022.

Against this background, the aim of this essay is to analyse the new broad regulation on remote justice. In this perspective, after reviewing the milestones in the implementation of the remote justice paradigm in the field of criminal procedure and the related academic and jurisprudential debate from early 1990s to the present day, particular attention is paid to the key role played by the consent clause, which appears in each of the new cases of remote participation in acts and hearings. The thesis presented here is that, despite its theoretical suitability for facilitating the technological "switch" without significant cost to fundamental rights, it may not function properly in practice. In this respect, some proposals are made to smooth out the identified criticalities and to improve the perspective of a knowing and intelligent waiver to the right to physical presence in criminal proceedings.

2. First steps, stabilization and growth

At the dawn remote justice was enclosed within narrow bounds.

It was in 1992 that the Italian legislator first opened the doors to audiovisual links as a means of participating in criminal hearings (art. 7 Law Decree n. 306 of 8 June 1992, converted into Law n. 356 of 7 August 1992). That was a dramatic year for Italy: two of the most famous anti-Mafia magistrates (Giovanni Falcone and Paolo Borsellino) were assassinated by the criminal organization they were investigating. In response to these tragic events, the legislator introduced numerous measures, both substantive and procedural, to strengthen the fight against organised crime. One of these measures was the introduction of the first case of "remote examination" (*esame a distanza*) of witnesses[3]. In particular, under (the early version of) art. 147-*bis* CCP Implementing Provisions (from here on CCP imp. prov.) it was provided that testimony of collaborators of justice[4] could be taken remotely, provided that the

[3] The term is used here in a broad sense, including also co-accused persons.

[4] As is well known, the term refers to persons accused or convicted of participating in a criminal organisation, who agree to cooperate with the judicial authorities, in particular by testifying about the criminal organisation and the crimes committed by its members, in exchange for protection from the

technological facilities were available. The purpose of this provision was to protect these people – who were often the target of deadly attacks, especially in those years – by avoiding their presence in the courtroom and by keeping the remote location secret[5].

A further step forward was taken in 1998 (Law 7 January 1998 n. 11), when art. 147-*bis* CCP imp. prov. was broadened in scope[6] and another application of videoconferencing was regulated: "remote participation" (*partecipazione a distanza*) in organised crime trials[7] for defendants serving a custodial sentence or in pre-trial detention, in the event of serious threats to security or the complexity of the trial (with the exception of dangerous inmates, who must in any case participate remotely). The rationale in this case was to avoid the transfer of these persons from one prison to another (in order to allow them to attend the numerous trials in which they were involved as defendants), mainly in order to prevent the possibility of contacts between the members of the criminal association (art. 146-*bis* CCP imp. prov.)[8].

These early implementations of remote justice were conceived as special measures to be adopted for security reasons, typically in criminal proceedings against organised crime. They were also designed to be in force for a limited period of time and not as a permanent feature of procedural law. For these reasons, the response of the majority of scholars has not been one of total rejection. Although the detrimental effects on the rights of the defence and on the adversarial model – particularly in terms of the

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State. At the European level on this matter see Recommendation n. 5 of 2009 and, more recently, Recommendation n. 9 of 2022. Available at: <https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5fe33>. Accessed on: April 8, 2024.

5 See CURTOTTI, Donatella. Esame a distanza. *Enciclopedia del diritto*, Annali II, t. 1, 2008, p. 201.

6 This is mainly due to the fact that the remote examination of witnesses (unless in case the presence of the witness in the courtroom was necessary) become mandatory for collaborators of justice but also for co-accused persons when they were called to testify in organised crime proceedings.

7 And also in hearings in chambers (art. 45-*bis* CCP imp. prov.) such as preliminary hearing and the hearing of abbreviated proceedings.

8 See CURTOTTI, Donatella. Dibattimento a distanza. *Enciclopedia del diritto*, Annali II, t. 1, p. 164.

reduced fluidity and effectiveness of cross-examination, and the greater difficulty for the remotely connected defendant to follow what happens in the courtroom and to consult his or her lawyer in confidence – were not ignored, and indeed were clearly highlighted, the rules on video-links were essentially accepted as the outcome of a fair balancing between the protection of fundamental rights and the public interest[9].

The Constitutional Court has also given the green light. In 1999 it ruled that the use of video-links as an alternative means of participating in court hearings is in line with the rights of the defence (art. 24 Cost.), in so far as the technology guarantees effective and concrete participation on the part of the accused and confidential communication with defence counsel[10]. In this perspective, technical aspects have played a significant role in the recognition of the constitutional legitimacy of art. 146-*bis* CCP imp. prov. In particular, the fact that the provision required a two-way (bidirectional) link capable of guaranteeing mutual visibility between the persons present in the courtroom and those – the defendants – at the remote location has been positively highlighted.

