



# REMOTE CONDUCT OF CRIMINAL PROCEEDINGS BY MEANS OF AUDIO-VISUAL COMMUNICATION AND THE GUARANTEES OF FAIR TRIAL

“IN UNITED ARAB EMIRATES LAW AND COMPARATIVE LAW”

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## Abstract

This Article addresses an issue related to criminal procedures conducted by video-conferencing. This is a clear development over the traditional confrontational criminal procedures. This latter means the effective presence of the suspect at the stage of inquiry, as well as at the stage of criminal investigation, especially during the trial stage. In this way, this form of non-adversarial criminal procedures raises an issue with regard to the guarantees of fair trial such as the right to defense and the right to confrontation, and even before the court where the personal presence of the accused, especially in criminal matters is necessary. This article is a comparative one where the Emirati Law is compared to other laws especially the American Law and the French Law.

**Keywords:** Audio-Visual Communication- Criminal Procedures- fair trial.

## 1 -Introduction

This Article deals with an issue related to criminal procedures in their advanced and non-traditional form, where the conduct of these procedures is implemented remotely. This is a clear development over the traditional confrontational criminal procedures. This latter means the effective presence of the suspect at the stage of inquiry, as well as at the stage of criminal investigation, especially during the trial stage. In this way, this form of non-adversarial criminal procedures raises an issue with regard to the guarantees of fair trial such as the right to defense and the right to confrontation, and even before the court where the personal presence of the accused, especially in criminal matters is necessary. In the past, jurists believed that such procedures were not acceptable because it ran afoul of the principle of fair trial. The time has come when this concept has been replaced by another method represented in the adaptation of traditional principles to accept these procedures without prejudice to the principle of fair trial, which is enshrined in tradition and on which criminal justice is based.

The importance of studying this topic has increased due to the spread of the Corona pandemic and the attempts of different countries to combat it by reducing the proximity of people to each other. This resulted in an attempt to carry out criminal procedures remotely. If this is possible when conducting investigations, this is faced with great difficulties when carrying out the preliminary investigation, and these difficulties reach their climax with the trial phase before the court.

The regulator in the Kingdom of Saudi Arabia allows electronic litigation, but in the field of non-criminal cases; Civil, commercial and personal status. It is possible to file a case, make declarations



of claims, and submit memorandum through the court's website <sup>(1)</sup>. However, the matter is different concerning the criminal lawsuits for which no legislative system has been issued.

This Article raises a number of legal problems and seeks to address in light of the principles governing the criminal justice. Problems are addressed by trying to answer the following questions:

- What are the manifestations of remote criminal procedures?
- How remote criminal procedures differ from the usual criminal procedures?
- What are the aspects in which remote criminal procedures collide with the basic principles that regulate criminal proceedings?
- How can remote criminal procedures be conforming to the principle of fair trial?

This paper demonstrates the meaning of remote criminal procedures, their legitimacy, the conditions for their application, and the scope of this application.

## II-Meaning of Remote Criminal Procedure:

### A-The Concept in Emirati Law;

The legislator in the United Arab Emirates has realized the importance of regulating criminal procedures remotely by issuing Ministerial Resolution No. 259 of 2019 regarding the procedural guide for organizing litigation using electronic means and remote communication in criminal procedures. This law defined that kind of remote procedure as being “submitting pleadings, documents and memorandums, and issuing judgments, whether during the investigation of crimes and the collection of evidence, or during the investigation or trial” (Article One).

Criminal procedures are based on the use of remote communication technology. The previous decision of the Minister of Justice in the UAE defined these techniques as “the use of audio-visual communication between two or more parties in a remote trial, to communicate directly with each other through modern means of communication to achieve remote attendance” (Article 1).

The decision of the former Minister of Justice clarified what is meant by such means as “smart phones, tablets, computers, and other means that use modern technology for communication” (Article 1).

In order for such means to be resorted to, the head of the entity seeking to do so must approve them. At the trial stage, approval is obtained from the president of the court based on a request from the head of the circuit (Article 3 of the decision of the previous Minister of Justice).

- The second requirement;
- Legality of remote criminal proceedings

### B-Dispute over the Legality of Remote Procedures:

Jurists did not agree on the legality of using modern technical means of communication in criminal proceedings as a substitute for confrontation in the procedures. Some of them rejected

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<sup>(1)</sup> See Ministry of Justice website, Electronic Litigation; Dr.. Eman bint Muhammad bin Abdullah Al-Qathami, Remote Litigation, An Applied Jurisprudence Study on the Saudi System, Journal of Sharia Sciences and Islamic Studies, Issue (84) Rajab 1332 AH, March 2021, p. 964



this type of procedure, while others accepted it and called for it. This has led to questioning the legality of these procedures<sup>(2)</sup>.

### 1- Arguments for the Legitimacy of these Procedures:

Proponents of the legality of remote procedures relied on the following arguments:

- Necessities justify the use of these techniques in some cases, as if the witness was ill with a disease that prevented him from moving to the court. The same excuse applies to a witness who was the victim of an accident that prevents him from attending court sessions.
- The remote procedure is sometimes justified by the presence of the witness in a foreign country.
- It is advised to allow the victim of some sexual crimes to attend remotely due to the psychological impact on the victim in the event of his confrontation with the accused who assaulted him, especially if the victim is a minor.
- The costs of criminal trials and criminal investigation sessions are reduced in case of remote attendance.
- The spread of the Corona virus constituted a strong justification for attending the investigation and trial sessions remotely to avoid the spread of this epidemic disease. It is not excluded that other viruses that justify remote attendance will appear in the future.

