

**LONG DISTANCE PROCEEDINGS THROUGH
VIDEOCONFERENCE:
THE ITALIAN EXPERIENCE**

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LONG DISTANCE PROCEEDINGS THROUGH VIDEOCONFERENCE: THE ITALIAN EXPERIENCE

Law no. 11 dated 7 January 1998, in force since 21 February 1998 has introduced a new method of operation, called long *distance or* virtual, involving video links in the Court process. The defendant does not have to appear in person in the Court for trial, he/she participates by video link with the Court.

Videoconferences in the penal process were first introduced into Italian Law in 1992 (decree 306/Law 356). This originally concerned the long distance examination of State witnesses.

The success of this technological innovation, introduced initially solely for the protection of the people who gave evidence on behalf of the State, led to the legislator introducing new rules and regulation which enabled video links to be used in (almost) any part of the Court process.



The legislation (Law 11/1998) allows for use of video links in three areas: a. participation in a trial; b. appearances before judge in Chambers; c. examination of State witnesses.

a) The option of video link in a trial (article 146bis disp. att. Penal Procedure Code) may take place in a prosecution for offences under article 51/3bis Penal Procedure Code e.g. Mafia involvement, aiding and abetting Mafia activities, kidnapping, drug trafficking etc, where:

1. There are serious security or public order concerns
2. The trial is complex and a delay would impede other concurrent trial commitments
3. The prisoner is subject to the special conditions of imprisonment under article 4 Ibis of the Penitentiary Act.

b) Appearances before a judge in Chambers may involve hearings before the Court of Freedom, appeal hearings, preliminary hearings, breach proceedings and response to supervision.

c) Examination of State witnesses, who are subject to protection, can occur by video link where:

- the offence falls within article 51/3bis of the Penal Procedure Code and the witness has been granted protection programmes or measures;
- the State witness has undergone a change of identity as a protective measure;
- the offence falls within article 51/3 bis of the Penal Procedure Code and a person accused for a relevant crime has to be examined, being on trial, also separately, for one of the same crimes.

Article 41bis/2 of the Penitentiary Act provides that the Minister of Justice, also by request of the Minister for Home Affairs, may temporarily suspend, completely or partly, the enforcement of treatment rules and of the institutes provided for by the law relevant to the Penitentiary Act which may be concretely a contrast to the need of order and security, towards people imprisoned for particular crimes (Mafia involvement, drug-trafficking, homicide, aggravated robbery and extortion, kidnapping, importation, buying, possession or cession of huge amounts of drugs, crimes committed for terrorism or for subversion of the constitutional system), where serious reason of order and public security occur.

The institute has an exceptional nature and it will last until 31.12.2000, which is the same expiry date provided for by the law relevant to long distance Proceedings. It is self-evident that both provisions, given their real and proved efficiency, will have to be extended in fair advance with regard to the next expiry, if not even made stable until the end of the Mafia phenomenon emergency.

At to-day's date, about 600 prisoners are subject to special conditions of imprisonment under article 41bis of Penitentiary Act, all of them belonging to the Mafia organised crime, in its different arms operating on the state territory (*mafia*) and *stidda* in Sicily. *Majorca* in Campania, *sacra corona unita* in Puglia, *'ndrangheta* in Calabria).

The decrees ex article 41bis/2 of the Penitentiary Act provide for the suspension of some treatments rules:

- . visits with relatives and cohabitants at the rate of more than one per month and for more than one hour and visits with third parties,
- . phone-calls, except for a monthly phone-call where no visit takes place the very month.,
- . organisation of cultural. recreational and sports activities,
- . nomination and participation in the representatives of prisoners and internees.

At the moment, 10 penal institutions have been intended for prisoners subject to special conditions of imprisonment under article 41bis of the Penitentiary Act,

whereas some wings have been intended inside two prison clinical and surgical centres, for such typology of prisoners needing a sanitary treatment.

The participation in video link- proceedings requires prior agreement from the trial judge. Before the trial, all parties to the case must be informed of this by a decree of the president of the Court at least 10 days before the hearing; during the trial, the judge decides by an order.

The law requires the adoption of such connecting modalities as to guarantee the concomitant, actual and reciprocal visibility of the people present everywhere and the possibility to hear what is being said (this point will be dealt with afterwards).

The defence counsel may decide whether to participate from the courtroom or from the remote site where his/her client is; a deputy of his may be in the other place instead of him/her, The counsel and deputy must be able to confer in private with defendant and each other.

There are four different ways the video link can operate: *point to point*, *switching*, *continuous presence standard* and *continuous presence advanced*.