The effect of the decision of the Constitutional Court, together with the substantial approval by the European Convention of Human Rights[11] and the reduction in the costs of IT equipment led to the

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[9] At least with respect to the cases strictly tight to the said rationale and not inspired by the need to speed up the proceedings. See VOENA, Giovanni Paolo. Il telesame. In: ZAPPALÀ, Enzo (org.) *L'esame e la partecipazione a distanza nei processi di criminalità organizzata*. Milano: Giuffrè, 1999. p. 104 ff.; BARGIS, Marta. Videoconferenza. In: ZAPPALÀ, Enzo (org.) *L'esame e la partecipazione a distanza nei processi di criminalità organizzata*. Milano: Giuffrè, 1999. p. 48 ff.; CURTOTTI, Donatella. *I collegamenti audiovisivi nel processo penale*. Milano: Giuffrè, 2006, p. 285 ff.

[10] Constitutional Court, judgment n. 342 of 1999. For a critical comment on the judgement, see CONTI, Carlotta. Partecipazione e presenza dell'imputato nel processo penale: questione terminologica o interessi contrapposti da bilanciare? *Diritto penale e processo*, v. 6, n. 1, p. 79, 2000.

[11] In the case Marcello Viola v Italy the Strasbourg Court found that the virtual participation in the appeal hearings (under art. 146-*bis* CCP imp. prov.) by the defendant: *a)* «pursued legitim aim» under the Convention «namely prevention of disorder, prevention of crime, protection of witnesses and victims [...] and compliance with the "reasonable time" requirement in judicial proceedings» as the applicant was accused of serious crimes related to Mafia's activities; *b)* did not put the defense at a substantial disadvantage as

conversion of the cases of remote justice from temporary to permanent solutions (Law of 23 December 2002 n. 279). Moreover, in the following years the scope of art. 146-*bis* and 147-*bis* CCP imp. prov. experienced a steady growth.

In 2010 a new case of "remote examination" was introduced for undercover agents (art. 147-*bis* co. 3 let. *c-bis* CCP imp. prov.): unless their presence in the courtroom is considered absolutely necessary by the judge, they are examined remotely and their face is shaded[12].

Then in 2017 an important change to remote participation's scheme[13]. By virtue of Law 23 June 2017 n. 103 the use of video-links, in case of security needs and great complexity of the trial, has become possible also in criminal proceedings other than those against organised crime and regardless of the fact that the defendant is *in vinculis* or not (art. 146-*bis* co. 1-*quater* CCP imp. prov.). Furthermore, it has been provided that persons detained for offences related to organised crime and defendants benefiting from protection programs (*id est* collaborators of justice) shall always participate in their proceedings remotely, the only exception being if their physical presence at the hearing is deemed necessary by the judge (art. 146-*bis* co. 1, 1-*bis* and 1-*ter* CCP imp. prov.)[14].

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compared with the other parties to the proceedings as the accused by taking advantage of the audiovisual link had an opportunity to exercise the rights and entitlements inherent in the concept of a fair trial (ECtHR, 27 5 October 2006, Marcello Viola v Italy, § 71-76). Manifestly ill-funded was evaluated also the application in the case Asciutto v Italy (ECtHR, 27 November 2007, Asciutto v Italy). On the contrary, in the case Zagaria v Italy the Court found a violation of art. 6, but not due to the fact that participation by videoconferencing is as such contrary to the Convention neither is art. 146-*bis* CCP imp. prov. The problem was with how the provision, in particular the part concerning the confidentiality of the communications between lawyer and defendant, had been applied (ECtHR, 27 November 2007, Zagaria v Italy).

12 Art. 8 Law of 13 August 2010 n. 136.

13 For a detailed perspective on the piece of legislation, see TRIGGIANI, Nicola. La partecipazione a distanza. In: MEZZETTI, Enrico. LUPARIA, Luca (org.). *La legislazione antimafia*. Bologna: Zanichelli, 2020. p. 538 ff.

14 Stands still the special rule concerning maximum-security prisoners who remotely participate to the proceedings in each and every case, with no exception.

The remarkable exstension of participation through videoconferencing has been accompanied by a new approach to it. The fact that the use of audiovisual links has become the rule (rather than the exception) for some categories of persons[15], and is now possible in all criminal proceedings provided, *inter alia*, that the trial is complex, has altered the original rationale for the provision: not only the needs of public safety but also efficiency justify the sacrifice of the physical presence of the accused. This in turn reflects the idea that, if supported by appropriate technology, virtual presence can be a perfect substitute for physical presence.

