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Right to fair trial. Impacts of new technology and contemporary space of justice on the process and administration of justice

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Right to fair trial. Impacts of new technology and contemporary space of justice on the process and administration of justice.

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Abbreviations List.

ADR Alternative Dispute Resolutions
CEJEC Centre d'études juridiques européennes et comparées
CESEDA Code de l'entrée et du séjour des étrangers et du droit d'asile
CSM Conseil Supérieur de la Magistrature
ECtHR European Court of Human Rights
ECHR European Convention for the protection of Human Rights and Fundamental Freedoms (CEDH in French)
EU European Union (UE in French)
HMCS Her Majesty's Courts And Tribunals Service
HRA Human Rights Act 1998
ICC International Criminal Court
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
LEC Ley de Enjuiciamiento Civil (Civil procedure Act)
LECrim Ley de Enjuiciamiento Criminal (Criminal procedure Act)
MoJ Ministry of Justice
UK United Kingdom
UK SC United Kingdom Supreme Court
USA (or US) United States of America

I. Introduction.

I have been writing for almost a decade on the topic of justice broadly speaking. I have during this time generated an number of documents but also work with colleagues in various part of the world. This is the result of an interdisciplinary reflection, but also of physical contact with courthouses in France, Spain, Italy, the UK, the USA, Australia, New Zealand and Mexico. It is also the result of discussions and debates.

I have during these years worked on a series of essays, collective studies that I have undertaken with presentations at several high-profile institutions or international conferences. I wish, particularly, to thank the Law and Society Association and all the colleagues I have met there over the years. I would like to thank my dear director of thesis professor JC Remotti very much.

In my research, I have tried to make accessible, as much as possible, the radical (and naïve) knowledge I have introduced in this thesis, in order to propose an abstract and theoretical work that can be comprehended, I hope, simply, by those of you who will give me the pleasure of reading me.

I have been considering something quite complex; the intersection between law and philosophy, architecture, art theory and psychoanalysis. My ideas are personal, I suppose, especially for lawyers who are not accustomed to the abstract world. Sometimes my ideas

seem quite naïve, because I may not be an expert on everything, but simply an apprentice that tries and tries again to perfect and polish his work.

As I mentioned, this thesis is based on my ongoing research on courts, judges and justice. If what is important for justice is to be seen to be done, the place where justice is or is supposed to be rendered has a pivotal part to play in its administration. The place of justice for neo-Classical architects was a Palace of Justice, 'speaking through allegorical and metaphorical forms', contrasting the 'temple illuminated by justice' and the 'dark places devoted to crime'. There is therefore, in spaces of justice, a very present and perhaps permanent idea of separation, of dichotomy, almost like a black and white vision. The place where justice has to be rendered has to show contrasts between light and darkness, highlighting the light of the truth, the legal truth. Spaces of justice are not just any other places; they are sacred places transcended through ideas of power and authority. This complex system of values is, via rituals, connected to the 'speaking architecture': the building, which imposes the solemnity of the state, illuminating this authority. We therefore need to think about and rethink spaces of justice. This is the objective of this research monograph. We particularly need to think about it in what is said to be a postmodern period. If we are after (post) modernity, we should consider the potential changes that have occurred between preceding periods and that time of modernity, and not simply in one geographical area or jurisdiction, but in a comparative way. For instance, does the idea of power and authority transfer to 'post modernity' or do we have something else, something different? One could argue that, in fact, a judge may not represent justice anymore because the changes introduce a lack of distance, where the power and authority vanish completely.

This is a circular problem, a revolution. Moving from a ceremonial, very formal judge, in a temple-like court building, to a business-like judge in an office-like court building affects the position of the judge. This questions whether a judge in a contemporary building, or a judge viewed through cameras, represents *something someone somewhere*, in the same way as it did before.

In the first Chapter (Chapter 1), I introduce the ideas and concepts that are, in my opinion, central to a work based on intersection between philosophy, psychoanalysis and law. I first review the literature on the right to a fair trial and more specifically its connection with new technologies, including the narrow issue of video-link and videoconferencing. I merge this from time to time to the question of the contemporary space of justice. I then introduce a more theoretical framework for this work, which in my opinion contribute to a better understanding of these issues with the question of the origin of trial. In fact, trial is linked to the original transgression. The transgression of the fundamental law 'you shall not kill' acts at the foundation of a micro society and establishes the law, repressed, through psychological mechanisms. Notions such as totem, taboos, Oedipus, the killing of the father by the brothers and the repression of the law are introduced here. The brothers must kill the father to exist as a group, a social organisation. But should they kill again, then the group would cease to exist. Hence 'you shall not kill' becomes the foundation of a (civilised) society. That essential moment of time is re-enacted during the legal event of trial, where the 'brothers' will be judged in front of an audience, for transgressing the law. That is when the 'where' is needed, when the consideration for spaces of justice arises. I argue that law courts operate like a microcosm of the social

organisation, where rituals of birth and re-birth take place, alongside the re-creation of the original transgression that marked the first step towards society.

In the following Chapter (Chapter 2), I analyse, in depth, the relationship between time and space in the legal event. It applies the psychoanalytical notions introduced in the previous chapter specifically to the administration of justice. It also offers a comparative approach, looking at the judge in the spaces of justice, both in the civil and common law traditions. I define how the judge relates to the idea of 'totem' and to the Oedipus complex, and how it can be compared in the two legal traditions on this basis. Specifically, it develops the idea of quality and quantities of 'totemic position/s' according to the specific legal traditions. I then consider elements that I believe to be conditioning the symbolic position of the judge and compare these in both traditions. Finally, I offer a connection between time and space through ritual(s).

In Chapter 3, I focus on analyses of the link between the architecture of courts of justice and the respect for the law. I consider how court architecture may influence the efficiency of the law, in terms of individual case resolution, which has an impact on the cohesion of society. I analyse the impact of courthouse designs and their importance because of the long-term investments they constitute and because of the specific message of authority they convey. Courthouses are looked at as specific spaces where the law is 'spoken' and where 'divine justice' results. I examine how, in the past, the original myth of authority was represented by neo-classical (in civil law countries such as France) or gothic revival architecture (in common law countries such as the UK) in 'palaces of justice'. I then consider that in more recent years, we have witnessed a radical shift in courthouse design.

The representation of authority through judicial architecture has now been replaced by a contemporary 'post-modern' approach that seems to modify the original myth. This chapter is more about examining the use of transparency, or what is termed here 'the new opacity', as an integral aspect of contemporary courthouse design.

In the next Chapter (Chapter 4), I will look at how the psycho-social perspective on the legal event of trial is challenged by technology. This chapter concerns, once more, the concept of "authority" in the process of justice. If justice has to be seen to be done, the appearance of justice becomes what is spoken of: its image becomes its new foundation. The technology deployed in courts modifies the archaic, sacred, spatio-temporal space of the court. It leaves an empty box in which there is literally no-one. Will it become a void that is related not to "real" justice but to a digital representation of justice? Let us remind ourselves that we, subjects, seek to articulate ourselves in a signifying field that is necessarily fragile (a representation rather than a reality) and that we may be creating a lack of justice. This void-consequence is the subject of the signifier, that is a retroactive effect of the failure of its own representation; that is why the failure of representation is the only way to represent it. Mainly, focus is on the Crime and Courts Act 2013 that relaxes the rules on filming court proceedings in the UK. I then consider how filming, recording and broadcasting might be a new legal Janus, with one positive side and one negative side. It appears on the one hand as a continuation of the (real) audience, the public present at a trial, through a 'techno-legal' transparency; while on the other hand it may appear as though drifting towards voyeurism. I finish by using Baudrillard's and Barthe's work on media to complete the illustration on this chapter about cameras in courts.

I then consider in a final Chapter (Chapter 5), a civil law tradition case with the use of Spain as example. I analyse how the system has incorporated new technology and has the country has been dealing with the arrival of contemporary mechanism. This would be used as a way to compare what can be found in common law countries of course, but also what is more specific to that particular civil law tradition/culture.

II. Chapter One: Preliminary Remarks on Right for a fair trial, new technology, and trial as the re-enactment of the original transgression.

> 'Le collectif n'est rien que le sujet de l'individuel'.
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> Lacan, Ecrits 1, Paris : Seuil, 1999, p. 211 note 6.

I first would like to give a description of the right to a fair trial and a brief literature review on the subject of right to a fair trial, new technologies (and particularly video-link and videoconferencing) in contemporary space of justice, before looking at trial and transgression.

Right for a fair trial, new technologies.

We may be rightly able to assume that the best or at least the best achieved (so far) definition or expression of the right to a fair trial comes for the transnational perspective of the European Convention on Human Rights. In *The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights*, Nuala Mole and Catharina Harby discuss at length the question of fair trial. The issue of 'fair trial' is therefore solely located 'geographically' within the parties to the convention, their territories. The issue is therefore focusing on a specific but rather large international/regional space that covers more than the European continent.

The right to a fair trial is described in the Convention. Under Article 6 of the European Convention, that I will consider as the starting point of the following development, the right to a fair trial is described as follows:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
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> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations against him;
>
> b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[1]

Article 6 is therefore broadly concerned with the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him or her.

The Strasbourg's Court, the European Court of Human Rights (ECtHR), has naturally interpreted Article 6 broadly, linking it to the operation of democracy. As mentioned by Nole and Harby, 'In the case of *Delcourt v. Belgium*, the Court stated that:

In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive

[1] https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9. Last accessed 21 January 2019.

interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.[2]

It is quite interesting, and we will see this in the following pages, that the right to a fair trial is also the right to a fair administration of justice. We will particularly see that the administration of justice, itself, will equate in many cases, to the notion of justice to be seen to be done. Therefore, the right to a fair trial has strong relation with what we see before our eyes happening in a certain space during the special time of the trial. In addition, we can note, as the two scholars mentioned, that the first paragraph of Article 6 focuses to both civil and criminal proceedings, while the second and third apply only to criminal proceedings. But the text of Article 6 does not explain fully the legal and full reality of its scope. It is not a surprise then to find, as they explained, that 'the text of the article is, however, only the starting point.' It is clear in the case of the right to a fair trial, that 'Article 6 has been extensively interpreted by the European Court of Human Rights in its case-law.'[3]

As this work is untitled Right to fair trial, Impacts of new technology and contemporary space of justice on the process and administration of justice, we should look, even briefly, at the case-law of the ECtHR. Indeed, the Strasbourg's court has very rapidly, and quire often been concerned with the right for a fair trial. Even more, and that is what we see

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[2] Mole, N. and Harby, C., *The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights, Human rights handbooks*, No. 3, Directorate General of Human Rights Council of Europe, 1st edition 2001; 2nd edition, August 2006, esp. p.5.

[3] Ibid.

relevant to this work, it has indirectly touched the question of video conferencing for instance, in the interpretation of the right to fair proceedings.

As stated by Nole and Hardy,

> 'Article 6 states that everyone is entitled to a fair hearing. This expression incorporates many aspects of the due process of the law, such as the right of access to court, a hearing in the presence of the accused, freedom from self-incrimination, equality of arms, the right to adversarial proceedings and a reasoned judgment'.[4]

It is quite obvious, that indeed, new technologies, the use of new technologies. such as video conferencing and its use in trials within the geographical space of the parties to the European Convention, are related to the question of fair trial, of access to court, as are the spaces of justice. But the new technologies and the right to a fair trial have another more critical dimension, with the question of presence to the trial. The simple question to ask is whether video conferencing guarantee the presence at trial, as protected by the European Convention. Then again, in turn, we have additional questions such as who should be present. Should the accused or the defendant be present? Should the judge be present? Should they be present in the same room? Should the counsels or advocates, the team defending the accused or defendant be present?[5]

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[4] Ibid, esp. p.38.

[5] See also what is said in Gibbs, P., *Defendants on video – conveyor belt justice or a revolution in access?* Transform Justice, October 2017, esp. p.19, in a section named 'the right to be or not to be on video': 'Article 6 of the ECHR guarantees the right to a fair trial. It requires that, in the determination of a criminal charge, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and

It transpires as a matter of principle that an accused must be present a trial hearing. It is understandable that it is crucial in criminal proceedings. However, in the case of civil proceedings, it is necessary only to certain cases, such as 'cases which involve an assessment of a party's personal conduct'.[6] The point here is quite straight forward: how should we consider this presence. If we look at the use of new technologies, such as videoconferencing, we know that the use of videoconferencing will mean different locations for the same hearing. If it is the case, how that redefines the space of justice? Location A (court room) and location B (where the accused or the witnesses or the lawyers are) are separated, and solely connected by video-link. Shall we consider the

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impartial tribunal established by law." "Effective participation" presupposes that the accused has a broad understanding of the nature of the trial process, and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence. Defendants usually appear in person during their trial, but the right of a defendant to effectively participate applies to every hearing. It is clear that video could be an impediment to general understanding and active engagement. But no-one from England and Wales has ever legally challenged a decision to have a defendant/prisoner appear in court on video either through challenging the denial of consent to defendants, or whether video is in the interests of justice in the case of vulnerable defendants, or the absence of reasonable adjustments'.

[6] Ibid, esp. p.44. To be more precise, 'A criminal trial in the absence of the accused or a party may be allowed in certain exceptional circumstances, if the authorities have acted diligently but not been able to notify the relevant person of the hearing and may be permitted in the interests of the administration of justice in some cases of illness. A party may waive the right to be present at an oral hearing, but only if the waiver is unequivocal and "attended by minimum safeguards commensurate to its importance". However, if the accused in criminal cases waive their right, they must still be permitted legal representation'.

video-link the new physical space of justice, in redefining completely the 'location' mixing A and B for example, or shall we consider that A is the main location and B is accessed via video-link that is, B will virtually be inserted in A, sole place of justice? But further to the question of presence, we should ask ourselves another one: does virtual presence equate physical presence? And is it always the case? And do we have absolute necessity or not to have that presence?

The right of a person to be present at the appeal will depend on the nature and scope of the hearing. The Court clearly stated that a hearing in the presence of the accused is not as crucial at an appeal hearing as it is at the trial. If the appeal court will only consider points of law, a hearing in the presence of the accused will not be necessary. The situation is different, however, if the appeal court will also consider the facts of the case. In determining whether the accused has a right to be present, the Court will take into consideration what is at stake for him/her and the appeal court's need for the accused's presence to determine the facts.[7]

Mole and Harby are quite clear here. The presence therefore is pre supposed, and the point of video link, of its use, challenges that pre-supposition, unless of course we redefine courthouses, courtrooms, and generally speaking space of justice. One of the land mark cases here is certainly the 2016 ECtHR case, *Marcelo Viola v. Italy*. In that case, the court decided that:

[7] Mole and Harby, *Right to fair trial*, esp. pp. 44-45.