### 2-Arguments Against Remote Procedures:

Those who rejected the holding of criminal proceedings remotely, and those who questioned their legality, relied on the following:

- Remote litigation would affect the prestige of the court with the litigants, since this prestige would decrease with them when attending remotely, so they would easily lie in their lawsuit and the truth would be lost at that time.
- The effective presence of the witness enables the court to read the expressions of this witness while examining his face in order to determine the extent of his truthfulness or lies and the extent of his integrity or evasiveness, and this helps the court to evaluate the testimony of the witness, so it gives it the weight it deserves <sup>(3)</sup>.
- The accused does not enjoy exercising his right to discuss and cross-examine the witness to the fullest extent in the case of remote procedures. This right to cross-examine the witness is not fully realized in its meaning. Thus, the right of the accused to discuss the witness is bound to be affected.

As for the defendant's defense, he is not fully able to carry out his work <sup>(4)</sup>. The use of the camera to transmit sound and image does not allow the lawyer to carry out his work to the fullest extent.

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<sup>(2)</sup> Dr.. Tamer Muhammad Muhammad Salih, Remote Presence in the Criminal Case, Dar Al-Fikr and Al-Qanoon, Mansoura, 2021, p. 70

<sup>(3)</sup> See Court of Egyptian Cassation , March 16, 1949, Group of Legal Rules, C. 7, No. 889, p. 858; Cassation of June 14, 1951, a set of rulings of the Court of Cassation, S. 2, No. 444, p. 1216.

<sup>(4)</sup>Ayodele Akenroye, Centre for Criminology and Socio-legal Studies (UofT) Videoconferencing Technologies and How It Challenges the Fundamental Tenets of Our Criminal Justice System in Canada:



In addition, the camera image and broadcast angles do not transmit the image and sound simultaneously to the accused and his defender. Sometimes the sound arrives moments after the image, thus hindering the ability to follow up the sayings in the broadcast.

- Remote procedures lead to depriving the accused of his right to appear before a natural judge, and this leads to a violation of one of the accused's rights to defense, especially since the protection of public health is not considered a justification for violating the accused's right to defense, guaranteed by Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789.

Therefore, the French Constitutional Council decided, by Resolution No. 872 of 2021, that these latest amendments are unconstitutional, because any society in which rights are not guaranteed, and in which there is no separation of established powers, cannot guarantee defense rights. And since the use of audio-visual means of communication is only an option for the judge and that the recent amendments were not subject to any legal conditions or standards in their practice, nor did they take into account the consent of the parties, this option should have been given, and the litigants or defendants should be asked about the use of audio-visual means of communication during trial, not to impose it on them without their consent. Hence, on January 15, 2021, the French Constitutional Council decided that these amendments related to the use of audio-visual means of communication in criminal proceedings without the need for the consent of the parties are unconstitutional<sup>(5)</sup>.

III-Ensuring the right to defense during remote procedures:

#### **-The Emirati Law Reconcile the Right to Defense with the Remote Procedure;**

The UAE federal law permits the presence of the lawyer with the accused during the latter's hearing from a distance, and in this regard the usual rules of criminal procedure apply. Article (7) of it states that "With due regard to the provisions of the Code of Criminal Procedures, it is permissible for the defendant's lawyer to meet his client or appear with him during the investigation or trial procedures via remote communication technology, in coordination with the competent authority." Therefore, it is not possible to challenge the illegality of the remote attendance procedures on the ground that they violate the right to defense.

It is established that the accused has the right to contact his lawyer. This right is one of the basic rights that are indispensable for a just lawsuit to exist<sup>(6)</sup>. This was the opinion of the European Court of Human Rights when it ruled that Article 6/3 of the Convention guarantees a fair lawsuit. This does not exist without the private communication between the accused and his lawyer<sup>(7)</sup>.

#### **B-Trial in Absentia and the Right to a Defense in American Law;**

The absent accused has a right that must be respected to seek the assistance of a lawyer<sup>(8)</sup>. In order to exercise this right, the lawyer must be given the opportunity to defend the accused in presenting his defense on merits and on procedure. He may not be denied pleading on the

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<http://www.slw.ca/2021/01/27/videoconferencing-technologies-and-how-it-challenges-the-fundamental-tenets-of-our-criminal-justice-system-in-canada/>

<sup>(5)</sup> Décision n° 2020-872 QPC du 15 janvier 2021.

<sup>(6)</sup> Pascal Dourneau-Josette, 'Convention européenne des droits de l'homme : jurisprudence de la Cour européenne des droits de l'homme en matière pénale -- juin 2013 (actualisation : mai 2018) Répertoire de droit pénal et de procédure pénale.

<sup>(7)</sup> 13 mars 2007, *Castravet c/ Moldova*, req. n° 23393/05, § 49. - *Sakhnovski*, préc. *supra*, n° 306, § 97; (28 nov. 1991, *S. c/ Suisse*, série A, n° 220, § 48. - *Artico*, préc. *supra*, n° 453, § 33. - *Sakhnovski*, préc. *supra*, n° 306, § 97); 16 oct. 2001, *Brennan c/ Royaume-Uni*, req. n° 39846/98, § 38-40, CEDH 2001-X. - *Öcalan*, préc. *supra*, n° 56, § 133.