The new regulation and its conceptual premises have caused a stir among scholars. A wave of polemical voices has filled the pages of law journals.

The majority view has always been (ant still is) that virtual presence, even when supported by the best technology, cannot be equated with physical presence[16]. This is because, when the accused is behind the

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[15] See SIGNORATO, Silvia. *L'ampliamento dei casi di partecipazione a distanza dell'imputato tra logiche efficientistiche e menomazioni difensive*. Available at: https://www.lalegislazionepenale.eu/wp-content/uploads/2017/11/S.-Signorato-Lampliamento-dei-casi-di-partecipazione-a-distanza.pdf, p. 5. Accessed on: April 8, 2024.

[16] Among those who support such opinion with a variety of arguments and perspectives, see DANIELE, Marcello. *La formazione digitale delle prove dichiarative. L'esame a distanza tra regole interne e diritto sovranazionale*. Torino: Giappichelli, 2012. p. 19. DE CARO, Agostino. La partecipazione al dibattimento a distanza. *Diritto penale e processo*, v. 23, n. 10, p. 1136-1137, 2017. LORUSSO, Sergio. La mutata fisionomia della partecipazione a distanza al dibattimento e il *vulnus* alle garanzie difensive. In: LORUSSO. Sergio (org.). *Il fragile mosaico delle garanzie difensive. Dalla legge Orlando alle scelte della XVIII legislatura*. Torino: Giappichelli, 2020. p. 220 ff. NEGRI, Daniele. Atti e udienze "a distanza": risvolti inquisitori di una transizione maldestra alla giustizia penale. In: CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO, Enrico Maria; VARRASO, Gianluca (org.). *Riforma Cartabia: la nuova procedura penale*. Milano: Wolters-Kluwer, 2023. p. 454 ff. SIGNORATO, Silvia. *L'ampliamento dei casi di partecipazione a distanza dell'imputato tra logiche efficientistiche e menomazioni difensive*. Available at: <https://www.lalegislazionepenale.eu/wp-content/uploads/2017/11/S.-Signorato-Lampliamento-dei-casi-di-partecipazione-a-distanza.pdf>. p. 12 ff. Accessed on: April 8, 2024. VOENA, Giovanni Paolo. Il teleseme. In: ZAPPALÀ, Enzo (org.) *L'esame e la partecipazione a distanza nei processi di criminalità organizzata*. Milano: Giuffrè, 1999. p. 83.

screen, the exercise of the rights and entitlements is far from ideal. This is not only because of the less fluid and rapid communication with the lawyer standing elsewhere, but also because of the (far from insignificant) risk that less care and attention will paid by the judge to what the defendant says, does and asks, with the effect of weakening the impact of self-defence. On a different level, participation by videoconference has a negative impact on the adversarial model of criminal proceedings, in that the physical distance makes cross-examination less sharp and "biting"[17] - it ends up resembling an interview rather than a proper examination with adverse effects on the ability of such a method to expose and discourage lies and fabrications[18]. Immediacy and orality also seem to be curtailed, even where the most sophisticated software and instruments are used. As has been noted, since it is extremely difficult, if not even impossible in videoconferencing looking at both the camera lens and the image of other participants at the same time, this would compromise the impression of eye contact[19].

If all this is true - this is the conclusion of the reasoning - it is highly questionable whether the remarkable expansion of participation by videoconference and, in particular, its transformation from a solution to be enforced when necessary to protect sources of testimony or to prevent the planning and commission of crimes by members of dangerous criminal

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[17] For example, without a full perception of the source of evidence and his or her reactions, the parties lack the information needed to decide whether to "squeeze" the witness or avoid insisting on a particular issue.

[18] The argument is refuted by SUSSKIND, Richard. *Online courts and the future of justice*. Oxford: Oxford University Press, 2019. p. 231 ff. The Author claims that: «there is nothing inherent in the concept of online courts that requires the abandonment of the adversarial system [...]. At the heart of the adversarial system is not the oral hearing but that the arguments are presented from both sides and that a judge sits impartially in deciding between competing accounts of facts and law. An online court can happily accommodate this mode of disputation and decision-making – parties set out their arguments through online argument and submission of evidence, while judges can sit as impartially at their dining room tables as they do in the courtroom».