> Paragraph 76.(…) that the applicant's participation by videoconference in the appeal hearings during the second set of criminal proceedings did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had an opportunity to exercise the rights and entitlements inherent in the concept of a fair trial, as enshrined in Article 6.[8]

The applicant complained that his participation in the hearing by videoconference equated to a violation of his right to a fair trial. The ECtHR was concerned about security. Particularly, the Court explained that the transfer of a prisoner such as the applicant would require stringent security measures and a risk of absconding or attacks. It could also provide an occasion to renew contact with the criminal associations to which the applicant was suspected of belonging. In fact, Viola, the applicant, was accused of serious crimes related to the mafia's activities. It was therefore reasonable to consider that the mafia could, even by their mere presence in the courtroom, exercise undue pressure on other parties in the proceedings, especially the victims and witnesses who had turned state evidence. The Court considered that the applicant's participation at the appeal hearings via videoconference was legitimate because of the protection of public order, the

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[8] *Marcello Viola v. Italy*, 5 October 2006, Appl. 45106/04. http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-77246&filename=001-77246.pdf&TID=thkbhnilzk. Last accessed 21 January 2019. We can note that according to Milano, L., in "Visioconférence et droit à un procès équitable", RDLF 2011, chron. n°8 (www.revuedlf.com), the ECtHR judges had to rule on the question of compliance with Article 6 and the use of videoconferencing in several Italian cases relating to Mafia trials and particularly CEDH, 5/10/2006, n°45106/04, Marcello Viola c/ Italie; CEDH, 27/11/2007, n°35795/02, Asciutto c/ Italie ; CEDH, 27/11/2007, n°58295/00, Zagaria c/ Italie.

prevention of crime, the protection of the right to life, the freedom and security of witnesses and victims of offences, and compliance with the "reasonable time" requirement in judicial proceedings. The Court therefore decided that the arrangements for the proceedings to be conducted via video conferencing had respected the right of the defence of Viola.

The discussion on video-link participation has been quite robust in the ECtHR and its results is that 'remote participation is a limitation of the defendants' participatory rights, which must be balanced with general interests, like the prevention of organised crime.'[9] This is particularly clear in Viola where the ECtHR 'stipulated that in the interest of victims and witnesses, and to prevent other serious crimes, the video conference participation of the defendant, being charged with extremely serious organised crimes is compliant with the principles of Article 6 ECHR.'[10]

The right for a fair trial, Article 6 of the European Convention, is here shaped in a certain way. The principles are established. However, there are rather clear exemptions, linked to the use of new technologies. Here, videoconferencing is considered as an option when necessary. Yes, it brings limitation to the right to a fair trial, but it has to be used when it is necessary. Viola is opened on the various cases when and where limitation will apply.

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[9] Quattrocolo, S., and Ruggeri, S., (eds), *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe,* Springer 2019, esp. p.460

[10] Ibid, esp. p. 464

In 2012, another important case was considered by the ECtHR. In *Gennadiy Medvedev v. Russia,* the question was the participation solely via video-link to the trial or part of it.[11] The issue in fact was slightly different but quite relevant to our question or right to fair trial, new technology and space of justice. It was said by the Court that 'the defence provided by State-appointed counsel had not been effective; that the video link had been of poor quality and he (the accused) had been unable to hear and to follow the court session'.[12] The Court introduced a deeper consideration of the use of new technology. It specifically mentioned poor quality of the video-link. If the quality of the link is not good, we cannot have a correct or a real , in the sense of realistic representation of the accused or defendant in court. That said, in that case, the outcome of less relevant than the discussion as no breach of Article 6 was found.

The importance of the case-law of the ECtHR is far more reaching that the space of the parties of the European Convention. In fact, there is, because of the transnational dimension of the Convention and the interpretation of the Court. The impact is doubled by the fact that most member states have incorporated the interpretation of Article 6 in their constitutional provisions.[13] Most of the members have now touched the issue.

But the question of video conferencing is not new and does not concern solely the European continent. It was, for example, considered as an important issue during the

[11] ECtHR, *Gennadiy Medvedev v. Russia*, 14 April 2012, Appl. 34184/03.

[12] Ibid.

[13] Quattrocolo, Ruggeri, *Personal Participation in Criminal Proceedings,* esp. p.463.

proceedings relating to crimes in Yugoslavia.[14] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 laid down guidelines on the use of video link in the Tadic decision as late as 1996, some 20 years before Viola.[15] Of course, this decision was merely made, as certainly it was the case in Viola, to protect witnesses. It does not seem to focus on parties as such, even though a witness to the defence may be considered as part of the block constituting the party 'defendant.'[16] Recurrently, the connection between fair trial and use of video links were raised several time by the tribunal. 'It was argued that granting the Motion to give evidence by video-link would violate the right of the accused to confront his accusers in person (…)'.[17] This demonstrates clearly similar link between rights of the parties, presence at hearings and use of video link. What is quite interesting here, and because the

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[14] http://cld.irmct.org/assets/filings/Decision-on-Defence-Appeal-of-the-Decision-on-Future-Course-of-Proceedings.pdf. Last accessed 21 January 2019. See also, for example, http://www.icty.org/x/cases/mucic/tdec/en/70528vl2.htm. Last access 21 January 2019.

[15] Decision on the Defence Motions to Summon and Protect Witnesses, and on the Giving of Evidence by Video-Link" issued by Trial Chamber II in Prosecutor v Dusko Tadić, Case No IT-94-1, 25 June 1996. See also, Bachmaier Winter, L., 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law', Utrecht Law Review, Volume 9, Issue 4 (September) 2013, note 95, p. 144.'(…) Under Art. 71 of the Rules of Procedure of the ICTY at The Hague: a video link for witness depositions and the exceptional admissibility of written statements, subject to the condition that the other party has had the opportunity to crossexamine a witness who does not appear at the trial. Later the Rules of the ICC, Art. 67 (Live testimony by means of audio or video link technology) and Art. 68 (Prior recorded testimony), provide for similar rules.

[16] See for example, Bouvier, A.-M., *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR,* Intersentia 2005, esp. pp. 245-246.

[17] http://www.icty.org/x/cases/mucic/tdec/en/70528vl2.htm, para 4. Last accessed 21 January 2019.

issue of court space, of space of justice, and their connection to both right to a fair trial and new technology will be discussed later, is the Court declaring that:

Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness.[18]

The point made by the Court highlight the question of definition and redefinition of space of justice while confronted to new technology. We may therefore consider that in the middle of the 1990s we actually had a top Court telling us that the virtual link to the courtroom is actually part of it, as an extension. We have here an embryo of explanation that video conferencing actually abolishes the walls of the court room, redefining space of justice. This is what we witness with new technology, spaces of justice and fair trial. It seems quite enlightening that even Antonio Cassese then president of the Court had to look at the issue. Indeed, in 1998, Cassese granted the possibility to use video-link, videoconferencing but under specific, and rather interesting, conditions listed in the statement:[19]

- The use of 'guidelines for the giving of evidence by video-conference link have been laid down in the Decision on the Defence Motions to Summons and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, issued by Trial Chamber II in *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, 25 June 1996 ("the Tadic Decision")'

[18] http://www.icty.org/x/cases/mucic/tdec/en/70528vl2.htm, para 15. Last accessed 21 January 2019.

[19] http://www.icty.org/x/cases/dokmanovic/tdec/en/80518VL2.htm. Last accessed 21 January 2019.

- The necessary equipment can be made available.

This reaffirm how Tadic was crucial in term of the use of video-conferencing, but also that software and hardware are key to video-link and videoconferencing.

Closer to us, the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union has brought into the other European system development on the use of videoconferencing. Article 10 of the Convention untitled 'Hearing by videoconference' gave a more achieved 'structure' to the use of video-link.[20]

> 1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.
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> 2. The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for

[20] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:42000A0712(01). Last accessed 21 January 2019.

videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.

3. Requests for a hearing by videoconference shall contain, in addition to the information referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

4. The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its law.

5. With reference to hearing by videoconference, the following rules shall apply:
(a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
(b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Member States;

(c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws;

(d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

(e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State.

6. Without prejudice to any measures agreed for the protection of the persons, the judicial authority of the requested Member State shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested Member State participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the competent authority of the requested Member State to the competent authority of the requesting Member State.

7. The cost of establishing the video link, costs related to the servicing of the video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses.

8. Each Member State shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.

9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the videoconference, and the manner in which the videoconference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Any Member State may, when giving its notification pursuant to Article 27(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time.

Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.

Let us also cite the *Guide sur la visioconférence dans les procédures judiciaires transfrontières.*[21]

According to Lorena Bachmaier Winter,

The use of video conferencing, as provided in Article 10 of the EU Convention of 2000, seems to be the most appropriate solution from the perspective of respecting the right of defense, the principle of equality of arms and the right to cross-examine a witness recognized by Article 6(1) and 6(3)(d) ECHR.[22]

She seems also to give us a glimpse of answer on the question we had above about the 'presence' of the physically absent individual using the video link.

> 'If the witness is to be found locally, but his attendance at the trial would be too burdensome, too costly or the witness does not express a willingness to appear, an appearance via a video link should be organized. In this regard, a European instrument should establish an obligation for Member States to facilitate the attendance of the witness at the trial. This would include not only cooperation in summoning the witness to appear in person, but, when this is not possible or proportionate, to provide for the presence of the witness at the trial via a video link.'[23]

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[21] https://www.consilium.europa.eu/media/30592/qc3012963frc.pdf. Last accessed 21 January 2019.

[22] Winter, 'Transnational Criminal Proceedings', esp. p. 138.

[23] Loc. Cit., esp. p.143.

We have here highlighted and developed the question of the use of video-link for safety reason, broadly speaking, the question of cost, the question of fear of the witness. But Winter does again pre suppose that a virtual presence of a witness is a presence. That is of course something subject to debates, within the literature as we have seen, and in this thesis, as we will see. Therefore, the point of using video-link has been debated in Europe at various levels.

In other jurisdiction, even small ones, video conferencing or video link have been used also, but not only, for witnesses.[24] As explained by James Lambert, director of the court service of Jersey:

> 'The courts in Jersey have had access to video conferencing equipment since 1999. (…) it has been used for remote examination of witnesses (expert, vulnerable or other), hearings involving prisoners detained in UK prisons, and delivery of reserved judgments from the UK by the Court of Appeal (Court of Appeal judges in Jersey are mostly appointed from the UK).'[25]

Lambert in his remarkable paper, highlights the vices and virtues of video conferencing. He does starts with the impact of the ceremonial, which is one of the underlying theme

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[24] We need to keep in mind that there are several issues with video-link. Witness, parties, judges, lawyers, but also broadcasting what is happening to a virtual audience. But the point of witness could be most of the time used as an example of video-link, as issues are related, except perhaps the point of virtual audience.

[25] Lambert, J., 'Courtroom Video Conferencing in a Small Jurisdiction: a Case Study', LVI 2016 conference paper, pp. 11, esp. p. 2.

of this work. The point raised by Lambert is the specific connection that is created between physical court room (the palace, the court, the building) and virtual court room (what is created or recreated through the use of video cameras), a recurrent theme here. As explained by Lambert,

> '(…) the design of court buildings has transformed. (…) This, (…), leads to open justice, improved access to justice and (arguably) an attenuation of the ceremonial of justice. Providing video conferencing as part of the mainstream activities in the judicial process will create opportunities for virtual courtroom presence which fundamentally alter the old order of doing things. However, ceremony has not yet disappeared in Jersey's legal system, whose roots go back to Norman times. With the exception of the lower courts, the estate is very traditional, or even old fashioned (not a whiff of post-modernism here). There will, for example, be significant obstacles to be overcome in adapting the Royal Court to accept video conferencing, due to the historical nature of the building and its listed architectural features.'[26]

He concludes that the use of new technology, in his opinion, will affect the right to a fair trial:

> '(…) to what extent does video conferencing (or other forms of technology) erode this sense of specialness? (…) Removal of walls leads to the space of justice being re-defined and begs the question: is justice a place? By bringing a witness into court

[26] Loc. Cit., p.3.

via a video link, it can be argued that the right of the defendant to a fair trial is diminished'.[27]

He then moves on the impact on human rights.

'In providing dedicated facilities for video conferencing and taking more progressive steps towards the use of technology in judicial proceedings, the courts in Jersey need to take account of the possible impact on the human rights of defendants and witnesses. To do otherwise would result in a sharp increase in appeals against decisions of the courts. A significant number of violations of Article 6 (in the European context) concern the right to examine witnesses or have them examined. In this respect, problems of compliance may arise when witness evidence is taken remotely from absent, anonymous or vulnerable people by video link, even when applicable legislation permits this (though the author is unaware of any case law arising from an Article 6 violation caused by video conferencing). Other violations concern the "reasonable time" requirement; arguably, video conferencing can help in meeting this objective'.[28]

To go back to our first and foremost question, how the right to be present at the hearing evolves (or not) with the new technology and particularly the use of video-link or videoconferencing? Should we also discuss the meaning of the term 'hearing' itself when video-link or videoconferencing is used? The presence of 'who' should also in my

[27] Ibid.

[28] Loc. Cit., p.4.

opinion be discussed: the parties and particularly the defendant, their lawyers, their witnesses.[29] How does the space of justice is affected or, again, evolves (or not)? We can probably be quite clear that, and that is a question of common sense, the hearing has to take place in a courthouse or a palace of justice, and in a courtroom, with one of more judges and probably the other actors present in the or a specific space. If the defendant, their lawyers, their witnesses are all in the courtroom, then the hearing is not virtual. That is an obvious point of course, but maybe we could use it as the 'standard'. Then again, for various reasons, the courtroom will be receiving part of the proceedings via video-link. Or broadcast part of the hearing via video-link. Does it make the defendant 'present' in the courtroom during the virtual or part virtual process or could we assume that physical and virtual are similar and therefore the question is irrelevant?

The simple question of technology should start with the question of quality of the audio and video connection and quality of the hardware and software used. A simple technological issue may be the key issue in fact, even before going deeper in considering physical presence or not, to ensure (or not) that the right to a fair trial is enforced. The quality of the technology equates here the quality of the (good) administration of justice. An accused, or a defendant, should therefore has the right to a good technology, as per a right to a good administration of justice to be able to participate to his or her hearing. The participation is here assumed to be not simple physical (physical presence) but also perhaps virtual. This is in substance what transpires from *Viola* and *Medvedev*. In

[29] See above comments on that question.

addition, and to be quite complete, one should also look at Article 5 of the European Convention here, and particularly paragraph 3.