<sup>(8)</sup> *Van Geyseghem*, préc. *supra*, n° 339, § 33.



grounds that he is defending an accused that is not present. The European Court of Human Rights has confirmed this right in this case <sup>(9)</sup>.

In this regard, the Sixth Amendment to the US Constitution stipulates that the accused has the right to cross-examine the witnesses for the prosecution. Confirming this, the Supreme Court of the United States of America ruled that what is meant by confronting the witness does not necessarily mean confronting him face to face. Accordingly, it ruled - in the *Maryland v Craig* case - that the child subject to harassment by the accused can be confronted with the accused remotely through video conference <sup>(10)</sup>. This is because the presence of the accused with the victim child can cause him to suffer a nervous and psychological shock <sup>(11)</sup>.

It is established in American law that the accused has the right to cross-examine the witness. That is why the Supreme Court of the United States excluded the statements of the witness who does not appear before the court from forming the court's conviction so that this ruling does not contradict with the Sixth Amendment to the American Constitution. In the *Crawford* case, the court ruled that the testimony of a witness who appeared only before the judicial officer or who had previously given statements in another case, is not valid as a ground for a judgment of conviction, because that violates the right of the accused to cross-examine the witness <sup>(12)</sup>.

On the contrary, Article (15) of the US Federal Rules of Evidence allows for testimony outside the court as if it took place before the Public Prosecution and therefore without the presence of the witness before the court in exceptional circumstances in order to serve the interest of justice, especially in the case of the witness's presence outside the country <sup>(13)</sup>.

Accordingly, the US Federal Court (Second Circuit) - in the *United States v Gigante* case - ruled that the statement made by the sick witness, who was unable to appear before the court, are valid, as long as they were consistent with the rules of justice. The witness was sworn in and subjected to cross-examination, and he delivered his testimony with the hearing and sight of the judiciary and the jury, as well as the accused <sup>(14)</sup>. Thus, the court was able to witness scrutinize the witness while giving the evidence. The court noted in this case that it differed from the *Craig* case, in which the victim, who was a child and testified without the accused being able to cross-examine him. The accused in this case could see and hear the child, but the child could not see the accused. Therefore, the Federal Court (Second Circuit) found no qualms in ruling the constitutionality of this type of testimony.

However, the Supreme Court - in *Coy v. Iowa*, - adopted a different position when it ruled - in a case related to sexual assault - that placing a screen between the accused and the victim child during his testimony so that he would not see the accused, violate the right of the accused to confrontation, which is the right guaranteed by the US Constitution <sup>(15)</sup>. Here the question arises, does the right to confrontation require the presence of the accused and the witness face to face?

The Florida Supreme Court answered in *Harrell* when it allowed two witnesses to a robbery to be heard by videoconference while they were in Australia, on the grounds that it was in the public interest; It was not possible for them to appear before the court <sup>(16)</sup>. It remains that giving

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<sup>(9)</sup> Lala et Pelladoah, préc. *supra*, n° 339, respectivement § 31 et s. et 39 et s. - procédure en appel. - Van Geysseghem, préc. *supra*, n° 339, § 35-36 ; - 19 mai 2005, Vigroux c/ France, req. n° 62034/00, § 28-30.

<sup>(10)</sup> *Maryland v Craig* 497 US 836 (1990).

<sup>(11)</sup> Matthew J. Tokson, Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional, 74 U. Chi. L. Rev. 1581 (2007).

<sup>(12)</sup> *id* 541 US at 54.

<sup>(13)</sup> *Harrell v State*, 709 S2d 1364, 1368-69 (Fla 1998).

<sup>(14)</sup> 166 F3d 75 (2d Cir 1999).

<sup>(15)</sup> 487 U.S. 1012 (1988).

<sup>(16)</sup> *Harrell v State*, 709 S2d 1364, 1368-69 (Fla 1998).



testimony without enabling the accused of his right to cross-examine the witness constitutes the exception, and this is only allowed as an exception.

However, the opinion was hesitant about hearing the witness outside the country and not being in the courtroom in order for the witness to take the oath and for the accused to be able to cross-examine him and to enable the court to evaluate the testimony of the witness. Thus, the Eleventh Circuit of the US Federal Court considered in the *United States v Yates* case that this type of testimony Violates the Sixth Amendment<sup>(17)</sup>.

Therefore, according to the rules for hearing the witness using video conferencing technology, this should be done in a manner that enables the litigants to hear the testimony of the witness clearly and to insure that the witness is alone without any interference from another person. Besides, the court investigates the accuracy of the technical established to hear that testimony <sup>(18)</sup>.

#### **IV-The Right of the Accused to Cross-examine the Witness:**

##### **A-Right to Cross-examine the Witness;**

The right to a fair trial cannot be guaranteed without ensuring the defendant's right to defense. One of the components of this right is his right to discuss the evidence witness. This right necessitates, according to the rules of a just case, the right of the accused to confront the witness in the session and discuss him. It was ruled that the court could not turn away from the defense's request for the prosecution witness to attend the hearing on the grounds that his testimony would not benefit justice. That is because it is her duty to request his presence from the Public Prosecution, and its assessment of the value of that testimony is after hearing it and not before <sup>(19)</sup>. The US federal criminal rules stipulate the right of the accused to discuss the witness who is attending from a distance, because that discussion is stipulated in the Constitution and is one of the components of a fair lawsuit. The Sixth Amendment to the US Constitution stipulates that "in criminal proceedings, the accused has the right to confront the evidence witness against him." <sup>(20)</sup>. This has been confirmed by the rulings of the Supreme Court of the United States of America <sup>(21)</sup>. It is worth noting that this right is decided - in accordance with the judicial decisions - to discuss the witness for the government and does not apply to the witness for the defendant<sup>(22)</sup>.