[19] FALCONE, Antonella. Online Hearings and the Right to Effective Defence in Digitalized Trials. In: BACHMAIER WINTER, Lorena. RUGGERI, Stefano (org.), *Investigating and Preventing Crime in the Digital Era*. Cham: Springer, 2022. p. 204. https://doi.org/10.1007/978-3-031-13952-9_9

associations to an option in the service of the efficiency of the criminal justice system is in conformity with the Constitution, in particular with art. 24 Cost. which declares the inviolability of the right of defense, and art. 111 co. 4 Cost., according to which the evidence in criminal proceedings must be gathered through the cross-examination in accordance with the adversarial model[20]. The guarantee of a reasonable duration of the trial is not a legitimate objective for the use of audiovisual technologies, since efficiency cannot be pursued at the expense of fundamental rights - quite the opposite, an efficient criminal proceedings assumes as its premises the acknowledgement of guarantees[21].

The suspicions of constitutional illegitimacy raised by scholars have so far been neither confirmed nor rejected by the Constitutional Court so far. Meanwhile exceptional circumstances have fostered a huge resorting to remote justice, like never before.

3. Anti-COVID 19 legislation

The tendency to employ audiovisual links as a substitute for physical presence of the persons involved in the criminal proceedings – not

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[20] See DANIELE, Marcello. *La partecipazione a distanza allargata*. Available at: <https://archiviodpc.dirittopenaleuomo.org/upload/9865-daniele2017a.pdf>. p. 6 ff. Accessed on: April 8, 2024. NEGRI, Daniele. La gigantesca espansione della videoconferenza come alternativa alla presenza fisica dell'imputato in giudizio. *Archivio penale*, v. LXX, n. 1, supplemento, p. 582 ff., 2018. https://doi.org/10.12871/978883318026729

[21] See Corte Cost., judgment n. 317 of 2009 where the Court clarified that the right of defence and the principle of reasonable duration of the trial cannot be compared, for balancing purposes, independently of the completeness of the system of guarantees. What matters is exclusively the duration of the 'fair' trial, as delineated by the same constitutional provision invoked as justification for the limitation of the right of defence. A different solution would introduce a logical and legal contradiction within Article 111 of the Constitution itself, which on the one hand would impose full protection of the confrontation principle and on the other would authorise all the exceptions deemed useful for the purpose of shortening the duration of proceedings. A trial that is not 'fair', because it lacks guarantees, does not conform to the constitutional model, whatever its duration.

only witnesses and defendants but also other parties and the judicial authority – hit a peak after the outbreak of the COVID-19 pandemic[22].

In order to avoid the paralysis of judicial activities during the toughest phases of contagion, the legislator has relied heavily on remote justice[23]. The regulatory interventions that took place between 2020 and 2022 were many and fast-paced. They followed a fluctuating trend, alternating pushes and backs up in line with the various phases of worsening and easing of the contagion in Italy[24].

The most innovative development was the decision to implement something close to the "virtual hearing" model, i.e. a hearing where all participants are outside the courtroom. The discrepancy with the model depended on the exception concerning the judge assistant who must be present in the courtroom in every case in order to fulfil his reporting duties.

It represented a significant step forward: under the anti-COVID 19 regulation video-links moved from being an option designed for selected people or specific evidentiary acts to a generalised and overarching solution covering the entire trial and affecting all those involved in it with the effect of making the proceedings a sum of virtual connections. This has been described as a form of «dematerialisation» of the criminal proceedings[25].

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[22] For an overview on the approach undertaken beyond the Italian borders during the pandemic period, see FALCONE, Antonella. Online Hearings and the Right to Effective Defence in Digitalized Trials. In: BACHMAIER WINTER, Lorena. RUGGERI, Stefano (org.), *Investigating and Preventing Crime in the Digital Era*. Cham: Springer, 2022. p. 194 ff. https://doi.org/10.1007/978-3-031-13952-9_9

[23] Similarly to what has happened in other States. An overview of how European courts have dealt with videoconferencing during the COVID-19 pandemic is available at: https://www.osce.org/files/f/documents/5/5/469170.pdf. Accessed on: May 27, 2024.

[24] For a close perspective on this, see GALGANI, Benedetta. *Forme e garanzie nel prisma dell'innovazione tecnologica*. Milano: Wolters-Kluwer, 2022. p. 235 ff. NAPOLITANO, Sebastiano. *Dall'udienza penale a distanza all'aula virtuale*. Available at: <https://www.sistemapenale.it/pdf_contenuti/1594123110_napolitano-2020a-udienza-penale-a-distanza-aula-virtuale-teams-dalla-legge-27-2020-alla-legge-70-2020.pdf>. Accessed on: May 27, 2024.