> (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.[30]

Article 5 is not quite our topic. However, the discussion around the term 'before', before a judge, is quite relevant to the same issue regarding Article 6 and the debate surrounding virtual/physical presence. 'Does the term before necessarily imply a physical presence or is video link participation compliant with this provision?'[31] Then again, the issue of virtual/physical presence is the issue of the 'settings', of the space of justice. That is the question of good administration of justice.

Lambert is too concerned with the question of 'settings' and seems to decipher the embryo of an evolution of the court, of the space of justice, with the development and use of new technology. He cites the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949, the legislation that deals with appearances of the accused for bail and pre-trial hearings via video link. [32] He refers to article 6 of this legislation:

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[30] https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9. Last accessed 21 January 2019.

[31] Quattrocolo, Ruggeri, *Personal Participation in Criminal Proceedings,* esp. pp.463-464.

[32] https://www.jerseylaw.je/laws/revised/Pages/07.595.aspx#_edn14. Last accessed 21 January 2019.

6 Power to hear accused through television links

(1) In any proceedings for an offence, the Court may, with the consent of the accused, direct that the accused shall be treated as being present at the proceedings if, during the proceedings, either by way of a live television link or by another means, he or she is able to see and hear the Court and he or she is able also to be seen and heard by the Court.

(2) Notwithstanding paragraph (1), in any hearing before the start of a trial, the Court may, after hearing representations from the parties and without requiring the consent of the accused, direct that the accused shall be treated as being present in the Court if, during that hearing, either by way of a live television link or otherwise, the accused is able to see and hear the Court and to be seen and heard by the Court.

(3) For the purposes of paragraph (2) "the start of a trial" means the first hearing at which the prosecution adduces evidence to prove its case.

For Lambert, 'Article 6 (…) makes it a requirement for the accused to be "…. able to see and hear the Court and …. also, to be seen and heard by the Court.".'[33] This mirror quite well what is mentioned in paragraph 40 of *Viola* by the Italian government:

[33] Lambert, 'Courtroom Video Conferencing in a Small Jurisdiction', esp. p.5.

In the Government's opinion, there was no substantial difference between the accused's physical presence and his participation in the proceedings by videoconference. A video link allowed the accused to see and hear what was going on in the hearing room, and he himself could be seen and heard by the other parties, the judge and the witnesses. He was thus in a position to listen to the evidence given by the witnesses and grasp anything capable of invalidating their evidence, request leave to address the court and make any statement he considered necessary to his defence.[34]

Maybe this is what the 'presence' means, to be able to recreate a proper space of justice by being able to see and hear the court, and also to be seen and heard by the court. Therefore, the question of quality of the software, hardware and internet connection is not a simple question at all, it is a becomes, like mentioned, a crucial question. 'Whilst this requirement is simply and clearly stated, it may, in practice, be more difficult to achieve, if the requirements of Article 6 of the European Convention on Human Rights are to be respected'.[35]

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[34] *Viola v. Italy*, p.9.

[35] Ibid. In section 5 of his paper, Lambert, as an 'practitioner' and rather expert, laid down some 'rules'.

5.1 Image and sound quality

In order to safeguard the interests of each person involved, the video and audio quality should be such that all have a realistic and clear view of what is happening at the other location. It is essential that sight-lines and positioning of equipment is carefully planned and accommodated. Where the equipment can be fitted permanently, this will be relatively easy to achieve; where the equipment has to be removable (as in the Royal Court) this will be less easy.

5.2 Personal interactions

Interactions between participants (how they react or respond to each other) should be clearly noticeable. It is important to be able to interpret witness demeanour and reactions. Anecdotally, it has often been stated that the emotional distance provided by a video link makes it easier to lie.

5.3 Voice-activation

In addition to those points, there are still some issues to analysed: Where will the accused or defendant lawyers be? How is the public taking care of in that sort of settings? How a direct or virtual 'confrontation' complexifies the defense of the accused, because most of the communication process is about body language of the parties, of the accused, of the witnesses. As put by Mehrabian, 'a face-to-face conversation is more immediate than one

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Voice-activated switching of camera shots should be avoided as much as possible (if used at all). The argument that technological "wizardry" will enhance the proceedings should be resisted.

5.4 Zooming and panning

The view should not be manipulated by zooming or panning of cameras to focus on certain characteristics of a person. Mulcahy15 argues that "….. the choice of camera angle and number of cameras create a 'fictionalisation' of what occurs in the separate but related space of the live link video suite." There is a danger that an overly artistic approach to the use of cameras will create unwanted exaggeration of the action.

5.5 Visual detail

Looks, facial expression, mouth movements, direction of view, gestures, and posture of each person involved should be clearly perceptible. There is a risk that a low quality video conference will be devoid of human connection, with physical or emotional reactions being less potent. This would result in the importance of the trial as a social ritual being lessened.

5.6 Representation

Each person should be represented in the same way to each other person, and each person should have the same perception of eye contact with all other persons. Care needs to be taken to design the system in such a way to ensure that the details of the participants always remain "in shot". It would be all too easy for participants to move at a critical moment in the proceedings, thereby removing themselves (visually) from the action.

5.7 Influence of technology

The principal tasks and roles of the court participants should not be negatively influenced by the appliance of technology. The dynamics of the traditional, adversarial court proceeding might have benefits; going to court is, after all, a serious business. However, the use of video conferencing may help to reduce fears and inhibitions, and is more likely to reflect contemporary aspirations for access to justice.

via video tape, which in turn is more immediate than a conversation over the telephone.'[36] Mehrabian was actually one of the first to research on the subject:

In 1971, Albert Mehrabian published a book Silent Messages, in which he discussed his research on non-verbal communication. He concluded that prospects based their assessments of credibility on factors other than the words the salesperson spoke—the prospects studied assigned 55 percent of their weight to the speaker's body language and another 38 percent to the tone and music of their voice. They assigned only 7 percent of their credibility assessment to the salesperson's actual words. Over the years, this limited experiment evolved to a belief that movement and voice coaches would be more valuable to teaching successful communication than speechwriters. In fact, in 2007 Allen Weiner published So Smart But... discussing how to put this principle to work in organizations.[37]

For Mehrabian, there is a simple rule that communication is only 7 percent verbal and 93 percent non-verbal. The non-verbal part of communication is made up of body language (around 55 percent) and of tone of the voice (around 38 percent). That is totally relevant to the issue of video-link and videoconferencing. How can we be sure that the virtual presence via video-link and videoconferencing convey (correctly?) the 93 % of what is said that is in fact non-verbal communication?

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[36] Mehrabian, A., *Nonverbal Communication*, Transaction Publishers, 1972, esp. p. 31.

[37] http://delivery.acm.org/10.1145/2050000/2043156/a1-yaffe.pdf?ip=82.132.238.36&id=2043156&acc=OPEN&key=4D4702B0C3E38B35%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35%2E6D218144511F3437&__acm__=1556719190_46341346097eb58c47f396d2e0ecbdb1. Last accessed 21 January 2019.

To focus a little bit more on other sides of the virtual space, let us look at the broadcasting of the hearing. Hearing are public in a good administration of justice, hence the positioning of cameras. It has also to be looked at. In addition, the position of the screens in courts also has to be looked at…And of course the question of broadcasting the hearing, which reshuffle entirely the matter.

Dumoulin and Licoppe discuss further that specific question.[38] For them, the use of videoconference technology 'allows interactions between citizens and their governments to be managed without systematic co-presence'. There seems to be resolved the question of presence, either physical or virtual! The pair systematically looked at 'the introduction and institutionalization of remote hearings in French courtrooms.' As suspected, Dumoulin and Licoppe have come to the conclusion that remote hearings, their use, the way they are currently, at least at the time of their research, equate the use of videoconferencing to 'a new way of organizing trials'. Here we have a clear conclusion: video-link, videoconferencing, brings a new (way of) trial. For them, the format by which justice is carried out is changing.

[38] Dumoulin, L. & Licoppe, C. (2016), 'Videoconferencing, New Public Management, and Organizational Reform in the Judiciary: Videoconferencing and Judicial Organization'. Policy & Internet. 8, pp.313-333. Their papers highlights four main points: the way in which videoconferencing is designed and the reasons put forward to justify its suitability in the judicial sector; its relationship with the efficiency programs underway in the justice system as part of wider New Public Management reform; the tensions and friction points between a pragmatic approach to innovation and the traditional judicial approach; and finally the case of personal appearance as an example of adjustments operated on judiciary standards by the introduction of videoconferencing.

In a 2004 French Senate report, the higher chamber delivered some information about what the French judiciary should look like. Interestingly enough, the report focuses on the Tribunal de Caen, which is a brand-new contemporary palace of justice design. The radical design of the Tribunal de Caen was qualified 'translucid', 'Un tribunal translucide pour une justice transparente'.[39] Transparency of contemporary palaces will be analysed further in this work. But we may here relate the design of the Tribunal de Caen and the introduction of new technologies. The Senate looked at new technologies in courts and specifically videoconferencing.[40] The court of the future, « tribunal du futur » was specifically Caen. The report wanted to identify how to use new technologies to facilitate access to information (including statistics) and to foster collaboration (at judicial and administrative levels) through videoconferencing. It was considered that in the long term, the use of videoconferencing has would become a valid alternative to the physical movement of prisoners, thus reducing the need for police presence, or improving the availability of occasional speakers at trial (such as experts and interpreters) but also, and that is logically relevant here, the exercise of specific rights of the victims (saving time and traveling). Solutions to the exercise of the rights of the defence in this context have been implemented.[41]

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[39] https://www.batiactu.com/edito/un-tribunal-translucide-justice-transparente-34199.php. Last accessed 21 January 2019.

[40] https://www.senat.fr/rap/l04-074-327/l04-074-327.html. Last accessed 21 January 2019.

[41] The report listed future projects such as:

'- entre la cour d'appel de Fort de France, le tribunal de grande instance de Cayenne et le greffe détaché de Saint-Laurent du Maroni, le recours à ce dispositif permettant de pallier les contraintes géographiques du département de la Guyane ;

- dans les ressorts des cours d'appel d'Aix en Provence (8 tribunaux de grande instance) et de Reims (4 tribunaux de grande instance)'.

It is striking to see that for the Senate,

> Le développement de la vidéoconférence dans le processus judiciaire, notamment pour procéder à l'audition de personnes détenues, ne peut être envisagé que dans le cadre d'une programmation concertée avec l'administration pénitentiaire.[42]

À cet effet un groupe de travail interdirectionnel a été constitué afin d'examiner au regard d'un cahier des charges précis (objectifs, usage attendu par chaque utilisateur, les droits de la défense, les normes techniques et choix à opérer), les déploiements géographiques à envisager et les moyens à affecter, à court et moyen terme dans le cadre notamment de la loi portant adaptation des moyens de la justice aux évolutions de la criminalité. [43]

A large test was launched. The aim was to check how integrated things can be between Courts and prisons for instance, but also how well it would work in reality. The test was conducted in Reims.

> Ainsi après différentes simulations effectuées par la cour d'appel de Reims pour tester les matériels, vérifier leur compatibilité et examiner les différents impacts de la vidéoconférence sur le déroulement de la procédure, une première expérimentation a été réalisée en situation par la Cour d'Assises spéciale de la

[42] Ibib.

[43] Ibid. Section g)

> Marne, le 17 mai 2004, pour procéder à l'audition en qualité de témoin d'une personne détenue en un autre lieu.[44]

The internal government's *circulaire* gave a more robust definition for the French courts.[45] It laid down the framework for the use of videoconference in France. The Judges Union was not quite impressed by the *circulaire*. Indeed, it was concerned with the banalisation of its use and the dehumanisation of the judicial relationship. Even more, it was considering the tool videoconference as a way of eradicating judges' accountability.

> Pourtant, le recours à la visioconférence n'a fait l'objet à ce jour d'aucune étude d'impact ni d'aucune réflexion déontologique, alors qu'il pose de sérieux problèmes (place de la défense, communication de pièces pendant les « débats », pannes…) et que sa banalisation porte en germe une déshumanisation de la relation judiciaire, voire une déresponsabilisation du juge.[46]

The Union went on presenting a conter-*circulaire,* sort of rebellion against the government project to extend its use but also rationalise its use. Mainly, the Union criticised the generalisation of the use of videoconferencing.

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[44] Ibid.

[45] Circulaire de la DAP SD4 du 18 juin 2009 relative au programme d'extension de la visioconférence dans certains établissements pénitentiaires en 2009. http://www.textes.justice.gouv.fr/art_pix/boj_20090004_0000_0031.pdf. Last accessed 21 January 2019.

[46] Souriez, vous serez filmés : la Chancellerie impose la Justice virtuelle. http://www.syndicat-magistrature.org/Souriez-vous-serez-filmes-la.html. Las accessed 21 January 2019.

> En résumé : la visioconférence, ce n'est pas automatique, fût-ce dans la limite (manifestement provisoire) d'un ratio de 5% des extractions. Chaque magistrat est libre de décider d'y recourir, en fonction de la situation qui lui est soumise. Il ne peut en aucun cas y être contraint et il ne saurait en abuser.
>
> Il ne s'agit donc ni d'une obligation ni d'une mesure de confort, que ce soit pour les magistrats ou, a fortiori, pour les services de police et de gendarmerie…
>
> En son alinéa 5, le texte évoque même « l'impossibilité pour un interprète de se déplacer » et précise qu'« en cas de nécessité résultant » de cette situation, la visioconférence « peut » être utilisée.
>
> Le recours à cette technique est donc une faculté exceptionnelle.[47]

The Judges Union was quite concerned with the possibility of disincarnated justice in fact, therefore moving back to our question of presence, of virtual, of physical absence. Meanwhile the government was quite pushing toward gain in cost, and virtual presence that is similar to a physical one etc…

[47] Contre-circulaire sur le recours imposé à la visioconférence en matière juridictionnelle. http://www.syndicat-magistrature.org/Contre-circulaire-sur-le-recours.html. Last accessed 21 January 2019.

In 2011, the Comptroller General of places of deprivation of freedom, has just delivered a very critical opinion on the generalisation videoconference, which is published in the Official Journal of the French Republic.[48]

If, according to the controller, videoconferencing is 'a palliative sometimes unavoidable', it cannot become a 'commodity unconditional' by the mere fact that it risks of 'undermining the rights of the defense'. The controller therefore proposed that videoconferencing should not be used without the express agreement of a well-informed person concerned. In particular, with regard to applications for asylum, he stated that the use of this technique should not be not possible until a law provided for it and is framed.