The *point- point link* consists in connecting directly a trial room *with* another remote place located inside the prison or in another trial room, It is the simplest system, giving fewer technical problems; it was experimented from 1992 to 1998, before the law relating the video linking came into force, as the point-point system has been adopted for the tele-examination of state witnesses and of people who are subject to protection; 90% of state witnesses, not hold in prison, are examined in trial rooms located in the same region or in a neighbouring region to the place of their residence, situated in a secret site unknown to the Prison Department. The choice of the room is made by the judicial authority or by the Protection Central Service which, on the other hand, may autonomously decide that a state witness who resides in Piedmont can appear in a trial room in Puglia, in order to guarantee his /her as well as his/her relatives' security.

The second kind of link is called *switching* or *the active speaker*; in this case different rooms are connected together; i.e. a trial room with different small prison rooms or with another trial room and every one can see the same image, corresponding to the speaker, in his/her own monitor: if more than one person speaks at the same time, the connection is automatically started with the site where the person speaking in louder voice is situated.

The third method is called *continuous presence standard (CPS)*. The monitor is split up into four quadrants, thus enabling five links, normally the trial room and four prison rooms.

A further more recent option is the so-called continuous *presence advanced (CPA)*, that is advanced because it originates from the change of the CPS method in order to meet practical-legal requirements. It has been necessary from the start to guarantee the distribution of video linked prisoners to different prison locations, particularly during trial involving large numbers (thirty, forty, up to fifty) of defendants subject to the special regime under article 41bis Law no354/1975; in these situations the judicial authority and the Department of Prison Administration had to decide whether to provide for simultaneous video linking of all defendants, or video links with limited groups of defendants and the separation of members of the same criminal organisation into different prisons.

Shortly after the Law no.1 1/1998 came into force, Telecom Italia provided a further option, CPA. This enables connections with a large number of remote sites. It provides for three static quadrants and the fourth working in dynamic operation i.e. switching to the current speaker (person speaking in the loudest voice). Whilst this overcomes the legal and technical problems connected with the effect of article 4 Ibis, it does not enable at all to overcome the problems relevant to concurrent, effective and reciprocal visibility, as there will always be visual limitation to the observing of all parties at any given moment.

It is now possible to have 30 simultaneous video link *sessions* i.e. 30 trials involving video links in any one day; each *session may* have a maximum of 14 remote video links. However, if the video links involve continuous presence advanced, only 15 sessions (included in the above mentioned 30) are possible, due to the increased technical, structural and human resources required.

Two years have passed since the Law no.11 dated 7 January 1998 came into force and the use of such video links have overcome the initial settling-down problems due to the sensational novelty of a virtual defendant.

The aims of the new provisions are:

- reducing the high number of transfers of very dangerous prisoners which requires increased security and greater costs
- avoiding contacts between particularly dangerous prisoners and their respective criminal associates; this supports the special prison regime which is difficult to enforce in prisons (located in places where trials for associative crimes are held, generally corresponding to prisoners place of origin) which are not so stably structured as the actual places of assignment: the former are therefore more permeable with regard to the real possibility of contacts between prisoners and their associates;

- guaranteeing the security of people under protection by negating the necessity for them to attend the trial in person and guaranteeing them a greater serenity during the deposition;
- avoiding constant transfer of prisoners, particularly where they are involved in multiple trials at different locations, because such transfers inevitably adversely affect continuity of the Court process and the overall length of the trial.

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So far it can be said that the above-stated aims have been almost completely achieved.

In particular the following results may be highlighted:

- a reduction in the overall number of transfers of prisoners under special regime provided for by article 41bis of Penitentiary Act as well as of state witnesses, with savings in both financial and staff resources and with a rise in the security threshold;
- the constant remand of special regime prisoners in specific prisons (12) which are distant from the regions of criminal influence,
- the examination of state witnesses in sheltered and secret locations far from the Court;
- the greater efficiency - as far as humanly possible with regard to the current state of the criminal justice - in the running of trials, particularly if more than one trial is running at same time in different locations many and important proceedings, already settled, have been carried out by the video linking system in very recent times).

This can be evidenced by the analysis of short statistical data confirming the efficiency of the system also from a technical point of view.

Since the Law came into force to 31 January 2000, only 29 video link connections out of 9158 (a really insignificant percentage) were annulled due to technical problems whereas 215 connections were successful despite technical problems.

Initially 13 proceedings a day using multi video links was the average, with a peak of 20 (April 1998); this has risen to 24 a day, with a peak of 42 in December 1999.

The possibility appears particularly interesting of using the videoconference in order to guarantee the protection of the people who, for various reason (witnesses or defendants in relevant proceedings) have turned state witnesses, It has been already said the provisions about long distance proceedings have been experienced for the first time right towards state witnesses, in order to protect their security and the authenticity of their statements of accusation.

The people under protection appear in video connection from secret positions, whose choice is entrusted to protection body or to the judicial authority (for people not imprisoned) or to the Ministry of Justice (for people in prison). In both cases positions situated in the areas of residence (under protection or in prison) of the subjects to be examined are chosen;

in the first case, they are trial rooms free from trial activities saved, in that day, exclusively for long distance proceedings in the second case, one room equipped for videoconferences is chosen, situated in the prison where the state witness is held in custody or in a prison not far from this one.