[25] MANCUSO, Enrico Maria. *La dematerializzazione del processo al tempo del COVID-19*. Available at: <https://www.giurisprudenzapenale.com/wp-content/uploads/2020/05/EMMancuso_gp_2020_5.pdf>. Accessed on: April 8, 2024.

This remarkable progression was made under the pressure and urgency imposed by the spreading of the pandemic and with a short time horizon, in the sense that the solutions adopted were clearly seen as temporary.

This has had an impact on the way the legislator has worked. Scarce attention was paid to the rule of law (art. 111 co. 1 Cost.). In this sense, it has been highlighted the absence of a legislative regulation on the technical aspects of the virtual hearing (operating system, connection mode, etc.) and the decision to give the Director of the information technology services in the field of criminal justice the authority and capacity to determine these essential aspects [26]. On a differen note, it was noted that the chosen IT platforms (*Microsoft Teams* and *Skype for business*) were structured in such a way that did not guarantee the openness of the trial since they were accessible by a limited number of people and only by invitation[27], which had a negative impact on the principle of publicity, which is an expression of the principle of popular sovereignty (art. 1 Cost.) and one of the ways in which the participation of the people in the administration of justice is fulfilled (art. 102 co. 3 Cost.).

However, it was another aspect that attracted the strongest criticism. Initially the "quasi-virtual hearing" model was also to be applied to the sensitive phases of the trial namely the gathering of evidence and the closing statements of the parties. But due to the strong disapproval of scholars and lawyers' associations the rule was soon abolished.

The criticism surrounding the perspective of an entire evidence-taking procedure carried out remotely called (and calls) into question art. 111 co. 4 Cost., the constitutional provision according to which evidence in criminal proceedings must be gathered through the cross-examination in accordance with the adversarial model. As already mentioned[28], the main opinion in the Italian literature is that confrontation, when carried out

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[26] See MAZZA, Oliviero. Distopia del processo a distanza. *Archivio penale*, v. LXXII, n. 1, 2020. https://doi.org/10.12871/97888331807316

[27] See BORGIA, Gianluca. *Dibattimento a distanza e garanzie costituzionali: spunti di riflessione a partire dall'emergenza sanitaria*. Available at: <https://www.osservatorioaic.it/images/rivista/pdf/2020_6_23_Borgia.pdf> p. 196. Accessed on: April 8 2024.

[28] See *supra*, § 2.

remotely, loses its strength and becomes something different from what is prescribed at the constitutional level. This means that audiovisual links are lawfully adopted only if one of the exceptions allowing a departure from the confrontation principle established by art. 111 co. 5 Cost. is met (consent, misconduct, impossibility of carrying out face-to-face confrontation)[29]. At the time, the legislator did not follow this path (at least not immediately and not in a consistent and systematic way) and the proposal of an online evidence-taking procedure was strongly opposed.

With the Cartabia reform things turned out differently, as we will see in a moment.

4. Current setting: cases

We are now back to the starting point namely the Legislative Decree no. 150 of 2022 which is the latest piece in the legislative puzzle concerning remote justice. As already mentioned, the assumption underlying this piece of legislation is one of deep trust in technology and its ability to achieve the goals of the reform – making the proceedings faster and more efficient – without prejudice for defence rights and the general principles of criminal proceedings. In this perspective, the proposition was to provide a solid and comprehensive basis for the use of audiovisual links in order to make it a stable and secure (in terms of guarantees) mode of participation in the proceedings, also in light of the experience gained during the pandemic.

The legislator decided to work "by addition". Basically the old cases provided for by art. 146-*bis* and 147-*bis* CCP imp. prov. have been retained and many new ones have been added. In this respect, the articulated framework resulting from the juxtaposition between pre-existent and new provisions can be examined from two different perspectives: one focused on the acts and hearings included within the scope of videoconferencing (objective perspective) and another one that looks at the subjects whose

[29] BORGIA, Gianluca. Dibattimento a distanza e garanzie costituzionali: spunti di riflessione a partire dall'emergenza sanitaria. Available at: <https://www.osservatorioaic.it/images/rivista/pdf/2020_6_23_Borgia.pdf>, p. 191-192. Accessed on: April 8, 2024.

participation in the proceedings can be supported by technological facilities (subjective perspective).

From the first point of view, it can be said that the use of audiovisual links has no limits today, as it is an option not only at the trial phase, but also – at the request of the person concerned – at the preliminary stage and within the framework of precautionary measures' procedures (re-examination procedure for orders directing a coercive measure according to art. 309 CCP, confirmation hearings in case of arrest or temporary detention pursuant to art. 391 CCP). It also covers both hearings (in whole or in part) and individual acts (questioning of the suspected person, non-repeatable technical ascertainments etc.).