For the comptroller, the ill-considered development of videoconferencing carries with it the risk of undermining the rights of the defense. In fact, if in some cases, videoconferencing can facilitate these, when for example the physical appearance of a person seems difficult, the judge does not need to defer and to delay the case or even to give up the hearing of the person called to appear.[49]

In many other cases, however, videoconferencing constitutes a weakening of the rights of defense in that it terminates the physical presence of the appearing of a person who is also a means of expression. Videoconferencing should presuppose an easiness for

[48] Contrôleur général des lieux de privation de liberté Avis du Contrôleur général des lieux de privation de liberté du 14 octobre 2011 relatif à l'emploi de la visioconférence à l'égard de personnes privées de liberté. http://www.syndicat-magistrature.org/IMG/pdf/visio-conference.pdf. http://www.cglpl.fr/wp-content/uploads/2011/11/Avis-JO_visioconference_20111109.pdf. Last accessed 21 January 2019.

[49] Ibid, para. 6.

someone to express himself or herself in front of a camera or in front of a desk and equality as some people are far from being used to it, especially for those suffering from mental illnesses.

In cases where the no one has a lawyer; the latter is forced to choose between being with the judge (in most cases) or stay with the client: links to one or the other are found less well-off and the task of the council made more difficult. Technical risks can accentuate the difficulties (show a document, challenge the presentation of an object ...).[50]

Finally, the comptroller noted that it was necessary for the preservation of the fundamental right of defense that the use of this technique, with regard to persons deprived of their liberty, was accompanied with specific conditions that are perfectly clear and common to the situations that may be faced by persons deprived of their liberty.

The Judges Union recently criticised the use of videoconferencing in matters concerning asylum seekers. The Union was concerned with the use of videoconference for 4 asylum seekers. Four times, the videoconferencing was done between police office and courts.

> Entre le 4 décembre et le 16 janvier, quatre personnes ont été présentées devant les cours d'appel de Toulouse et de Bastia, depuis le centre de rétention administrative (CRA) de Toulouse, par le moyen de la visioconférence. Ces personnes se trouvent

[50] Ibid.

donc dans un local géré par la police aux frontières, qui n'a aucunement le statut de lieu de justice, tandis que les magistrats siègent à distance, dans leur tribunal.

La publicité est une condition essentielle du droit au procès équitable. Assurée dans le cadre de la comparution dans les palais de justice, elle se perd quand l'institution accepte des comparutions dégradées, dans des salles d'audience délocalisées ou par visioconférence.

S'il donne un fondement légal à ces pratiques contestables, le Code de l'entrée et du séjour des étrangers et du droit d'asile (Ceseda) impose toutefois des conditions minimales. Pour les audiences par visioconférence, l'article L552-12 du Ceseda impose que chacune des deux salles d'audience (celle où se trouve le juge et celle où se trouve la personne retenue) soit ouverte au public.

A minima, la salle dans laquelle se trouve la personne étrangère doit être ouverte au public, ce qui n'est pas assuré dans l'enceinte d'un centre de rétention. Plus encore, le local utilisé ne peut pas constituer une salle d'audience. En effet, lorsque ces juridictions se sont prononcées sur les audiences délocalisées dès 2008, le Conseil constitutionnel et la Cour de cassation ont clairement exclu « l'aménagement spécial d'une salle d'audience dans l'enceinte d'un centre de rétention ». Il s'en déduit qu'aucune salle située sur son emprise ne peut recevoir la

qualification de salle d'audience et qu'aucune visioconférence ne peut valablement s'y tenir.[51]

The question is here again the one of space of justice and how it may be redefined by the use of new technologies. Both rooms used should be at least a hearing chamber. That seems quite logical in fact, and relevant to our questions. You cannot really imagine that a police office or a living room of someone could be linked to the Court and defined as the virtual link of the Court. Both rooms should be seen as related to a Courts or a hearing chamber. The point of the audience and the publicity of the audience impact to that matter too. A police office cannot be left opened, then the audience cannot be considered as public. And it is the position of the top French Courts on this issue that no hearing chamber may be organised in a retention center. It was deemed illegal or unconstitutional.

Concerning the UK, the experience started in the 1990s. Without pre-empting on the Chapter concerning the Cameras in Courts, which is largely devoted to the UK, it would be a good idea to give some brief information on the introduction of videoconferencing there. According to Gibbs's report,

'In 1992 the first prison-court video link was established between Norwich Prison and Great Yarmouth Magistrates' Court. Video links were originally used for case

[51] La justice par visioconférence : des audiences illégales au sein même des centres de rétention http://www.syndicat-magistrature.org/La-justice-par-visioconference-des.html. Last accessed 21 January 2019.

management and remand hearings. (…) The rationale for using prison to court video hearings was to save money, and make the process more convenient for the defendant. The prisoner who appears on video link is spared a long journey to court in a very uncomfortable van, and a potential prison move. Money is saved on the transport of prisoners from prison to court and on court custody staff, while prisons pay for video equipment and for staff to supervise prisoners attending video hearings. The first police station to court video links were tried in 2009. A room in a police station was equipped with video monitors, and the means to connect the room to a local court. These "virtual" courts were used for defendants who had been detained by the police (either arrested on warrant or charged and denied bail by the police), who would otherwise be transported in a van to the court. The first courts to take part in the pilot programmes were in Kent and London, and an evaluation of the pilot was published in 2010 . This showed the virtual courts to be more expensive than traditional courts. Defendants appearing on video were less likely to take up (non means tested) legal advice, and more likely to get a prison sentence - Background: the defendants who appear on video and why? possibly because they were unrepresented. It is hard to understand why this MoJ research did not lead to some soul searching, but the research has not been cited in any official publication subsequently, and such police station to court links have increased. There are now a number of police forces offering "virtual courts". In some areas (Kent, Norfolk and Suffolk) nearly all detained defendants appear on video. Defendants on these

links plead, have bail considered and, if they have pleaded guilty, are usually sentenced there and then.'[52]

What is interesting in citing this report, is that it is quite negative in fact about videoconferencing. For reasons that we have mentioned for other jurisdictions. Indded,

'This report suggests that virtual justice may not be more efficient, may not deliver the cost-savings it is meant to do, and may compromise human rights and confidence in our justice system.'[53]

It particularly was concerned with the right to participation, which mirror our commentaries about presence physical or virtual, but also links videoconferencing and rights:

'If defendants are to have trust in the criminal justice system, they need to be able to contribute to proceedings. That defendants' voices can be, and are, muted speaks volumes about how using a virtual court can facilitate the dehumanisation of defendants and undermine the right to participation'.[54]

In the case of the USA, we also can see that there have been some rather lengthy debates concerning the use of videoconferencing. But we might start by simply referring to the

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[52] Gibbs, *Defendants on video,* esp. p.05.

[53] Ibid, esp. p.3.

[54] Ibid, esp. p.18.

USA equivalent to the right to a fair trial. Amendment VI of the US Constitution seems to mirror quite well at least part of the right to a fair trial. Indeed, the Right to speedy trial by jury, witnesses, counsel passed by Congress on the 25 September, 1789 and ratified on the 15 December 1791 states that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[55] No wonder that the Constitution and lawyers are therefore concerned with the use of video-link here after interpretation of the amendment. But it seems that nothing was quite developed until the 1990s and 2000s. Indeed, according to Marr, 'In the 1990s and early 2000s, circuit courts first considered whether the use of videoconferencing at a criminal proceeding governed by Rule 43 satisfies the statutory requirement that a defendant be "present"'.[56]

> Rule 43 requires a defendant's presence at "(1) the initial appearance, the initial arraignment,

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[55] https://www.law.cornell.edu/constitution/sixth_amendment. Last accessed 21 January 2019. See also the 6 CFR § 27.335 - Hearing procedures. https://www.law.cornell.edu/cfr/text/6/27.335 Last accessed 21 January 2019. Particularly:

(a) Any hearing shall be held as expeditiously as possible at the location most conducive to a prompt presentation of any necessary testimony or other proceedings.

(1) Videoconferencing and teleconferencing may be used where appropriate at the discretion of the Presiding Officer.

[56] Marr, K., 'The Right to "Skype": The Due Process Concerns of Videoconferencing at Parole Revocation Hearings', 81 U. Cin. L. Rev. (2013), esp. p. 1519.

> and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing." FED. R. CRIM. P. 43(a). The terms presence and present of the rule 43, were read by courts along with the Webster's Dictionary and Black's Law Dictionary definitions of presence and present, and the conclusion was that physical presence was required.[57]

But rule 43 is only concerned with the defendant being present. None else. Rule 32 however is different in substance. It focuses on defendant and the judge being in the same room. Rule 32.1(b)(2), requires the defendant and the judge to be physically present in the same courtroom. In that case again, this provision was read along with the Webster's Dictionary and the Black's Law Dictionary. The terms appear and appearance were considered. It was found that 'an appearance can only occur if the parolee comes into the physical presence of the judge'.[58] Physical v. virtual is again at the essence here. If you stop on the question, it is quite normal and logical in fact. It is rather difficult to imagine a court without the presence (even virtual) of both the defendant and the judge, it seems to be a minimum in order to have actually something that resemble a court. It defines or is defined by a specific space , that could be the physical or virtual or both at the same time, of the actors of a trial.

It is obvious that the question of presence of the accused or defendant, together with the presence of the judge, therefore the overall, let us call them parties or even better actors, like I will later, is a crucial one. Like in the European context, we note that the USA have

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[57] Ibid.

[58] Ibid, p. 1523.

also faced similar issues. That said, the challenge was also quite similar: Is it the same when an individual is physically present than when he or she is not? Marr looked at the constitutional position on the presence of someone at hearing. It is a constitutional requirement, which is way for us compares well with the ECHR, human rights position. Indeed, judge and defendant have to be in the same room, according to what Marr considers the landmark case, i.e. *United States v. Thompson.*[59]

US case law seems to be quite clear on the issue:

> Under the balancing test used by many federal circuits, a parolee who is forced to appear at his revocation hearing via videoconference without good cause can successfully argue that the right of confrontation is violated when adverse witnesses are physically in the courtroom. Under this test, the presiding court must consider the parolee's due process rights, balanced against the government's good cause for denying it.[60]

As mentioned by Marr in the conclusion of her article:

> The Seventh Circuit in *United States v. Thompson* acknowledged that "virtual reality is rarely a substitute for actual presence and . . . watching an event on the screen remains less than the complete equivalent of actually attending it."[61]

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[59] Ibid, p. 1522, esp. note 45.

[60] Ibid, p. 1536.

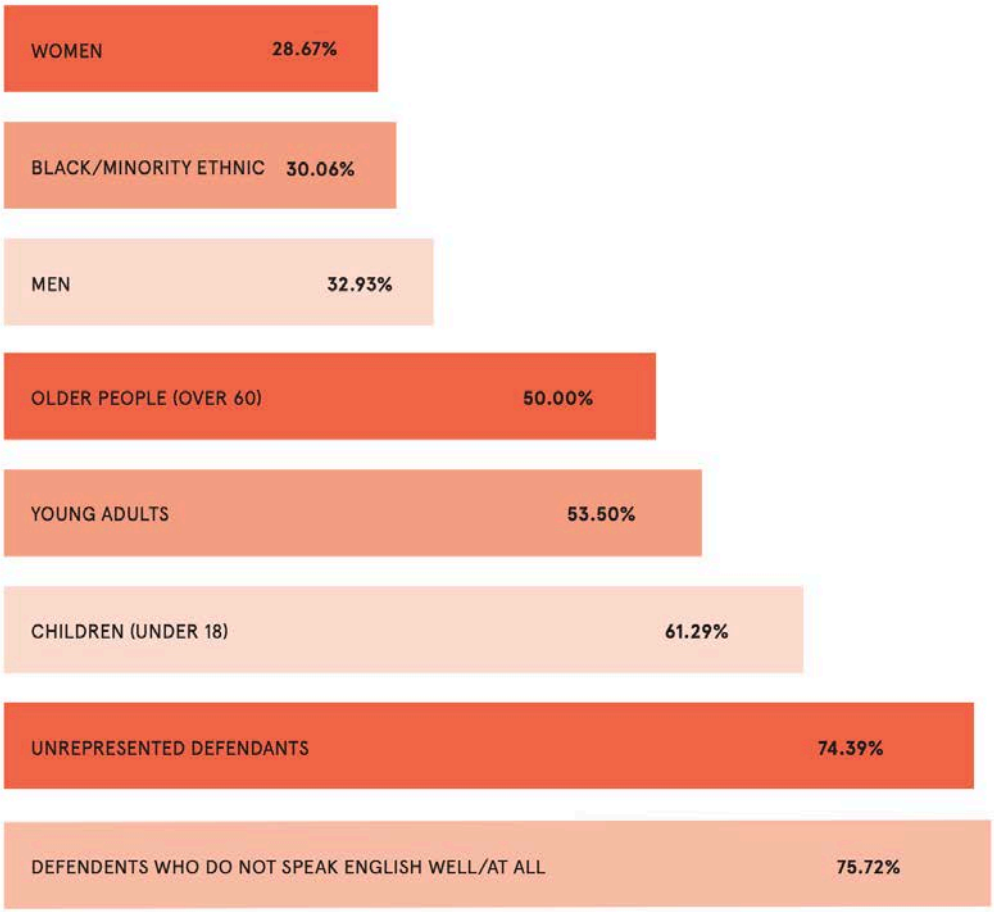
[61] Ibid, p. 1537. *United States v. Thompson*, 599 F.3d 595, 601 (7th Cir. 2010) (quoting United States v.

To progress further on the issue of videoconferencing and perhaps as a matter of short conclusion, it could be interesting to look at some data. The merit of Gibbs's report, was to give use some empirical information that are now available. The report surveyed the way Video link or videoconferencing has a particularly negative impact on specific groups and as such provide quite a truly deep understanding on the perception of the utilisation of video link.[62] It particularly is interesting to see various angles on the matter. Research was done, and data became available on a) defendants ability to participate when using videoconferencing and b) defendants capacity to communicate with the judicial actors when using videoconferencing.