It is also noted that the right of the accused to discuss the witness is not an absolute right; It does not apply if the witness gives his statement on issues prior to the decision on the matter or procedural issues, or if the testimony is not related to the case or is related to side issues <sup>(23)</sup>.

##### **B-Is the expert a witness regarding the right of the accused to cross-examine the witness?**

The question was raised as to know whether the expert was a witness with whom the accused had the right to cross-examine him, pursuant to the Sixth Amendment to the US Constitution (which is similar to the right to a fair trial in Egyptian and comparative law). It is noted that the answer to this question has repercussions on the remote trial, where the accused should have the right to cross-examine the witness. This right is clearly affected by the procedures of hearing him remotely without cross-examination from the accused.

The American courts - in the case of *Melendez-Diaz v. Massachusetts* - addressed the question whether an expert is a witness or not, although the witness and the expert are similar in the fact

<sup>(17)</sup> ) 438 F.3d 1307 (11th Cir. 2006) (en banc).

<sup>(18)</sup> ) <https://casetext.com/rule/alaska-court-rules/alaska-rules-of-criminal-procedure>

<sup>(19)</sup> ) Egyptian Court of Cassation, Criminal Cassation, Appeal No. 10228 of Judicial Year 71, issued on November 15, 2001, Technical Office S 52, S 165, P 861.

<sup>(20)</sup> ) "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

<sup>(21)</sup> ) *Pointer v. Tex.*, 380 U.S. 400, 403 (1965).

<sup>(22)</sup> ) *U.S. v. Houlihan*, 92 F.3d 1271, 1296 (1st Cir. 1996).

<sup>(23)</sup> ) *U.S. v. Martinez-Vives*, 475 F.3d 48, 53-54 (1st Cir. 2007); *Del. v. Van Arsdall*, 475 U.S. 673, 679 (1986); *U.S. v. Byrne*, 435 F.3d 16, 21-22 (1st Cir. 2006).



that each of them gives his statements before the court. But the statements of the witness are oral, while the statements of the expert are usually written in the form of a report <sup>(24)</sup>. Besides, the statements of the witness are about an incident, while the statements of the expert are of a technical nature <sup>(25)</sup>. It was decided that the accused has the right to discuss the expert who prepared a report on a chemical substance that was seized in a drug case, and that what the trial court concluded that the expert does not take the witness's judgment and therefore the accused is not entitled to ask to be cross-examined in the session is a violation of the accused's right to cross-examine the Witness (Sixth Amendment to the US Constitution)<sup>(26)</sup>.

Assigning the status of a witness to the expert would create a right for the accused to cross-examine the witness. This entails the right of the accused to have the expert present to cross-examine him, excluding the expert report presented a distance. On the contrary, if we end up excluding the status of the witness from the expert, then his physical presence is not the rule. As for the right to discuss his report, it can be guaranteed through the right of the court to summon him to be present.

### C-Inability to Cross-examine the Witness in Anglo-American law

Under American law, testimony given by a witness that the accused did not have the opportunity to cross-examine is a type of hearsay. This type of testimony is not permitted before the courts in the laws inspired by the Anglo-American system <sup>(27)</sup>. Therefore, provisions of the American law require that the witness be confronted with the accused "face-to-face" <sup>(28)</sup>.

And if the crime was committed by two of the accused, and one of them testified against the other, whether he alone was the perpetrator or committed the crime with another. Those statements cannot be taken against the one who was involved with him, unless he agreed to be interrogated by this participant by standing on the facts. The witness is cross-examined and takes an oath, which is permitted by Anglo-American laws. But if the accused who implicates others refuses to do so, invoking his right to the Fifth Amendment to the US Constitution, which guarantees the right to refuse to answer questions implicating his criminal responsibility for the crime in question or for the co-defendant, then his statements against the co-defendant cannot be relied upon in the judgment issued convicting the latter <sup>(29)</sup>.

Accordingly, the previous case, which was related to the theft of postal funds, was decided by two defendants. The postal inspector testified that one of the accused confessed to him that he had committed that crime. The court ruled that these statements are a sort of hearsay that cannot be relied upon to convict this accused. All statements or confessions made by the witness or the accused outside the court are considered according to Anglo-American law a hearsay that cannot be the ground for conviction, as long as the accused is unable to cross-examine this witness.

Nevertheless, the rulings of the American courts - as in the case of *Giles v. California Rely* - in exceptional cases -on the hearsay although the witness did not appear and therefore the accused was unable to cross-examine him. The court ruled that this type of testimony is permissible in two cases: the first is when the witness is about to die and realizes that fact, and the second ; if the witness' failure to attend the trial session is due to the act of the accused himself who intended not to enable the witness to attend <sup>(30)</sup>.

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<sup>(24)</sup> ) 557 U.S. 305 (2009).