The choice to apply the remote justice paradigm also to the preliminary phase is, on the whole, commendable in the sense that it allows a concrete saving of time and resources without having a significant negative impact on guarantees. However, there are two options that seem to be controversial. The first concerns non-repeatable technical ascertainments. If remote participation appears to be perfectly suitable for preliminary activities, such as the appointment of experts, the same cannot be said for the technical assessment itself, which normally consists of complex activities and procedures[30]. The case of confirmation hearings following arrest or temporary detention can also be criticised. In this respect, it should be stressed that, even if the judicial control of the measure does not explicitly include an assessment of the detained person's state of health, these are aspects that should nevertheless be taken into account, given the particular vulnerability of the person concerned[31]. After all, the evocative phrase used to refer to the need for judicial control

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[30] See DEI-CAS, Eleonora A.A. *La partecipazione "parzialmente smaterializzata": il grimaldello del consenso a favore dell'economia processuale*. Available at: <https://www.lalegislazionepenale.eu/wp-content/uploads/2023/04/DEI-CAS-Definitivo.pdf> p. 18. Accessed on: April 8, 2024.

[31] There is support for such a view in the document elaborated in October 2020 by OCSE on *The functioning of courts in the Covid-19 pandemic. Primer*, available at: https://www.osce.org/files/f/documents/5/5/469170.pdf. In the section dedicated to "fair trial concerns" relating to the use of audiovisual links it is recalled that the UN Human Rights Committee has clarified that detainees have the right to appear in person – physically – before the court when the legality of the restriction of personal liberty must be assessed by the competent legal authority.

of deprivation of liberty measures – *habeas corpus* – suggests a physical dimension of such an assessment – a physical dimension that is inevitably cut off by video-links[32].

As for the trial phase, the rule contained in the new co. 2-*bis* of art. 496 CCP represents a step forward as compared to the previous regime (including pandemic legislation[33]). It provides that, upon consent of the parties, the entire evidence-taking procedure may be carried out remotely.

Turning to the second perspective, there is also a broad and permissive approach at the subjective level. Under the new legislation, all private parties, legal representatives and sources of testimonial evidence (lay persons, experts, co-accused persons etc.) can participate in acts and hearings via audiovisual links. Only the judge and the public prosecutor are required to be physically present in court[34]. It can be said that the legislator decided to maintain something in between a virtual and a traditional – physical – hearing: a *phygital* hearing[35].

Overall, the new scenarios are remarkable. The combination of innovations occurred at the objective and subjective levels gives us the image of an institution that is deeply and stably rooted in the system.

5. ... AND MODE OF VIDEOCOFERENCING

The wide recognition of videoconferencing and the aim of giving it a stable and rational allocation within the system can also be inferred

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[32] On structure and essential contents of the guarantee, see DANIELE, Marcello. *Habeas corpus. Manipolazioni di una garanzia*. Torino: Giappichelli, 2017.

[33] See § 3.

[34] It can be inferred by the joint consideration of art. 496 co. 2-*bis* CCP and 146-*bis* co. 4-*bis* CCP imp. prov. For the shared view that such provision is in breach of the equality of arms principle (art. 111 co. 3 Cost.) see NEGRI, Daniele. Atti e udienze "a distanza": risvolti inquisitori di una transizione maldestra alla giustizia penale. In: CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO, Enrico Maria; VARRASO, Gianluca (org.). *Riforma Cartabia: la nuova procedura penale*. Milano: Wolters-Kluwer, 2023. p. 454.

[35] An evocative neologism referring to the coexistence and reciprocal interaction between digital and physical dimensions. It is available at: <https://www.treccani.it/vocabolario/figitale_(Neologismi)/?search=figitale>. Accessed on: April 8, 2024.

from the introduction of a general and comprehensive regulation on the technical aspects of the use of video links and the range of guarantees to be recognised (art. 133-*ter* CCP).

Firstly, it is stated that, under the penalty of nullity, videoconferencing facilities must ensure «contextual, effective and reciprocal» visibility and audibility between those present in the courtroom and those connected from remote locations, in order to guarantee the right to confrontation and an effective participation in the act or hearing (co. 3).

As far remote locations are concerned, there is a fundamental distinction to be made: people facing custodial sentence or pre-trial detention participate from the place of detention, whereas people not subject to restrictions on their personal liberty participate from a judicial office (or police office) designated by the court, subject to verification of the availability of the necessary technical equipment (co. 4 and 5). In the latter case, the court may also authorise the connection from another place, provided that the parties have been heard (co. 6). Special rules apply to lawyers who may connect from their offices or any other adequate place, unless they prefer to be with the person they are assisting. In any event, the right to confidential communication between lawyers and clients is guaranteed (co 7).