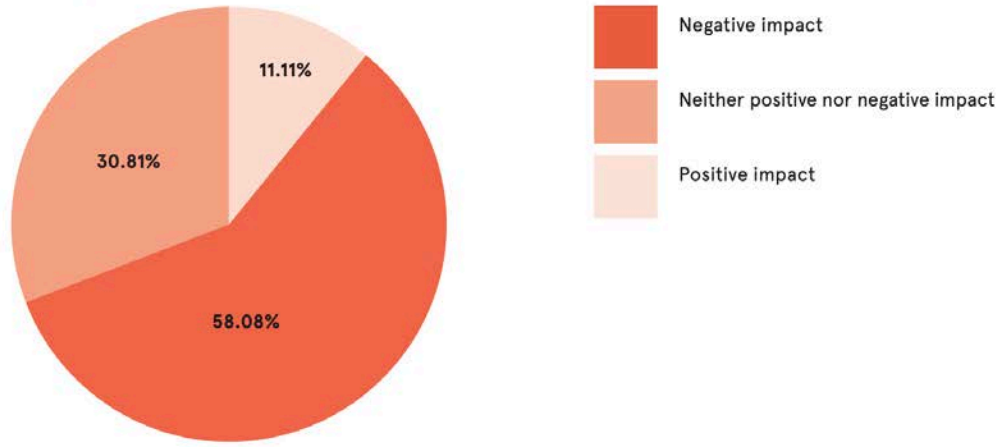
Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)).

[62] Gibbs, *Defendants on video,* esp. p.16 and p.26.

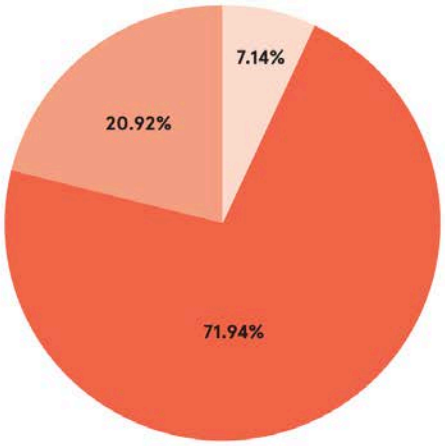
Video link has a particularly negative impact on which groups?



What is the positive/negative impact of video hearings on defendants' ability to participate?



What is the positive/negative impact of video hearings on defendants' ability to communicate with practitioners and judges?*



The question of space of justice.

We touched briefly upon the question of new technologies and space of justice in the case of the Caen Court. Courts of the future are actually Courts of the present.

As explained by David Tait,

> 'Court buildings can be analysed from several perspectives. First as places where justice procedures are carried out –where citizens come to resolve grievances, settle disputes or get protection; where administrative decisions are reviewed, judicial officers or juries decide on the guilt of accused persons, sentences are handed down and appeals heard. They are also workplaces for judges, court staff, support workers, 'regulars' like prosecutors, police, lawyers and interpreters and 'occasionals' like jurors or expert witnesses. Further, they may also have a less tangible role in embodying community values about the rule of law, transparency of justice or reconciliation'. [63]

Indeed, it is quite clear that,

[63] Tait, D., '3 Ways of Reading Court Buildings', https://courtofthefuture.org/publications/3-ways-of-reading-court-buildings/. Last accessed 21 January 2019.

> 'Architecture and the common good should be intimately connected, and nowhere more so than in the public buildings - courthouses large and small - that speak of the value a society places upon the ideal of justice according to law.'[64]

Meredith Rossner has seen the link between right to a fair trial, Court design and new technologies. In her consideration about UK Courts, she mentioned:

> The UK Government has recently launched an ambitious reform of the court estate across England and Wales, including the closure of 86 courts and significant investment in new technologies. The time is right to rethink how courts of the future should look, with an emphasis on flexibility of space and the use of technology.[65]

Rossner sees the need to rethink courts in the light of new technologies and the issue of space. A remarkable assumption that merge pretty nicely with the title of this thesis. Of course, she focuses more in the space inside the courthouse, in the courtroom than the outside architecture, like Tait and the Courts of the Future network did. But she clearly sees a connection with the right to a fair trial. Indeed, while talking specifically about the dock in the courtroom, she brings light to the broader aspect of space of justice:

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[64] 2005 Court Tour Report, https://courtofthefuture.org/wp-content/uploads/2017/06/2005-E1uropean-Courts-Executive-Research-Tour-Reflections-Court-Architecture-and-Judicial-Rituals-Reduced.pdf. Last accessed 21 January 2019, esp. p. 3.

[65] Rossner, M., 'Does The Placement Of The Accused At Court Undermine The Right To A Fair Trial?', Policy Briefing 18, 2016, esp. p.2.

> Isolating the accused in this way undermines their right to a fair trial and their right to dignified treatment. Given the current re-imagining of court buildings and courtrooms, it now seems a fitting time to revisit the peculiar persistence of docks in criminal proceedings.[66]

Essentially, as mentioned by Tait, 'Courts are public spaces'.[67] For him, that is the message for example given by

> 'the busy foyer in Barcelona's City of Justice, which serves as a meeting place, somewhere to get coffee and wait for legal proceedings to begin or end. The foyer connects three major high-rise buildings, each with its own distinctive function and colour scheme.'[68]

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[66] Ibid, esp. p. 2.

[67] 2011 Court Tour Report https://courtofthefuture.org/wp-content/uploads/2017/05/2011-European-Courts-Executive-Research-Tour-Reflections-1.pdf, esp. pp.23-24.

[68] Ibid. The City of Justice in Barcelona is a Spanish court designed by an English architect. Given the controversy about Richard Rogers' Bordeaux courthouse – 'the English revenge', the indirect 'between Common Law and Civil Law cultures, practices and use of space are obvious here. What would seem 'foreign' about this court design to lawyers from England & Wales, or France? What would seem familiar, but misleadingly so – *faux amis*?

Fig. 1 City of Justice, Barcelona, Spain.

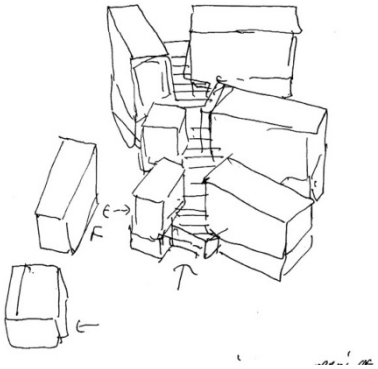

Fig. 2. Design/Drawing of the City of Justice.

Of course, less focus has been seen on space of justice and right to a fair trial that we can see in the case of new technology.

Connection to the technical or legal technical issue, we have a rather more theoretico-legal one, with the question of trial and transgression.

What is a trial? That question should be a good start of this work. It should be fundamental, meaning its foundation. One may consider a trial simply a mechanism that is needed to resolve disputes, to smoother different, to allow one person but also by

extension a whole community, to live in harmony with others. Trial is then a specific legal event that permits members of a group of individuals to bring back the social bond. This event will, as a result, be conceived as a staging or a play repeating the original pact, the transgression, and its repression.

Transgression is an invitation to go further but also a process of limitation between what is allowed and what is forbidden. It is a situation that delineates a space which is more or less real: it allows us to exist. Transgression shows what is possible, through the delimitation of what is and cannot be. To transgress is, in law, to breach a rule, or to violate a law. The act of transgressing sets down the issue of the rule and its breach. We understand how this passes beyond the idea of sanction. Transgression defines, therefore, what is good and what is bad, not only psychologically but also legally. However, it is also the path from the law to the outlawed, from the permitted to the forbidden, a forbidden that is identified by the transgression itself. Transgression also, then, means the guarantee of the creation of a social space.

Without transgression, there cannot be a rule that can be qualified 'a rule'. It highlights the point that only the respected rules, with sanctions as corollary, are 'true' laws. Only with the possibility of transgression are sanctions necessary. We may consider here the thoughts of Bentham or Austin who told us about the nature of an obligation to respect the law: 'to be obliged to do…is to be liable…to a sanction.'[69] This is not without reminding us of themes developed by Kelsen either: 'Rules of law, if valid, are norms.

[69] Austin, J., Campbell, R., *Lectures on Jurisprudence, Or, The Philosophy of Positive Law, Volume 1,* Clarck: The Lawbook Exchange Ltd, 2005, p.444.

They are, to be more precise, norms stipulating sanctions.'[70] Norms can only be laws positing sanctions. In addition, sanctions appear to be anticipated: what is 'illicit' is not a negation of the law but an action that the law prohibits and subjects to a sanction that is forecasted, anticipated.[71] Sanctions are required because we must keep in mind that *la chair est faible,* the flesh is weak, and that our world is not an utopia; rules are not always permanent, and may be a result of the sanction that would eventually follow an offence. Transgression may at the same time be imagined as progression or regression according to whether or not the rule is respected. What is forbidden, and the sanctions for not respecting what is forbidden, are linked, and we will then see taboos, crimes and incest appearing as the norm. Indeed, to be civilised we need to have laws making it impossible to transgress.

It is quite simple to consider that a society cannot really develop without laws, and sanctions of these laws. A society cannot develop without a corpus of rules with sanctions, conceived as the only way for the rules to be respected. Sanctions are the corollary of

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[70] Kelsen, H., *General Theory of Law And State*., Clarck: The Lawbook Exchange Ltd, 2009, p.30.

[71] 'Ce qui est 'illicite' n'est pas une négation du droit mais une action que la loi prohibe et dont la sanction est prévue d'avance, anticipée'. Balibar, E., 'The Invention of The Super-Ego, Freud and Kelsen 1922', p.15 Balibar, E., 'The Invention of The Super-Ego, Freud and Kelsen 1922', p.15. http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.soundandsignifier.com%2Ffiles%2FBalibar_The_Invention_of_the_Superego_NEW.doc&ei=yot9T-y6J8HC0QXW_9jQDQ&usg=AFQjCNEsz0XbjYJ9P2y0bEZ_A9JizcMPSQ&sig2=As2ov-fL8SOwZdJx1UoKJw. http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.soundandsignifier.com%2Ffiles%2FBalibar_The_Invention_of_the_Superego_N. EW.doc&ei=yot9T-. Last asscessed 21 January 2019.

rules and then of the structuring of a society. That is a theory that reminds us of the myth of creation of a primitive society, as explained by psychoanalysis. According to Lacan,

> '(…), la première situation dont encore nous sommes redevables à l'initiative freudienne d'avoir amené la notion en psychologie pour qu'elle y trouve à mesure des temps la plus prodigieuse fortune – première situation, disons-nous, non comme confrontation abstraite dessinant une relation, mais comme crise dramatique se résolvant en structure –, c'est justement celle du crime dans ses deux formes les plus abhorrées, l'Inceste et le Patricide, dont l'ombre engendre tout la pathogénie de l'Œdipe. Il est d'autant plus significatif de la reconnaître dans la succession des crises, sevrage, intrusion, Œdipe, puberté, adolescence qui refont chacune une nouvelle synthèse des appareils du moi dans une forme toujours plus aliénante pour les pulsions qui y sont frustrées, toujours moins idéale pour celles qui y trouvent leur normalisation.'[72]

As a consequence, we discover that the primordial crime is at the foundation of universal law, and that it is with law and crime that mankind, that the civilised man, starts; through the game of transgression and refusing to transgress that law. Without crime punishment would not be, and the coercive characteristic of the law would remain a fiction. It is possible to conceive a crime as affirming that law is a compulsory norm, a necessity for crime to exist. [73] But further, it is also the foundation of the social ensemble. As highlighted by Balibar, Laplanche, in his deciphering of Freud, shows the existence of a

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[72] Lacan,J., *Ecrit 1*, Paris : Point Seuil, 1999, pp.128-129.

[73] Balibar, 'The Invention of The Super-Ego', p.15.

transition from a first level of complexity, that corresponds to a simultaneous and ambivalent presence of love and hate, admiration and fear, to a second level that corresponds to the simultaneous prescription of obedience to the law and transgression, bringing, paradoxically, the creation of the guilty via sanctions.[74]

The original crime, the original laws, are elements of a game that develops only because of the 'limits' forced by crime and its rejection. This constitutes the basis of a primitive micro-social organisation, something similar to the transformation of the state of nature into the state of civilisation. As explained by Levis-Strauss, the structures of the society are symbolic, [75] and in addition, 'the social [is] constituted by relations of communication and symbolic exchange.'[76] Furthermore, 'In order that social order shall be maintained (…), it is necessary to assure the permanence and solidarity of the clans which compose the society.' [77] It is then quite interesting to analyse Freud's writings in their social dimension and not simply on the individual level. When undertaking research on incarnations of power (such as the Head of State or the judge),[78] we ought to put forward what is too often hidden; the father figure. Looking at the description that Legendre made

[74] Ibid, p.31

[75] Lacan, *Ecrit 1*, p.131. Les structures de la société sont symboliques.

[76] Dews, P., *Logics of Disintegration, Post-Structuralist Thought and the Claims of Critical Theory*, London: Verso, 2007, p.128.

[77] Levi-Strauss, C., *Totemism*, London: Merlin, 1964, p.60

[78] Je remercie Pierre Brunet de m'avoir orienté et proposé ce lien.

on Lortie, we understand that the Oedipus complex and the figures of the judge and the Head of State, are in position similar to that of a triangle.[79]

To sum up, it is the interference between the individual and the group in Freud's thoughts that we contemplate here, an interference not always simple to see and even less to describe but an interference that is truly present. This interference begins with the mixing of Oedipus and the myth of the primitive horde, between a schema supposed to apply to individuals and one supposed to apply only to the group. Both are a narration of the same thing. Both talk to us about transgression. In this chapter, I analyse the notion of individual and collective via transgression, then how the 'you shall not kill' interact with transgression and the group before considering the variation in the account of transgression.

One for transgression, transgression for all.

Freud's work does not simply focus on isolated individuals. It concerns associated individuals, which are the individuals in a group and as constituents of that group. Freud in *Totem and Taboo* recognises that '(…) the totemic system is, as we know, the basis of all the other social obligations and moral restrictions of the tribe (…)'.[80] The totemic system is composed of totems and taboos. It presents various characteristics: a) it is an

[79] Legendre, P., *Le Crime du Caporal Lortie, Traité sur le Père*, Paris: Champs Flammarion, 1989, p.74. We note specifically that Lortie declared that the governement of Quebec had the face of his father. 'Le gouvernement du Québec avait le visage de mon père'.