<sup>(25)</sup> ) Dr.. Ghannam Mohamed Ghannam, Explanation of the Egyptian Criminal Procedure Law, Mansoura University, 2013, pg. 406.

<sup>(26)</sup> ) 557 U.S. 305 (2009).

<sup>(27)</sup> ) Crawford v Washington, 541 US 36,42-43 (2004).

<sup>(28)</sup> ) Coy v Iowa, 487 US 1012, 1016 (1988).

<sup>(29)</sup> ) 391 U.S. 123, 126 (1968).

<sup>(30)</sup> ) 554 U.S 353, 360 (2008).



The position of the American judiciary has evolved; they considered that the physical presence of the witness in court is not a condition for the validity of the testimony as long as the accused's right to cross-examine the witness was respected <sup>(31)</sup>. What matters, according to the opinion of the Supreme Court of the United States, is not so much the physical presence of the witness in court as the ability of the accused to question the witness<sup>(32)</sup>. Accordingly, these provisions allow testimony outside the court with conditions. Firstly, it must not be possible to hear the witness as if he was traveling or sick, secondly - that the accused had the opportunity to discuss this witness in a previous session <sup>(33)</sup>.

It is clear that this problem is not raised in laws of Latin origin, such as Emirati law, Qatari law, Egyptian law, and French law. This is because those laws admit the statements of the accused against another accused as a presumption that the court may rely on in its judgment of conviction if it is supported by other evidence <sup>(34)</sup>.

### V-Conditions for Hearing the Accused Remotely:

#### A-Consent of the Accused;

Some legislation requires - when interrogating the accused or in case of confrontation - the consent of the accused if it is to be conducted by video conference (Article 694-5 French Proceedings).

The French law (Article 694-5, al. 3 of the French Code of Criminal Procedure) allowed in misdemeanors, and not felonies, to hear the accused by the court, but on condition that the accused agrees to that. This includes hearing the accused, interrogating him, and confronting him via video conference. The principle remains that it is permissible to hear witnesses, experts, the victim, and the civil plaintiff. In the case of inquiry, or preliminary investigation, the hearing of the accused without his approval.

However, Article 706-71 of French procedures guarantees the confidentiality of audiovisual communications for questioning and interrogation.

When renewing the period of arrest by the police or judicial detention, it is permissible to be done by means of audio-visual communication. In addition, these actions may be recorded with audio and video.

As for the imprisoned person, according to Article 706-71, the third paragraph, procedures may be conducted by videoconference only. The second paragraph of the same article allows the judge, while reviewing the case, to make use of the means of audio-visual communication, to hear the witness, the expert, and the civil plaintiff from a distance.

The principle remains in French law that interrogating the accused may not be done by the judge by means of audiovisual

However, as an exception, the court may hear the accused from a distance in the following cases:

- The accused before the Court of contravention.
- If the accused is imprisoned in another case before a neighboring court.

<sup>(31)</sup> ) *Craig*, 497 US at 849-50

<sup>(32)</sup> ) *Douglas v. Alabama* :: 380 US 415 (1965); *Maryland v Craig*, 497 US 836 (1990)

<sup>(33)</sup> ) Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional*, 74 U. Chi. L. Rev. 1581 (2007); *Ohio v Roberts*, 448 US 56,63-66,73 (1980), overruled in part by *Crawford*, 541 US at 67-68. See also *United States v Yates*, 438 F3d 1307, 1329-30 (11th Cir 2006)

<sup>(34)</sup> ) See, for example, in Qatari law: Qatar Court of Cassation, Criminal Articles 6/20/2011, No. 116/2011; And in Egyptian law: Appeal No. 554 of 60 BC, session 2/5/1991





- In the case of legal aid, the Convention left the possibility of applying this method with regard to the accused to the discretion of the State (art. 10, § 9, al. 2).

Most countries refused to apply this method to the accused. France approved it for the accused during the preliminary investigation, not the trial (art. 694-5, al. 3).

Comparative legislation does not agree with regard to the presence of the accused in trial sessions. Article 715-23 of the Canadian Law stipulates that the court has the authority to order his attendance remotely by means of videoconference or audioconference given:

The circumstances of the accused

Financial costs for the accused to attend court sessions.

The place from which the accused travels to court

The seriousness of the crime

The right of the accused to a fair lawsuit and public hearings

#### **B-The Accused's Right to Object to Remote Attendance:**

Some legislation allows the accused to object to the application of remote attendance rules, and allows him to request his personal attendance. In this regard, Article (6) of the UAE Federal Law stipulates that “the accused, in his first trial hearing via remote communication technology at any stage of litigation, may request his personal appearance before the court, and it shall decide on his request by accepting or rejecting it.”

The position of the Belgian law was amended on January 29, 2016, when Article 127 of the Belgian Code of Criminal Procedure was added, providing for the possibility of remote investigation of detainees held in custody through the use of remote communication technology. However, on June 21, 2018, the decision No. 76 of 2018 was issued by the Belgian Constitutional Court declaring the unconstitutionality of this amendment regarding the use of remote communication technology for pre-trial detainees. The rationale for the ruling of the Belgian Constitutional Court issued on June 21, 2018 came to ensure a fair trial for the accused, as the Belgian Constitutional Court assessed that remote trial procedures are within the jurisdiction of the legislator and not the accusation chamber. This is because a set of procedures related to the use of these technologies, as mentioned in the preparatory works for the law, did not restrict that procedure. This law did not address any requirement that determines the location of the defendant's lawyer, and it did not specify precisely the place through which the trial session will take place remotely<sup>(35)</sup>. It was necessary to specify those guarantees to achieve the meaning of a fair lawsuit.