An assistant to the judge or the public prosecutor or a police officer must be present at the place where the persons participating to the act or hearing by remote access are located in order to certify and report on the regularity of the procedure and the absence of obstacles to the excercise of rights (co. 8). It is also prescribed that the Ministry of Justice shall ensure the security and integrity of the transmission of data between the courtroom and the remote locations (art. 147 *quater* CCP imp. prov.).

In case of public hearing, the court ensures that what happens in the remote location can be seen and heard not only by the parties and the judicial authority but also by the public.

The influence of the constitutional jurisprudence (judgement no. 342 of 1999) and also of the Guidelines on videoconferencing in judicial proceedings delivered in 2021 by the European Commission for the Efficiency of Justice (CEPEJ) can be seen behind this articulated set of rules. Both convey the idea that the quality, integrity and security of technological facilities play an essential role in guaranteeing the enjoyment

of rights. With regard to these aspects, the introduction of a nullity (of the decree authorizing the use of video links) in the event that the technological equipment does not guarantee effective participation in the act or hearing, and the attention paid to the need for security and integrity of the data transmitted over the links deserve particular recognition. On the other hand, more could have been done with regard to the description of the type, number and direction of the cameras, which are aspects of paramount importance in order to guarantee the realism of remote participation and the effective excercise of rights[36].

6. Due process by remote: where are we?

Despite the faith in technology on which the broadening of remote justice is based, the new legislation does not support the idea that videoconferencing is perfectly comparable to the experience of being present. This is clear from the fact that, in all the cases recently introduced, in order for remote participation to be authorised, it is necessary for the persons concerned to express their will and for all the parties involved to agree when the use of audiovisual links relates to the taking of evidence (at the preliminary hearing or at trial).

Such a requirement reflects the view, shared by the majority of scholars[37], that virtual participation is not the same as in-person participation, that cross-examination is somewhat different when parties and witnesses are not face-to-face and, more generally, that justice is better served when litigants gather in the same place – a public physical space where everyone accommodated can look each other in the eyes.

Against this background, consent plays a key role in the new legal framework for remote justice, as already mentioned. With the exception of cases where participation by videoconference is based on art. 146-*bis* and 147-*bis* CCP imp. prov., the authorisation of audiovisual links depends on the expression of the persons concerned. Such an expression of will is essential in order to respect the constitutional guarantees. By requesting

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[36] See GALGANI, Benedetta. La c.d. remote justice nella riforma Cartabia. *Giurisprudenza italiana*, v. 175, n. 5, p. 1183, 2023.

[37] See *supra*, § 2.

or accepting to participate in the act or hearing by videoconference the parties, and in particular the defendant, freely waive that part of the right of defence which is impeded by the virtual connection without prejudice to art. 24 Cost. Moreover, the consent of the defendant is one of the conditions under which the constitutional rule that the the evidence-taking procedure must be adversarial may be derogated from (art. 111 co. 5 Cost.).

Is the overall picture satisfactory? Does it dispel any doubts of constitutional illegitimacy? Leaving aside the opinion that the extent of the dematerialization of judicial activities achieved by the "Cartabia reform" is such that the new virtual proceedings is so different from the traditional and constitutionally-driven criminal process that it cannot be considered constitutional despite the introduction of the consent clause[38], there is room for doubt that the legislator has achieved a satisfactory balance between efficiency and guarantees. If we look at the way in which consent is obtained, we can see that little or no attention is paid to essential aspects: is the consent to be expressed explicitly or implicitly? Is it a personal or a technical choice, in the sense that it can be validly expressed by the lawyer without special authorisation (*procura speciale*) from the client? Is the declaration of will revocable?

The vagueness of the law makes it difficult to find sure answers to these questions even though they concern delicate aspects. Given the structural asymmetry of powers between the State and the individual in the realm of criminal proceedings, provisions on the waiver of guarantees may in practice encourage haggling and bargaining to the detriment of the "weak part" in the proceedings – the accused – who may be tempted to give up his rights in order to obtain a "reward"[39]. We see this, for example, in the area of agreements on the use of evidence gathered

[38] The opinion is supported by NEGRI, Daniele. Atti e udienze "a distanza": risvolti inquisitori di una transizione maldestra alla giustizia penale. In: CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO, Enrico Maria; VARRASO, Gianluca (org.). *Riforma Cartabia: la nuova procedura penale*. Milano: Wolters-Kluwer, 2023, p. 457.