[80] Freud, S., *Totem and taboo*, London : Ark 1950, p.9.

organisation; b) it is an organisation that concerns a group; c) it is an organisation that 'organises' that group, bringing order to it, as basis of the rules which manage the group. We note that the term 'horde' is used by Freud as a small ensemble of people; that the group, he made reference to, appears to us as a renewal of the primitive horde. [81]

The primitive form of social human formation is the horde, led by a powerful male in a despotic fashion.[82] The father persecutes the brothers equally. They fear him equally. [83] He will be violently eliminated by the horde's members, his sons, which will transform the paternal horde into a community of brothers. [84] This horde, resulting from a transgression, becomes a community. The father of the horde becomes a god: the totemic clan appears.[85] The totemic system is therefore a micro-social organisation that is at the origin of the taboos and originates from taboos. Freud acknowledges this to define the notion of taboo: 'the meaning of 'taboo', as we see it, diverges in two contrary directions. To us it means, on the one hand, 'sacred', 'consecrated', and on the other 'uncanny', 'dangerous', 'forbidden', 'unclean'. [86] He acknowledges, as do anthropologists and sociologists, that the word 'taboo' has two meanings, which he sums up under the term *religious interdiction*.[87] That *religious interdiction* is manifested 'essentially expressed in

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[81] Freud, S., 'The Group and The Primal Horde', in Group Psychology and the Analysis of the Ego, *SE* 18, London: Vintage Hogarth Press, 2001, pp.-67-134, esp. p.122-123.

[82] Ibid, p.122.

[83] Ibid, p. 125.

[84] Ibid, p.122.

[85] Ibid, p.124.

[86] Freud, *Totem and taboo*, p.18.

[87] Ibid, p.19.

prohibitions and restrictions.'[88] In fact, for Freud, the taboo is something that cannot be tackled because it is sacred and provokes fear, terrifying fear, expressed mainly under the form of forbidden elements and restrictions. We may note the oedipal identification that concerns the father as original totem, and the original crime, essential to society, where guilt, aggression, the killing of the father and rivalry between brothers seem to structure the subject. [89]

We have a working hypothesis laid down by Freud; the idea that taboos are forbidden things, frontiers that culture or various cultures place around a large catalogue of phenomena such as specific objects, places, and people, including the father of the horde, but also actions. Taboos, Freud tells us, are principally expressed through what is forbidden. The wild man, a sort of guinea pig, sees his life structured by those taboos which permit the birth of a micro-societal life. In a permanent yo-yo between individual and group, we find that we are close to what happens with a child who, through socialisation, is presented with what is forbidden. The parents explain what is forbidden when they order the child not to do something. To say 'no' and create limits,[90] through the idea of '*ne fait pas ci, ne fait pas ça*'[91] is in fact a proto normative structure with rules that allow a social life to be organised; its first version being family life. Those rules allow us to become 'civilised'.[92] But what is forbidden produces desire. What is forbidden,

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[88] Ibid, p.18.

[89] Lacan, *Ecrits 1*, pp. 100-123, esp. p. 116.

[90] Halmos, C., *L'autorité Expliquée aux Parents*, Paris : Nil, 2008, p. 11.

[91] As popularised by the singer J. Dutronc.

[92] Halmos, *L'autorité Expliquée aux Parents*, p. 49. C. Hamos illustrates parental authority explaining its necessity in the process of child civilisation. She analyses it in four principles. Principle 1: in a civilised

which is behind the barrier, behind the frontier, which is potentially dirty, or impure or taboo, produces desire: the desire to cross, to go beyond the limit, a desire that needs to be repressed and condemned, creating the comprehension of *transgression*. We are confronted here with the same dilemma as Narcissus, or the famous cartoon character Mandrake and their reflection in the mirror, their image.[93] Narcissus looks at himself in the water and sees his reflection, as he would see it in a mirror. He comes closer to the image, to the frontier that constitutes the surface of the liquid. Narcissus goes further and crosses that frontier, that limit; he transgresses. Going too far, means that the water 'mirror' becomes the water 'window', making him cross to the other side. If the story of Narcissus offers a fatal ending, Mandrake and his double, the one behind the mirror, his inverted *image inversé* Ekardnam, warn us of what could happen. His double is evil. Mandrake/Ekardnam symbolises the historical and heroic battle between good and evil. Narcissus drowns transgressing, Mandrake reveals the secret of our consciousness, of the good and the evil inside us, at individual and group levels.

Freud offers an initiation into the tight links between anthropology and the development of the individual. The explanation of taboos highlights the nature and origin of consciousness at both the level of individual and society. Indeed:

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society, we may think about anything, say anything but we cannot do everything. Principle 2: We cannot have everything. Principle 3: sexuality is subjected to rules (horror of incest, consenting partner, private dimension of the act). Principle 4: necessity imposed by the reality of price to pay (effort and reward).

[93] Ekardnam ('Mandrake' en image) est le jumeau diabolique de Mandrake qui existe de l'autre cote du miroir.

> ‘If I am not mistaken, the explanation of taboo also throws light on the nature and origin of conscience. It is possible, without any stretching of the sense of the terms, to speak of a taboo conscience or, after a taboo has been violated, of a taboo sense of guilt.’ [94]

It is possible to use the idea of conscious taboo, and if a taboo is violated a sense of guilt is attached to the taboo, in the same way as crossing the mirror for Mandrake. The conscious taboo as moral conscious, internal perception of the repudiation of certain desires we feel,[95] brings an internal condemnation of accomplished actions.[96] The conscious taboo is probably the most primitive form of consciousness that includes the establishment of what we know as *good and evil*. For Freud,

> ‘this same characteristic [conscience] is to be seen in the savage’s attitude towards taboo. It is a command issued by conscience; any violation of it produces a fearful sense of guilt which follows as a matter of course and of which the origin is unknown.’[97]

If it seems evident that Freudian theory is more concerned with the individual self. But we cannot eliminate the social dimension from Freud’s writings. For him, taboo is a social formation.[98] His analysis of the socio-cultural phenomenon lets us imagine also that the

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[94] Freud, *Totem and taboo*, p.67.

[95] Ibid.

[96] Ibid.

[97] Ibid, p.68.

[98] Ibid, p.105.

transgression has to be thought in this specific context. We need to bear in mind that the connection between individual and group seems to go through neurosis, which, even if Freud clearly explains that it is different from taboo, has elements so similar that he uses some analogies:

> 'The asocial nature of neuroses has its genetic origin in their most fundamental purpose, which is to take flight from an unsatisfying reality into a more pleasurable world of phantasy. The real world, which is avoided in this way by neurotics, is under the sway of human society and of the institutions collectively created by it.'[99]

The fear in primitive tribes that the violation of taboos would be followed by punishment, serious illness or death, is characteristic. Indeed, 'It is feared (…) that the violation of a taboo will be followed by a punishment, as a rule by some serious illness or death'.[100] But it is not necessary for the punishment to really exist. The threat of possible punishment following a transgression is enough. This echoes what Bentham proposes: this is less the punishment that the idea of punishment, apparent or what comes from a real punishment (the idea of the punishment) that matter.[101] However, if the transgression is not followed by 'real' punishment, the group must be punished:

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[99] Ibid, p.74.

[100] Ibid, p.71.

[101] Tusseau, G., *Jeremy Bentham, la guerre des mots*, Paris : Dalloz Les sens du droit, 2011, p.155.

> ‘Only if the violation of a taboo is not automatically avenged upon wrong-doer does a collective feeling arise among savages that they are all threatened by the outrage; and they thereupon hasten to carry out the omitted punishment themselves.’[102]

There is a necessity felt by the group, a social necessity, towards applying a real punishment, which is understood as an essential element of the cohesion of the group. We can easily see hidden here the beginning of a sort of solidarity that really seems to push the solitary individual into a forced association. In fact,

> ‘If one person succeeds in gratifying the repressed desire, the same desire is bound to be kindled in all other members of the community.’[103]

We then understand that criminal law, Freud’s human criminal law, is based on the hypothesis that impulses are the same for the guilty and the one avenging the victim; ‘one of the foundations of the human penal system’[104] keeping in mind that ‘the punishment will not infrequently give those who carry it out an opportunity of committing the same outrage under colour of an act of expiation.’[105] There is a sort of mechanism here too, which demonstrates a certain dose of solidarity,[106] a *bricolage* that reinforces social norms.

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[102] Freud, *Totem and taboo*, p.71.

[103] Ibid, p.72.

[104] Ibid.

[105] Ibid.

[106] Ibid.

Transgression, 'you shall not kill', and 'masks' of the group.

In *Civilisation and its discontent*, Freud considers again the borders between the individual and the collective and seems to focus on the irreconcilable antagonism between instinctual demands and restrictions imposed by civilisation. This point has to be linked to the idea of human criminal law and the relation between 'that the prohibited impulses are present alike in the criminal and in the avenging community'.'[107] What Freud establishes here is a spatial dimension of the world as society, the civilisation. We may ask ourselves here if it is not possible to consider that 'civilisation' was defined by Freud as a synonym of the State in Kelsen. Indeed, for him the State is an association of people based on psychological interaction.[108] This one is maintained by an organic repression, the ego emerging from that constraint. The social link begins then in repression.

Transgression continues to develop by transforming into morality. It is perhaps here that the individuals' assimilation into a group can then take shape and grow beyond civilisation. Transgression or the possibility of transgression becomes a point of view that affects the lifestyle and builds social stratification (through transgression; deviance), interacting between individual and group. This is the beginning of the creation of the superego and that is not far from the State concept, Kelsen considering that for Freud, the State has a 'group mind'. [109] Kelsen himself will attempt to apply the Freudian theory of

[107] Ibid.

[108] Kelsen, H. (1924), 'The Conception of the State and Social Psychology—With Special Reference to Freud's Group Theory', *Int. J. Psycho-Anal*., 5:pp.1-38, p.3.

[109] Ibid, p.19.

totemism to legal theory; totemism imagined as the collective consumption of the same animal killed by the tribe, by all members of the tribe, as an act of identification. [110] If one refers to the exchange between Freud and Kelsen on the consideration of the superego and the State, one realises that it is designed as enlargement of the Father in parent-authority. The Father itself is imposed as the 'third instance' which initiates social functioning, [111] and is already reminiscent not only of the problem of authority in the group, whose superego is one element, but also of what will be discussed later, the issue of legal event, the trial that according to Ost is 'the ritualised staging, institutionalised by words which have layers'.[112] The superego is the other face of the Name of the Father, his mask. [113] One needs to recall this phrase of Lacan; 'It is in the name of the father that we must recognise the support of the symbolic function, which (...) identifies himself with the figure of the law'. [114] In addition, the pure logic of Oedipus means that to the capricious desire of the mother, origin of the superego, we must oppose the law that applies to all, the pacifying effect of the Name of the Father. [115] But this State of which

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[110] Jabloner, C., 'Kelsen and his Circle: The Viennese Years', *European Journal of International Law,* 9 (1998), pp. 368-385, esp. p383.

[111] Halmos, *L'autorité Expliquée aux Parents*, p.149

[112] Ost, F., 'L'invention du tiers, Eschyle et Kafka', *Esprit* Aout-Septembre 200, p.149. Furthermore, we note that the absence of the figure of the third party in a society brings automatically a trial similar to Kafka's one, (p.155), absence that reflects the absence of the Father as carrying the law (p.156). 'la mise en scène ritualisée, institutionnalisée de la parole qui fait tiers'.

[113] Miller, J.A., *Theorie de Turin*, http://www.causefreudienne.net/index.php/ecole/textes-fondateurs/theorie-de-turin (consulté le 5 avril 2012). Miller too brings Kafka here : 'Un monde sans juge, où la loi n'aurait pas d'interprète, où l'inhumanité universalisante de la loi s'appliquerait sans médiation au particulier, ne serait pas un monde de Kant, mais un monde de Kafka'.

[114] Lacan, *Ecrits 1*, p. 276. 'C'est dans le nom du père qu'il nous faut reconnaître le support de la fonction symbolique qui (…) identifie sa personne à la figure de la loi.'

[115] Miller, *Theorie de Turin*.

Kelsen speaks resonates here as the best group for the individual: 'Like all other social groups, the state, the most significant of them all, is the specific unity of a multitude of individuals, or at any rate, of individual activities, and the inquiry into the nature of the state is fundamentally an inquiry into the nature of this unity'.[116] It is also the best example of community:

> 'The state, too, as a social bond, is manifested in the idea of a definite community, of common organisation, of common territory, etc. Here, again, an extra-psychological conception of the state must be assumed whose psychic reflex-its precise kind is irrelevant-may create this feeling of fellowship in the minds of the people forming the state'.[117]

The heart of the superego manifestations oscillates between two extremes: critical monitoring or surveillance, in fact self-critique, and severity and harshness towards oneself, the anticipation of punishment for things that have not been committed 'in the real'.[118] The state constraint seems to be associated with the law in analysing the ambivalent effects produced in the individual unconscious.[119] Without this connection, no social standard is effective, and compliance to standards does not cause excessive guilt and need for punishment, which Freud describes as characterising the severity or even

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[116] Kelsen, The Conception of the State and Social Psychology', p.1.

[117] Ibid, p.6.

[118] Balibar, 'The Invention of The Super-Ego', p.8.

[119] Ibid.

the cruelty of the superego that finally establishes equivalence between respect for the law and its transgression. [120]

It is through a psychic court that the creation of 'his' world is defended: the excessive guilt and cruelty of the superego not only establishes an equivalence between respect for the law and its transgression, but also between court and 'for interieur'. [121] Humans become civilised, if we look again at the myth of the primal horde as narrated in *Totem and Taboo*, only at the time of renunciation, when the border between the psychic court and the future judicial court is no longer clear. We know that in the horde, the sons, the brothers, are forced to kill the father in order to take his place. But this is not the only consequence. In fact, the father must be killed in order to implement this prohibition of killing. The only original pact is the implementation of 'thou shalt not kill'. But it is a pact that can only arrive after the patricide. It should first be a transgression of the pact, even though it does not yet exist, so that it can be imposed. According to Freud, 'we feel not the slightest temptation to violate any of these prohibitions- the commandments to 'do no murder', for instance- and that we feel nothing but horror at the notion of violating them.' [122] This first, and most important, effect of the commandment is to block the *passage a l'acte*. We must repress the desire to kill the father, renounce transgressing, to create a social bond. The assemblage, or 'weaving' [123], is a psychic one, a symbolic weaving with a social impact, which creates social ties; a court judging permanently, by

[120] Ibid.

[121] Ibid, p.11.

[122] Freud, *Totem and taboo*, p. 69.

[123] Halmos, *L'autorité Expliquée aux Parents*, pp.148-149

creating this superego, which prevents the patricide from happening again. It is well understood that this operates both at the individual level and at group level. It includes moving from the pleasure principle to the reality principle. As Marcuse says '[t]he radical hypothesis of *Beyond the Pleasure Principle* would stand: the instincts of self-preservation, self-assertion, (…)'.[124] For Freud, human history began in repression, the beginning of civilisation occurs when humans 'give up'. [125] One can venture this hypothesis: that civilisation began in crime and its renunciation, when man gave up the idea of transgressing.