Right in order to guarantee a wider protection of a state witness in liberty, sometimes people not detained in prison have been allowed - by request of the protection body of the judicial authority - to enter a prison equipped for long distance proceedings.

Also the need of modifying the provisions currently in force has been highlighted, by providing that a state witness participation in the long distance proceedings may last not only for the limited phase of the hearing but also for the whole trial.

The issue relevant to the possibility of participating in long distance proceeding from foreign countries is very interesting as well. During the first two years of enforcement of the Law 11/1998 there have been 24 cases of international video links with people under protection in different foreign countries.

In most cases, the international connection has been requested for the witness or for the examination of very important state witnesses, living under protection (both in liberty and in prison) in the USA or in Germany Some other connections have been activated to examine from Italy some witnesses involved in a trial in the USA; a series of connections with Switzerland is also for seen to carry out pre-trial activities through video-conference by international letter of request within a trial for Mafia crimes.

A long preparation has been necessary to activate in practice these connections, because the matter to connect and to put through technical audio and video systems very different from each other as for the type and the quality.

As an example, the elaborate procedures brought into being by the protection system of an important foreign country are particularly interesting; this country has granted the opportunity of being connected by video with the remote site where an exceptionally significant state witness was held in custody, only through a long succession of intermediate connections prepared in order to spread the technical course and making any possibility of locating the state witness himself more difficult. On the other hand this precautions, obviously necessary to insure the safety of people under protection, have negatively influenced the technical quality of connections, which have suffered from many changes of directions of the audio-visual connection.

The new provisions ran into many difficulties in the first months of its enforcement; such difficulties were essentially due to:

- a) many objections raised by the prisoners' defence counsels, with particular regard to the constitutional compatibility of the rules and regulations with the possibility of asserting the defence right;
- b) an unbiased lack of structural resources from the administration (insufficient number of prison small rooms: 33 rooms out of 5 prisons; insufficient number and not optimum distribution of trial rooms equipped for videoconferences: about 150);
- c) a widespread scepticism from some judicial authorities about the potentials of the multi-video-communication system.

Such problems have been overcome thanks to:

- a) the acknowledgement of - the constitutional legitimacy of long-distance proceedings (sentence no. 342 of 14-22 July 1999 by the Constitutional Court);
- b) the implementation of the structural resources of the justice administration (small prison rooms are about 100 at the moment and they will soon be 126, split up into 18 prisons; other trial rooms have been equipped, especially in areas characterised by the highest density of offenders);
- c) the experiments, from the judicial authorities having proceeded by the multivideocommunication system, have demonstrated the enormous potential of the system which, properly organised, could enable many complex trials to be held in reasonable time limits.

On the other hand it is not possible to say that the problems have been completely overcome; in particular the transfers of prisoners under special regime have considerably decreased, but not completely disappeared due to three reasons.

On one hand, the current limited number of small prison rooms equipped for videoconferences requires the daily transferring of prisoners from one penal institution to another one in order to make optimum use of the potentials of the multivideocommunication system.

On the other hand, some judicial authorities carry on reporting the impossibility to adopt the long-distance proceedings even where the law makes it compulsory, or would they be allowed, because of the insufficient number of trial rooms suitably equipped for videoconferences.

From another point of view, in 1998 the legislator chose to make long-distance proceedings compulsory for offenders under special regime., only where they are charged with the crimes provided by art. 51 bis cpp (416bis and 630 cp, 74 DPR 309/1990): this does not allow for videoconferences where the same offenders are tied up in criminal processes concerning other crimes, or where proceedings for the enforcement of precautionary measures are concerned. In these cases it is necessary to assure the personal attendance of the accused persons at the hearing, transferring them before the competent judicial authorities.

It is not legally possible to meet the needs of special regime prisoners who need to be separated. In fact, they are assigned to different prisons by standards which also consider the trial requirements of video links, i.e. Law no. 11/1998 requires people participating in long-distance proceedings to be *actually, concomitantly and reciprocally* visible to each other. Due to technical and contractual reasons, Telecom Italia does not provide for the separation of the image on the monitors in the respective trial rooms into more than four quadrants. As a result, following a widespread but not uniform jurisprudential interpretation not accepting the other possible modalities of connection, the often numerous co-accused persons have inevitably to be assigned to no more than four prisons. This results in a concentration of prisoners belonging to the same criminal association in each prison- at least according to the formulation of the prosecution body.

A technical solution providing for six connections, rather than four, simultaneously visible in one monitor is being considered but this may result in a serious loss of image quality. It would be better to modify the requirement for actual, concomitant and reciprocal visibility of all the people present (this condition, on the other hand, is not guaranteed in many trial rooms where accused personally participate), without restraining a prisoner's right to participate in the hearing, exercising any right he/she could exercise through his/her personal appearance.