[39] For a broad perspective on the relationship between procedural agreements and criminal justice, see CAMON, Alberto. Accordi processuali e giustizia penale: la prova patteggiata. *Rivista di diritto processuale*, vol. 63, n. 1, p. 55 ff., 2008.

during preliminary investigation for the establishment of facts. The judge is more inclined to be lenient and to recognise mitigating circumstances if the defendant agrees to the use of such acts. However, it is clear that behind this approach there is a recognition on the part of the system that consent is not a "neutral" choice as it should be[40].

Against this background, it is important to minimise the risk of expressions of will which are not personal, knowing and intelligent. Although the structural and unavoidable asymmetry of powers between the State and the individual will always make the criminal proceedings a slippery slope for negotiation – in the field of remote justice as well as in any other field where it is allowed – strict rules on the waiver of rights could certainly help to prevent injustice and abuse.

7. Conclusive remarks: the importance to take the consent seriously

The scenario described above invites the elaboration of a solid and clear scheme for the interpretation of the "consent clause" provided for in each of the new rules on participation in acts and hearings by videoconference. Given the importance of the consent clause for the respect of constitutional guarantees (art. 24 and 111 Cost.), a strong commitment to take it seriously would be a (small but) decisive step to open up the perspective of remote justice as a technological switch capable to pursue efficiency without (undue) prejudice to fundamental rights.

This means, on the one hand, that an explicit expression of will should always be required, even in cases where the implementation of audiovisual links is not subject to a specific request on the part of the persons concerned but the wording of the law refers generally to the "consent" of these persons[41].

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[40] See NICOLICCHIA, Fabio. *Consenso del difensore all'acquisizione dibattimentale degli atti d'indagine e riconoscimento delle attenuanti generiche. Riflessioni all'incrocio tra diritto e processo penale*. Available at: <https://www.lalegislazionepenale.eu/wp-content/uploads/2020/06/Nicolicchia-opinioni.pdf>. Accessed on: April 8, 2024.

[41] In order to increase the awareness in relation to the potential disadvantages of virtual participation, there has been discussion about the possibility of

Secondly, the choice should not be considered as a "technical" one, in order to avoid the risk that the decision to accept the participation by videoconference could be driven by the personal interest of the lawyer (who may be tempted to give the consent in order to win the good will of the judge also with regard to other proceedings) or by his/her negligence[42].

Thirdly, revocation of consent should be allowed. This is particularly important where the waiver does not relate to a single act or examination, but potentially to the entire evidence-taking procedure (art. 496 co. 2-*bis* CCP). The parties should be given the opportunity to reconsider their decision at any time during the trial, if circumstances so warrant.

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introducing information requirements in favour of the accused. Moreover, it has been argued that consent should refer not only to the acceptance of the virtual connection but also to the lawyer's decision to be connected from a location other than that of the defendant. See FALCONE, Antonella. *La videoconferenza nel procedimento penale italiano: riflessioni a margine della recente riforma Cartabia in materia di partecipazione a distanza*. Available at: https://www.lalegislazionepenale.eu/wp-content/uploads/2023/09/A.Falcone_La-videoconferenza.pdf. Accessed on: 27 May 2024 pp. 37 and 33.

[42] See DEI-CAS, Eleonora A.A. *La partecipazione "parzialmente smaterializzata": il grimaldello del consenso a favore dell'economia processuale*. Available at: <https://www.lalegislazionepenale.eu/wp-content/uploads/2023/04/DEI-CAS-Definitivo.pdf> p. 34. Accessed on: April 8, 2024

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Editorial process dates (https://revista.ibraspp.com.br/RBDPP/about)

- Submission: 09/04/2024
- Desk review and plagiarism check: 10/04/2024
- Review 1: 18/04/2024
- Review 2: 28/04/2024
- Review 3: 28/04/2024
- Review 4: 01/05/2024
- Review 5: 02/05/2024
- Preliminary editorial decision: 11/05/2024
- Correction round return: 27/05/2024
- Final editorial decision: 29/05/2024

Editorial team

- Editor-in-chief: 1 (VGV)
- Associated-editor: 1 (SL)
- Reviewers: 5

How to cite (ABNT Brazil):

BIRAL, Marianna. The Italian Route towards Digitalisation of Criminal Proceedings. The Latest Developments in the Field of Remote Justice. *Revista Brasileira de Direito Processual Penal*, vol. 10, n. 2, e1007, mai./ago. 2024. https://doi.org/10.22197/rbdpp.v10i2.1007