In the group we do find this. The pleasure principle, party time, *le temps de la fête*, the state of nature, is a state of complete satisfaction of everything and anything. It precedes the application of the principle of reality when we should repress a number of things, starting with renouncing killing our neighbour according to 'thou shalt not kill'. From the psychic court to the place of justice, there is actually only one small step, but one giant leap for mankind. Places of justice are there to narrate something much broader than the settlement of a dispute between parties. They are there to help us with special devices to present a play, allowing us to put on the clothes of an actor, framed by law, through specific rituals. [126]

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[124] Marcuse, H., *Eros & Civilisation*, London : Abacus, 1972, p.73.

[125] Ibid, p.29.

[126] See following chapters on that point.

We refer to these fictions so decried by Bentham, these 'intellectual or ideological constructs of large scale such as the social contract'.[127] It is well known that according to the state of nature, the social contract theories of Hobbes and Locke, that Rousseau considers that time without the direct experience of continuity is an almost magical space-time; hypothesis 1, which is used as a marker to another almost magical space-time, and hypothesis 2, where one lives the experience of discontinuity. [128] Man will be civilised when he renounces the satisfaction of 'all' desires. He does it for himself, but also, consciously or not, willingly or not, for the group. By becoming civilised, he can or can hope to, live with others. Under the mask of civilised man remains the (original) crime, his renunciation, transgression. The civilised man renounces transgression and aggression toward his peers. The civilised man must therefore make huge efforts to not transgress anymore because it is this renunciation that creates social ties. It is therefore not surprising that in their desire for civilisation, humans retain their desire for aggression. In the state of nature, where the pleasure principle (or the lack of it) was the rule, humans could do whatever they wanted. Crime, transgression of the future pact, was permanent. The state of civilisation is a space-time where the reality principle that becomes the rule is applied, (or is present), making the transgression of the pact a crime. We should not forget that the crime is committed only because there is something else in front of us as an obstacle for our enjoyment. Primitive man, son in the horde, knows this well and knows the obstacle: the father. For Freud the first crime, the crime *par excellence*, is patricide. We must kill the father, obstacle to pleasure; our pleasure. He must be killed because he, the father, is the foundation of the law. He both forces and prevents pleasure. He forces it

[127] Tusseau, *Bentham*, p.38.

[128] Derrida, J., *De la Grammatologie*, Paris : Les Éditions de Minuits, 1967, p. 372.

because without something forbidden, he does not exist. He prevents it because it 'brings' reality. We must transgress once at least, to be sure of the sustainability of 'thou shalt not kill'.

From one story of transgression to another.

Almighty God created the Garden of Eden, a paradise, whose image is reminiscent of the state of nature. Yet it is a somewhat peculiar state of nature because Adam can do everything except one thing. Adam can do whatever he wants in the garden, except eat the forbidden fruit of the tree of knowledge. The 'Father' prohibits his 'son' from doing this but we feel that if he does not transgress there cannot be anything else. So we may well have here a state of nature time-1 of the state of civilisation. It touches tangentially the state of civilisation through this prohibition that must be transgressed, especially as we know what comes after... We anticipate transgression, as it is anticipated in the relationship rule; punishment/sanction. By imposing this rule, a development through what is forbidden is allowed, by transgression. One could think of Adam not touching the forbidden fruit. So he does not come out of this state of nature of a particular kind. This is a particular state of nature because it is created by the divine with a limit that must necessarily be exceeded: Adam must absolutely not touch the forbidden fruit but must also do it (this is expected) to found human society. When Adam contravenes this prohibition, there may then be the development of humanity. It is a transgression that is also a foundation. The divine prohibition in the time-1 offers a space of reality not unrelated to the Freudian reality principle. The divine prohibition and its transgression create man/humanity.

Man is facing rules, taboos, that he cannot (or can no longer) break. Yet these are the rules that he gave himself. These taboos; sacred, consecrated, disturbing, dangerous, forbidden, impure are related to totems. They work around the will of the father, either in agreement with it, or against it. The totem is marked by taboos attached to it, which constitute its heart: the members of the horde cannot kill the totem (horror of patricide) while the rule of absolute abstinence to all women, as totem (horror of incest) also exists. The myth of the primal horde, the totem and taboo, creates the story of the desire to transgress and of the law, of not to transgress. [129] To become civilised, patricide must be contained by the original law, the basic/fundamental law, the simplest of the state of civilisation that is the rule of 'thou shalt not kill', an essential rule and commandment included in the Decalogue, and therefore a foundation. From the moment this law is 'there', present, human society can be said to be civilised. The myth works as a pact, an alliance between the brothers; members of the horde. They will not kill (or not anymore) the father, because they become civilised. Until this transgression is repressed, the horde knows nothing other than freedom. For Marcuse, the absence of repression is the archetype of freedom, civilisation is the struggle against it. [130] The substitution of the reality principle to the pleasure principle is the largest traumatic event in human development, personal and social. It happens when the young child learns to submit to his parents, but it was there in the primitive horde, when the father controlled power and

[129] Derrida, *Grammatologie*, p.372. For Freud, laws are prohibition of patricide and of incest. This is at the time of « la fête » that incest becomes a crime too. Before that time, there is no incest, no crime, because there is no prohibition of incest as there is no society.

[130] Marcuse, *Eros & Civilisation*, p.31.

pleasure and forced his children, brothers, to give up their freedom. [131] Basically, the myth of the primitive horde, and the assassination of the Father, demonstrates that the history of individuals is also that of the group, of civilisation, and vice versa. The development, the move from the pleasure principle (which was used as the equivalent to the state of nature) to the reality principle (the same for the state of civilisation), in Freudian theory, involves a chronological social time, a time when everything is done for and by the acquisition and integration of social rules, code of conduct, morality. Time, as Levinas says, is not the act of an isolated subject, alone, but is the relation itself of the subject in otherness, illustrating again a social dimension. [132]

But the transition to the reality principle, to the state of civilisation, does not mean the end of the crime. Thus the pleasure principle remains in the unconscious, archaic memory of the patricide, and may resurface.[133] A mechanism is needed to resolve disputes, a specific legal event that permits them to reconsider the renunciation and to bring back the social bond. This event will, as a result, be conceived as a staging or a play repeating the original pact, the transgression, and its repression. The original pact that Rousseau considered the birth of human society: "It is sacred to him only one institution, one fundamental agreement: it is the Social Contract, the order social itself, the right of law, the Convention that is the basis for all agreements [...].' [134]" In a brief effort of memory

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[131] Ibid.

[132] Levinas, E., *Le Temps et l'Autre*, Paris : PUF, 1983, p.17.

[133] Marcuse, *Eros & Civilisation*, p.31.

[134] Derrida, *Grammatologie*, p.373. 'Il n'est sacré à ses yeux qu'*une seule* institution, *une seule* convention fondamentale: c'est, nous dit le *Contrat social*, l'ordre social lui-même, le droit du droit, la convention qui sert de fondement à toutes les conventions […].

the brothers will be reunited to be judged and sentenced. We will recall the original act of patricide; this original crime that was in fact not one in our state of total freedom, and that has become one since we qualified it as a transgression. As said by Marcuse, Freud's individual psychology is essentially social. [135] The social bond is 're-woven' through this reconstruction, in the legal event, then trial, [136] each participant identifying the criminal and reliving the crime scene. The specificity of this event, as shown by Garapon, is a meeting, mediated by specific forms, of several persons whose imputation of their actions is recognised, as well as their ability to justify themselves by narrating stories.'[137] This event appears as a ritual link between the space of justice and what 'accounts' for the individual and for the group, the society. In places of justice, the ritual concern allows a metamorphosis of everyday life, where one comes to the transformation of what is mundane. [138] There is therefore an urgent necessity for the process of justice, for the device or the judicial apparatus, to allow the smooth functioning of society, which is also that of group harmony. The places of justice are charged with orchestrating that harmony by using rituals to contribute to the restoration of some order. For Eliade, myth and ritual are connected:[139] The ritual abolishes the profane, chronological, time, and recovers the sacred time of myth. [140] The sacred time meets the sacred place in the places of justice

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[135] Marcuse, *Eros & Civilisation*, p.31.

[136] For a analyse of the differences between trial and *procès*, see Marrani, D., 'Confronting the symbolic position of the judge in western European legal traditions: A comparative essay', *European Journal of Legal Studies,* Vol. 3 Issue 1 (2010), pp. 1-31.

[137] Garapon, A., 'Le Droit mis à l'Epreuve', *Esprit* Août-Septembre 2007, p.208.

[138] Bowie, F., *The Anthropology of Religion*, London: Blackwell Publishing 2000, Excerpts from Chapter 7 'Ritual Theory, Rites of Passage, and Ritual Violence', pp. 151-168, citing Alexander, B., p.139.

[139] Eliade, M., *Aspect du Mythe*, Paris : Gallimard idées 1963, p.10

[140] Ibid, .p.172.

through rituals of justice. But it connects, it communicates, with the myth, in particular that of the primal horde.

The judicial ritual functions as memory, reminding us of the fundamental ambivalence of legal events. It allows us to link the psychic court and the 'social' court. In fact, behind the judicial ritual hides the sacred, the religious, magically linking time and space.[141] Humans who are not free as they were 'before' have now overthrown their 'masters' and hidden their commands in their mental apparatus.[142] We know that the particular characteristic of an event, its movement, is well known; a frantic march bringing us from the outside to the inside. The boundary between the outside and the inside is a wall of separation between two spaces, in and out. We move from outside to inside the sacred space of justice, the walls of which are an enclosure separating the sacred from the profane; the place where the social bond is 're-woven', where the return to the primal scene is taking place. When we consider what happens abstractly within a place of justice, we have inside or outside a feeling that is the same for everybody, that here and now there is something about the law and its application.[143] This event is framed by specific rituals that merge time and space, a theatrical ritual, where the development of mankind, passing through transgression, will replay through some *mise en scène*.

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[141] On that specific point related to ritual, see Reik in Reik, T., *Ritual, Four Psychoanalytic Studies*, New York : Evergreen, 1962 (1946).

[142] Marcuse, *Eros & Civilisation,* p.32

[143] Goodrich, P., 'Europe in America: Grammatology, Legal Studies and the Politics of Transmission', *Columbia Law Review*, 2001 101.8 pp.2033-2084, esp. 2077.

Spaces of justice, playing with the natural movement of the Earth and the Sun, day and night, life and death, light and darkness, between the 'temple illuminated by justice to the dark places devoted to crime',[144] offer not only a representation of the psychic court but also of the myth of the horde and the patricide. They impose the separation between good and bad, right and wrong, real and/or symbolic. [145] The court contributes to this connection between justice and human development. [146] It is a sacred place, illuminated by the light of truth, which contrasts with the darkness of the crime scene, [147] a place where people are physically face to face, where 'justice is (...) inseparable from the experience of human plurality, appearance (in court) becoming a metaphor for human coexistence'.[148]

In place of justice, there is the presence of a specific ritual, a complex system of values which forces solemnity. There is theatre creating a space where time is organised to produce a symbolic moral system. It allows the movement from the darkness, a chaotic moment, disorganised and terrible, which follows the dispute, coming after the outlawed time, that continues on from the transgression of the law, to the light of the system of

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[144] Markus, T., *Buildings and Power, Freedom and control in the origin of modern building types*, London: Routledge, 1993, pp.34-35.

[145] The term trial owes its origin to the French word *triable*, sortable, and thus is closely tied to that which can be sorted or separated. This dynamic process, understood as an event for the parties and for society, must achieve a result: the separation of the good from the bad. See also Klein, M., « L'amour, la culpabilité et le besoin de réparation » *in* Klein, M., *L'Amour et la Haine*, Paris : Payot 2001 (1937), pp.87-88.

[146] This works as a reminder of one of the reasons we may have used temple as signifier of justice over centuries, in development of societies we may qualify of post primitives.

[147] We may with Lacan consider that « Truth begins to be established only once language exists ». Lacan, J., *My Teaching*, London : Verso, 2008, p.29.

[148] Garapon, 'Le Droit mis à l'Epreuve', p. 215.

morality. This revives the pact, and repeats a journey of initiation, from the beginning, from the pre-transgressive state, to the post-transgressive state, enabling a fresh start, and then finally a re-birth. In a courthouse, a microcosm of a primitive world, the development of humanity is replayed, from the time of birth to the time of the dispute. Within the legal event, this drama's primal scene is played and replayed, reminding us of where we came from and how we arrived at where we are: Remembering the transgression. Ritual, myth... we see the renewal, a transformation affirmed and confirmed by an existing link between the myth of birth and rebirth.[149] Also, the work of the judge, as explained by Professor Assier-Andrieu, is to reformulate what was; what originates in the past.[150] The Stare decisis, so important to the trial, is illustrated by the idea of tradition, an endless chain of rules, which is handed down in time 'by the institution of the jury, the voice of the people itself.'[151] Understandably, the trial (by jury) is an important legal event for the common law. It is a flagship event that carries both powerful magic and value judgment. It is, in fact, the legal event *par excellence*. In the courtrooms and in the classrooms of our law schools, one can legitimately call the trial an 'event' and see through the judicial process what should or should not be—in the present time for the parties, and in the future for society. The trial is also an expression of a certain kind of magical thinking. It is therefore an open and specific expression of the *raison d'etre* of common law lawyers, which is brought about through dramatisation. The common law through precedent reminds us of the past and brings to our present an unconscious fear of power and authority. The voice

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[149] Reik, *Ritual,* pp.91-166, esp. p.156.

[150] Assier-Andrieu, L., *L'Autorité du Passé, Essai anthropologique sur la common law*, Paris : Dalloz Les sens du droit Essai, 2011, p.111.

[151] Ibid, p.63.

of the people, the cry of the horde... the judicial rituals go beyond the solely individual frame as they allow the brothers to rebuild social bonds, and to remember the transgression as a founding act. As highlighted by Balibar, the judicial time of subjectivity, conceived as the moment when the superego is considered as structure; a system individualising social relationships mediated by guilt, by integrally moving the logic of negative identification at the scene of the unconscious, permits the proposition that there is only transgression, and that only this statement makes our membership of or belonging to the legal order possible. [152]

In this introductory Chapter I look at the right for a fair trial and analyse the connection in the literature review, between the right itself, and via its definition in various jurisdictions, and new technologies and spaces of justice. After those introductory remarks, I would now like to introduce the question of spaces and ritual/s in the trial, in Chapter 2.

[152] Balibar, 'The Invention of The Super-Ego', p.15.