In the same vein, it was decided in Canada, in *de Upegui v. Canada* (Minister of Citizenship and Immigration), that videoconferencing did not afford the applicant fair hearing. Hence, it became unconstitutional<sup>(36)</sup>.

The draft the Egyptian Criminal Procedure Law of 2017 adopted the same concept when it inserted Article (573), saying: “The accused may, in the first session, object to the remote trial procedures, and the court must decide on the objection by accepting or rejecting it, and proceeding with the procedures if it deems that the objection is not justified. The project should have provided for the right of the accused to cross-examine witness for the prosecution from a distance, the right of the lawyer to be present, and to specify sufficient legal guarantees for the use of modern technologies.

#### **VI-The Opinion of the European Court of Human Rights on Remote Trial:**

<sup>(35)</sup> Decision No 76\ 2018: <https://www.const-court.be/public/f/2018/2018-076f.pdf>

<sup>(36)</sup> [2007] EC.J. No. 369 (F.C.) (QL).



The European Court of Human Rights raised the issue of compatibility of the remote trial with fair trial considerations in the case of MARCELLO VIOLA c. ITALIE. This is because Article (6-1 and 3) provides for the right of the accused to a fair trial in which he is heard by an impartial court after being notified of the charge at the earliest opportunity in a language he understands and that he has sufficient time and facilities to prepare his defense and to defend himself personally or through an agent of his choice. or appointed when unable to interrogate the prosecution witnesses and summon the witness for the defense in the same circumstances as the prosecution witnesses, in addition to the right to a translator when he does not understand the language of the trial <sup>(37)</sup>.

The accused, who was heard by the court by video-conference, claimed that his right to a fair claim was violated, due to his failure to attend the trial session, and invoked also that his treatment was discriminatory, as that treatment differed from that of other defendants.

In this case, the court emphasized that the rule in the criminal justice is the presence of the accused in the trial session in order to be able to participate in the hearing pursuant to Article (6) of the European Convention on Human Rights, so that he can defend himself and hear the witnesses and cross-examine them, i.e. participate in the lawsuit <sup>(38)</sup>. However, the court did not see in the aforementioned Article (6) what makes it inconsistent with hearing the accused from a distance, provided that this accused is enabled to hear witnesses and experts, defend himself, seek the assistance of a lawyer, and the presence of this lawyer with him, and enable the accused to consult with him in confidentiality without eavesdropping on him. These requirements were satisfied in the facts of the case. This why ,the Italian Constitutional Court had previously ruled - in its ruling issued in 1999 - that hearing the accused from a distance does not violate the provisions of the European Convention on Human Rights, when these conditions are met <sup>(39)</sup>.

From the foregoing, it is clear that the European Court's jurisprudence affirms the following legal principles:

- Hearing the accused, witnesses, and experts by video-conference does not, in principle, violate the principle of fair trial.
- The general rule in the criminal trial is the physical presence of the accused and the witness.

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<sup>(37)</sup> « 1. Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial (...) qui décidera (...) du bien-fondé de toute accusation en matière pénale dirigée contre elle. (...)

3. Tout accusé a droit notamment à :

- a) être informé, dans le plus court délai, dans une langue qu'il comprend et d'une manière détaillée, de la nature et de la cause de l'accusation portée contre lui ;
- b) disposer du temps et des facilités nécessaires à la préparation de sa défense ;
- c) se défendre lui-même ou avoir l'assistance d'un défenseur de son choix et, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat d'office, lorsque les intérêts de la justice l'exigent ;
- d) interroger ou faire interroger les témoins à charge et obtenir la convocation et l'interrogation des témoins à décharge dans les mêmes conditions que les témoins à charge ;
- e) se faire assister gratuitement d'un interprète, s'il ne comprend pas ou ne parle pas la langue employée à l'audience. »

<sup>(37)</sup> ) Lala c. Pays-Bas, arrêt du 22 septembre 1994, série A no 297-A, p. 13, § 33, Poitrimol c. France, arrêt du 23 novembre 1993, série A no 277-A, p. 15, § 35, et De Lorenzo c. Italie (déc.), no 69264/01, 12 février 2004

<sup>(38)</sup> ) Lala c. Pays-Bas, arrêt du 22 septembre 1994, série A no 297-A, p. 13, § 33, Poitrimol c. France, arrêt du 23 novembre 1993, série A no 277-A, p. 15, § 35, et De Lorenzo c. Italie (déc.), no 69264/01, 12 février 2004

<sup>(39)</sup> ) arrêt no 342 du 22 juillet 1999

- Deviating from the previous general rule must be justified by legitimate reasons, i.e. seeking to achieve a legitimate purpose, as long as the accused wishes to attend the trial session.
- - The remote trial must be permitted by the internal law of the state.
- Remote procedures must respect the requirements of a fair case, including the right of defense, oral hearing, access to the procedures, the right to a lawyer, and the right to meet with the defender without supervision.
- - The state has an obligation to provide the necessary technical means to enable the accused to exercise his right to defense and to follow up the trial procedures fully in case of holding the session remotely <sup>(40)</sup>.
- - It is important to ensure successful remote procedures in case the defendant is in prison due to the difficulty of transporting the prisoner to the courtroom or because of the risks associated with his release from prison especially if he is a member of a criminal gang.
- - If the accused is in a mafia case, his attendance at the trial session may endanger the witnesses and may enable him to communicate with the mafia gang to which he belongs.
- - The idea of a fair lawsuit should allow for a balance between the interests of the accused on one hand and the interest of the witnesses and the victim on the other hand in a way that guarantees the safety of the latter. Hence, the idea of a just lawsuit is not devoid of considerations of security and ensuring the safety of the litigants <sup>(41)</sup>.
- - The accused has exercised - in this case- his right to defense, his right to an attorney, his right to hear prosecution witnesses, and his right to consult in private his lawyer, which was achieved in the facts.
- - Reviewing the case at the appeal stage does not differ from the judgment by the court of first instance as long as the Court of Appeal review the case as to merits and as to procedure and does not restrict its review to the interpretation and the application of law <sup>(42)</sup>.

#### **VII-Hearing the Witness and the Expert Remotely:**

- The European Council Convention issued on May 29, 2002 regarding judicial assistance, in Article (10) of it, allows states to hear witnesses and experts via video conference. Indeed, the Convention allows for the hearing of the accused. However, the application of this procedure depends on the state's adherence and on the accused's consent to that as well <sup>(43)</sup>.
- Consequently, Article 706-71, French law allows for French courts to hear the witness and the expert remotely, and it did not specify the cases of interrogation of the witness and the expert through this method, and contented itself with justifying this procedure by the necessities of gathering evidence and investigation. In this regard, Article 706-71 stipulates that the court may use technical means during the trial to hear the witness, expert, and civil plaintiffs <sup>(44)</sup>.
- It is noted that the application of this type of attendance is admitted in the case of judicial assistance, as the requesting country provides the means of audio-visual communication, as well as the presence of its representative during the procedures to verify the identity of the person in question. In addition, the requested state must make

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<sup>(40)</sup> ) l'arrêt *Lawyer Partner* (CEDH, 16/06/2009, n° 54252/07, *Lawyer Partner SA c/ Slovaquie* ; *Procédures*, 2009, comm.358 N. Fricero

<sup>(41)</sup> ) ) *Doorson c. Pays-Bas*, arrêt du 26 mars 1996, *Recueil des arrêts et décisions 1996-II*, p. 470, § 70, et *Van Mechelen et autres c. Pays-Bas*, arrêt du 23 avril 1997, *Recueil 1997-III*, p. 711, § 53

<sup>(42)</sup> ) *Dondarini c. Saint-Marin*, no 50545/99, § 27, 6 juillet 2004.

<sup>(43)</sup> ) Laurent Desessard, *Témoignage : matière pénale- Répertoire de droit international*, janv. 2007

<sup>(44)</sup> ) L'article 706-71 du code de procédure pénale, issu de la loi du 15 juin 2000, et dont les dispositions ont été étendues par les lois du 9 septembre 2002, 9 mars 2004, 26 janvier 2005, 5 mars 2007, 24 novembre 2009, puis celles du 14 mars 2011 et du 14 avril 2011, du 20 juin 2014, 3 juin 2016 puis par l'ordonnance du 1<sup>er</sup> décembre 2016



sure that the rules of fair trial are respected. This includes the presence of a lawyer during questioning, interrogation or confrontation.

- The Convention provides for the hearing of witnesses and experts whose presence seems inappropriate or impossible (art. 10, § 1er). It is the case when that the person is old or minor, or his health does not allow his presence, or that his journey from his country endangers him.
- The European Convention of 2000 stipulates that the requested State must impose penalties on a witness who refuses to appear to complete these procedures (art. 10, § 8),
- The Canadian law goes in the same direction when it stipulates that a witness can be heard in case of necessity and danger to his life through technology and means of remote communication, according to Articles 112 and 112 -2 of the Belgian Code of Criminal Procedure.
- In the same vein, Article (709-1) of the Canadian Criminal Code specified cases of remote procedures by providing that any party to the procedures has the right to request the court to appoint an investigator who receives the testimony of a person in the following cases:
  - If the witness suffers from a disability that prevents him from attending court
  - If the court deems impossible -for any reason- for the witness to attend the hearing.
  - If the witness is outside the country<sup>(45)</sup>.

The same time, the Canadian law allowed the judge to have a discretionary power to grant remote attendance when Article (714-1) of the Canadian Criminal Code permitted the judge to allow the witness to give his testimony by means of (audio conference) or (video conference) if the judge considers that the circumstances of the case so require. Especially considering:

The whereabouts of the witness and his personal circumstances

- The large costs of attending the court session,

The expected importance of the testimony,

- The right of the accused to a fair lawsuit and procedures through public hearing,
- The seriousness of the crime being prosecuted,
- Any damages that may be caused to the rights of the parties who will not confront the witness directly, if the court decides to hear the testimony through (audioconference).

Article 714-2 of the Canadian Criminal Code provides for the testimony given by a witness from outside the country and permitted it to be conducted by videoconference, unless one of the litigants proves that accepting this type of testimony would violate the principles of a fair lawsuit.

Although the Canadian law belongs to the Anglo-American laws whose provisions are inspired by the old customary law, which does not rely on testimony outside the court and considers it as a hearsay, Article (715-1) of the Canadian Criminal Code has permits, as an exception, this kind of testimony as well as any evidence previously presented on the same charge, even at the stage of preliminary investigation or inquiry, even if the one who gave that testimony refused to take oath. So, the court may rely on it in its ruling.

The previous article also allows having recourse to previous statements made by the witness if evidence is established that this witness passed away, became insane, or contracted a disease that prevented him from appearing in court, or if he traveled abroad.

Article 715-1 allows the Canadian criminal court to accept the recording of the testimony of the victim or any other witness, even if his age is less than 18 years, if it is recorded by videoconference. In addition, Article (715-2) allows the court to accept video recording of the victim's statements even if he suffers from a mental or physical disability.

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<sup>(45)</sup> The Canadian Criminal Law: <https://laws-lois.justice.gc.ca/eng/acts/c-46/>



The Supreme Court of the United States of America expressed its opinion on a bill proposal regarding the use of videoconferencing in criminal proceedings in the year 2002 and approved it, but under certain conditions. The most important of which is that the witness is not available because certain circumstances prevent him from attending, such as death, illness or travel, and that his testimony should be admitted in the interest of justice, and finally that technical measures are taken in order to guarantee the right of the accused to cross-examine the witness <sup>(46)</sup>.

Some judicial rulings have attempted to strike a balance between the accused's right to interrogate the witness and the use of modern technologies in hearing from a distance, using the notice-and-demand rule, so that the Public Prosecution informs the accused that the witness will be heard via videoconference, and he has the right to object to that. . In the event that he does not object, he is considered to have waived this right, which, although its source is found in the Constitution, is subject to waiver by the accused because it is decided in his interest.

The state of Alaska has enacted a law allowing witnesses to be heard by videoconference in two cases; the first; the accused agrees to his hearing. Second if it is obvious that hearing the witness is in the public interest <sup>(47)</sup>. This law requires that the witness give his testimony after on oath and that the accused has the right to cross-examine him. As for the state of Idaho, it determined - in a law issued in 2011 - the field of application of video conferencing in hearing a certain group of experts, who are forensic doctors only <sup>(48)</sup>.

Regarding taking the oath remotely, if the witness is in a foreign country, it is legally permissible as long as a judicial delegation agreement is concluded between the two countries. Thus, the Supreme Court of the State of Florida ruled for the oath of a witness who was present in Argentina on the basis of the existence of an extradition agreement between the United States and Argentina <sup>(49)</sup>.

#### VIII-Conclusion:

At the end of our article on remote criminal procedures, we come to some conclusions and recommendations, the most important of which are the following;

- The application of criminal procedures extends to the stage of inquiry, the criminal investigation stage, and the trial stage.
- This type of procedure applies to the witness, the expert, the victim, the plaintiff for civil rights, the person responsible for civil rights, and the accused.
- The accused may object to this type of procedure. Rather, its application depends on submitting a request to the competent authorities. Those authorities decide whether to accept It or not. She may accept it and she may reject it, and this acceptance or rejection is not subject to appeal.
- Criminal procedures are often applied remotely in the field of judicial delegation due to the presence of the witness or the accused outside the country.
- The application of remote procedures for the accused raises deeper legal problems, than those raised by these procedures for the witness, expert and other litigants.

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<sup>(46)</sup> ) Francis A. Weber, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Videoconference-Testimony Provisions*, 86 Temp. L. Rev. 149 (2013).

<sup>(47)</sup> ) *Cf Melendez-Díaz*, 557 U.S. at 326-27.

<sup>(48)</sup> ) Francis A. Weber, *ibdi*.

<sup>(49)</sup> ) Francis A. Weber, *ibdi*.



- The organization of criminal procedures remotely must be surrounded by a set of guarantees and precautions so as not to conflict with the constitution, and this is what the French Constitutional Council ruled. Among these guarantees, the accused must agree to this type of procedure, and he may object to it and request his personal attendance. He may also object to hearing the witness by video-conference and request that he attend the trial hearing.
- The US Constitution recognizes in the Sixth Amendment the right of the accused to cross-examine the prosecution witness, and therefore the attendance of the witness remotely raises more profound constitutional problems in American law than those established for other litigants. Other constitutions differ in not stipulating this right and contenting themselves with stipulating the right to a fair lawsuit, which includes as one of its constituent elements the right to confrontation and defense, i.e. confronting and discussing evidence of conviction.
- The use of remote criminal procedures has become more urgent due to the spread of the Corona virus, which can be raised again when other viruses spread.
- Resorting to criminal procedures is a procedural necessity required by the investigation and trial of terrorist crimes when the victims and witnesses are heard.

#### **IX- Recommendations:**

We recommend the following in the event that the Egyptian legislator plans to agree to conduct the investigation or trial remotely:

- That the law expands the scope of remote procedures to include the inquiry by the judicial police, preliminary investigation and trial.
- That the legislator in different countries, when preparing texts for remote procedures, be guided by the law in the UAE as a model for good laws in this field.
- That the law requires that the accused consent to these procedures remotely
- That the accused has the right to appear in person before the court
- The court and the Public Prosecution in addition to the accused must agree to the hearing by video-conference.
- That the accused has the right to withdraw his previous consent to the remote procedures, so that the procedures return directly in presence of the parties to the lawsuit.
- That the remote criminal procedure be confined to the contraventions and misdemeanors, the remote procedures in felonies being limited to hearing witnesses and experts according to the previous conditions.

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