III. Chapter Two: Judicial spaces and ritual(s) of justice. The relation between Time and Space in the Trial.

Preliminary remarks.

According to Paul Ricœur's words, '[…] the delivery of justice is not merely a matter of arguments, but one of making decision. Here lies the heavy responsibility of the judge, the last link in the proceedings' chain, in any stages. When the last word of the judge is one of sentencing, the judge reminds us that he is the holder of the balance as well as the sword'.[153] With this beautiful definition given by the philosopher, we will keep in mind the idea of the argument and of the decision, the balance and the sword, of the proceedings and of the judge as an agent in the delivery of justice, of all these characteristics of judicial practice '[which] allow to define […] justice formalism'.[154] By focusing on the idea of formalism, we quickly realise that behind what Ricœur calls 'judicial practice characteristics' is hidden the appearance, or even the aesthetic aspect, of justice, which is equally, if not more, important than its reality. However, the idea of proceeding and of practice requires us not to consider justice as motionless but as dynamic. Such formalism is bound to ritual and is more or less already noticeable in primitive societies, and

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[153] RICŒUR, P., *Amour et Justice*, Paris, Seuil, Point Essais, 2008, p.27. '[…] l'exercice de la justice n'est pas simplement un cas d'arguments, mais de prise de décision. C'est ici la lourde responsabilité du juge, dernier anneau de la chaîne de procédures, à quelque degré que ce soit. Quand ce dernier mot du juge est un mot de condamnation, le juge se rappelle à nous comme porteur non seulement de la balance mais du glaive'.

[154] Ibid. « toutes ces caractéristiques de la pratique judiciaire [qui] permettent de définir […] le *formalisme* de la justice ».

perfectly visible in archaic and pre-modern societies.[155] Here, formalism is articulated with religion, magic and law, within the context of the value and of the normative system of each social organisation.[156] As Garapon underlines 'before rules, law, judges, courthouses, there was ritual'.[157]

If we consider law in primitive societies, a number of examples of ritual(s) linked to justice can be found. Tribal courts, such as Tribal Councils of American Indians, or of the Ashanti, are, for instance, striking illustrations. One may, from these examples, note the absence of temporal permanency – which is not unrelated to Garapon's ideas. There is no continuity in time, as courts sit temporarily. Furthermore, there are no permanent structures which could remind us of our 'courthouses'. Finally, there are, occasionally, the use of (compulsory) procedures or a judicial apparatus which includes 'several things/elements: a body of written laws/rules, tribunals or courts of justice, committed in the function of stating the law, judges, […].'[158] However, two elements are generally found: accountability and authority. Indeed, the liability of the author of the 'wrongdoing' and authority of the group (or of one individual in the group acting or reacting on behalf of the group) are almost always present.

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[155] HOEBEL, E.A., *The Law of the Primitive Man*, New York, Atheneum 1976, p.257.

[156] Ibid, p.267.

[157] GARAPON, A., *Bien Juger*, Paris, Odile Jacob, 2001 (1997), p. 23. « Avant qu'il y est des lois, du droit, des juges, des palais de justice, il y avait un rituel ».

[158] RICŒUR, *Amour et Justice*, p.27. « plusieurs choses : un corps de lois écrites, des tribunaux ou des cours de justice, investis de la fonction de dire le droit, des juges, […]. »

Likewise, the presence of a certain method or process can be found: a comparatively developed and complex procedure. If we can hardly imagine the absence of continuity, however, we understand the latter elements very well in our modern societies.[159] Only the preconceived ideas of modern or postmodern man are likely to stop us considering these ancient practices as institutions which, like our current ones, are essential to the delivery of justice but also of making law effective or even 'alive'. Thus, in primitive societies, justice expresses itself as social practice, as defined by Ricœur. It is obviously less formal than the one we know: it means applying rules which are not always written, expressing opinions in places which are not always built 'physically', and operating thanks to judges who are not truly judges but 'individuals like us [here like them], deemed [more or less] independent and responsible for pronouncing the just sentence in a particular circumstance', that is to say 'a higher instance' responsible for 'deciding between claims of parties with competing rights or interests'.[160] In addition, primitive societies will always be concerned with focusing on a social dimension of the wrongdoing and the restoration of the right (social) order. Furthermore, this is confirmed in non-European modern societies where the overriding objective is not the truth, but rather harmony and peace. [161]

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[159] HOEBEL, The Law of the Primitive Man, p.24.

[160] RICŒUR, *Amour et Justice*, pp.26-27. « des individus comme nous [comme eux ici], réputés [plus ou moins] indépendants et chargés de prononcer la sentence juste dans une circonstance particulière », c'est-à-dire « une instance supérieure » chargée de « trancher entre des revendications (*claims*) de parties porteuses d'intérêts ou de droits opposés ».

[161] NADER L. et SURSOCK, A., « Anthropology and Justice », *in* COHEN, R. (eds.*), Justice: views from the social sciences*, New York, Springer, 2006, pp.205-230, esp.p.209.

Primitive societies, in this sense, must be seen as important examples because they influence what is and what happened 'after', which shaped our vision, with the help of ritual(s). Thus, a very primitive level of justice does not necessarily require the presence of a third party, such as our judge. From this absence, it is worth noting, for example, that their court will occur in a space and a time very different from the one we know with the justice of today, but will, however, respect a precise and certain legal chronology. This 'procedure', accepted by the tribesmen, will be sanctioned in last resort by public opinion, emanating from the whole tribe.[162] Justice is done as soon as public opinion of the tribe accepts and acknowledges that the procedure followed by the plaintiff is correct, the sentence is adequate, and the guilty person agrees to accept it.

Thus, the court will be constituted by the plaintiff, and with public opinion which supports him, the procedure will be supposed 'legal'. [163] The court and the sanction become landmarks for the law. Indeed, law cannot exist without a sentence pronounced to enforce it, with the court as the special space where the authority is manifested. Professor Sacco claims, 'Law is rooted in man's willingness to obey'.[164] Thus, any legal apparatus would only be there to revive in man this willingness. Even in the most primitive societies, law should pass the test of the court, which is the only tool to allow an order, a command, to become a legal rule. [165] What about, then, the difficulties that we sometime face concerning the recognition of courts? In primitive societies, it is clear that a flexible

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[162] RICŒUR, *Amour et Justice*, p.24.

[163] Ibid, p.25.

[164] SACCO, R., Anthropologie Juridique, Apport à une micro histoire du droit, Paris, Dalloz, 2008, p.170.

[165] See HART, H.L.A., « Positivism and The Separation of Law and Morals », *in The Philosophy of Law*, DWORKIN, R.M., (ed.), Oxford, OUP, 1977, pp. 15-37

model is favoured, one which corresponds to cosmogony, of a cosmogonic vision of the world, of the myth of its creation and so of the ritual as recreation of the original myth. [166] Eliade underlines, 'the original myth of medicines is always integrated in the cosmogonic myth'. [167] There is thus a parallel relationship between the cure and justice – this relationship is also present in the presence of the shaman, the magician, or the sorcerer, as an affirmation of the supernatural origin of authority. [168] The magical side of justice is present in most primitive societies. In some Eskimo tribes, the legal instrument of dispute resolution, and restoration of the relations between the members of the community, is the sung duel, alone or with the support of the family of the accused. One of the litigants will receive a 'judgment' in its favour. This judgment will be followed by a psychological 'reward' but no real 'reward' or compensation.[169] The sung duel operates like the duel which takes place between the lawyers and the parties. Another illustration can be found in the case of the Ifugao. The Ifugao have a very precise procedure to respect. This requires the use of an intermediate; the Monkalun, who is neither a judge, nor an arbitrator, but a mediator, whose only objective is to restore the balance, the good order in the community. Chosen by the plaintiff, he is the facilitator of both parties, contributing to an embryo of a legal institution.[170] One will notice here the parallel between balance and good order and the use in the justice symbol of the balance for the equilibrium and of the sword for the good order.

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[166] ELIADE, M., *Aspects du Mythe*, Paris, Gallimard, Idées, 1963, p.33.

[167] Ibid, p.42.

[168] SACCO, Anthropologie Juridique, pp.122-123.

[169] HOEBEL, The Law of the Primitive Man, pp. 96-99.

[170] Ibid, pp.114-115.

But we will focus a little longer on the case of the Ashanti. Their procedure is really codified. The parties (first defendant and second defendant) are presented to the Speaker or the Okyeame who starts the hearing, describes the facts, and proposes a date for the trial. The day of the trial, both parties are presented to the chief and to the elders. The Okyeame asks the first defendant to present his facts orally and concludes by saying, 'if the presentation I made is not the truth, and if I made up anything, then I am ready to undergo the punishment, because I uttered the forbidden words'. Therefore, he relies on the court. The second defendant presents himself, and explains his own version of the case by repeating the same sentence as the first one. The presentations are diametrically opposite. The Okyeame must then corroborate both versions by repeating them. He asks the first one 'Is it the words of your mouth or am I lying'. If the words are not identical, he may request they be corrected, but this is rare. The statement is therefore confirmed. Idem for the second statement. Two truths oppose one another, 'by confronting reasons for or against, supposedly plausible, communicable, worthy to be discussed by the other party'.[171] Like barristers, the elders will cross-examine the two parties, while the chief remains discreet. The public may then ask questions, and one can call a witness, who will be called by the Okyeame. Only one witness will be called. Indeed, the Ashanti system relies on a very firm religious belief. It is not possible to believe that one witness will be more or less in favour of one of the parties. Moreover, the power of the oath and of the death penalty, along with the lie, a sort of sin, in short, makes the presence of two witnesses impossible. The elders will ask the chief to present the witness via messenger. The latter should take the oath, in particular to not tell anyone of the hearing, otherwise

[171] RICŒUR, *Amour et Justice*, pp.26-27. « en confrontant des raisons pour ou contre, supposées plausibles, communicables, dignes d'être discutées par l'autre partie'.

he will die. Now, everything relies on the testimony. The Okyeame informs the chief 'Great sire, we will introduce the main support' and he warns the parties that the witness will be decisive in the decision making. Then, the witness arrives with the messenger and should take the oath before the gods to tell the truth. The Okyeame appeals to the gods to kill the witness if he lies, and orders the witness to swear three times that he will not lie. The elders must then decide, of the two parties, whose story is best supported by that of the witness . The Okyeame then tells the losing party: 'you heard what the witness stated', explaining that what he did was similar to the fact of coming to the court and hitting the Okyeame with sticks, and therefore he was guilty. Everyone present then shouts: 'E, e, e, e, e!' [172] Then the sentence will be pronounced by the King. The various examples presented above show a certain vision of justice.

Understandably, the work of the anthropologist, or of the lawyer, is not the same as the work of the preceptor or of the fabulist. Yet, we dare to express the idea that justice presented in these illustrations closely corresponds to fables narrated by La Fontaine. From the umpire who 'Never held to their discretion [the parties' discretion] an equal balance',[173] and the tree or monkey judge [174] before which the trial takes place, and the pleas are done 'Not by a lawyer, but by each party, as Themis did not work' ('No lawyers called to twist the laws; Each client pleaded his own cause),[175] to Rabelais' caricature of

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[172] HOEBEL, The Law of the Primitive Man, pp.246-251.

[173] LA FONTAINE, J., « Le Juge arbitre, l'Hospitalier et le Solitaire », Livre XII fable 25, *in Fables*, Paris, Hachette, 1929, p.511. « Jamais ne tenait à leur gré [au gré des parties] la balance égale »

[174] *Ibid,* « L' Homme et la Couleuvre », Livre X, fable 1, p.383.

[175] *Ibid,* « Le Loup plaidant contre le Renard par devant le Singe », Livre II, fable 3, p.55. « Non point par avocat, mais par chaque partie, Thémis [n'ayant] pas travaillé »

the judge, Perrin Dandin/Sir Nincom, mentioned in La Fontaine's fable, who 'made him' judge and 'draw the cash, and leave the parties only purse and cards'.[176] One likes to think that this judge, so powerful, so close to the sovereign, can only be corrupted, and that we can notice the difference of treatment between the judge of the 17th century and that of primitive societies. Yet it is obvious that what La Fontaine portrayed corresponds to a time of transition between a society which seems primitive and a more rational justice. This judge is corrupted: 'The parties leaving for their shares, The shells (and shells there might be moister), From which the court has sucked the oyster.'[177] The tree or monkey judge would not be considered as caricatures in primitive societies. We nevertheless understand that something is already changing. The judge's dress, coated with fur, appears like one of his strong and important characteristics: 'A saintly mouser, sleek and fat, An arbiter of keenest wit. John Rabbit in the judge concurred.'[178] But the clothes do not make him more convincing:

> 'And off went both [the weasel and the young rabbit] their case to broach
> Before his majesty, the furred.
> Said Clapperclaw, "My kids approach,
> And put your noses to my ears:
> I'm deaf, almost, by weight of years."
> And so they did, not fearing anything.

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[176] *Ibid,* « L' Huître et les Plaideurs », Livre IX, fable 9, p.355. « constitue » en cour et « tire l'argent à lui, Et ne laisse aux plaideurs que le sac et les quilles ».

[177] *Ibid,* « Les Frelons et les Mouches à miel », Livre I, fable 21, p.47. « On fait tant, à la fin, que l'huître est pour le juge, Les écailles pour les plaideurs. »

[178] *Ibid,* « Le Chat, la Belette et le petit lapin », Livre VII, fable 16, p.265.

The good apostle, Clapperclaw,

Then laid on each a well-armed paw,

And both to an agreement brought,

By virtue of his tusked jaw.'[179]

Furthermore, as Garapon highlights when he quotes the fable of the *Donkey carrying relics*: 'It's thus a brainless magistrate, is honoured for his robe of state'.[180] Basically, behind the judge hides the man, a human corrupted or not. His function keeps dignity, thanks to this fur, to the judge's uniform. The fur helps to keep the dignity of the function.

The link with the archaic memory of these rituals is often highlighted by psychoanalysis. Unconscious ideas particularly influence criminal law, where, for example, we see the affirmation of the *lex talionis*, the law of retaliation, or even revenge, as mentioned in the Old Testament: an eye for an eye and a tooth for a tooth.[181] It can also be found in many codes such as the Hammurabi code.[182] Freud refers to this law in *Totem and Taboo*: 'the law of retaliation, which is so profoundly rooted in human feelings, considers that a murder can only be atoned for by the sacrifice of another life'. [183] We will see that it is in this crime; the first crime and all the mechanisms established to prevent it, that the drama

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[179] *Ibid*.

[180] GARAPON, *Bien Juger*, p.12. « d'un magistrat ignorant, C'est la robe qu'on salue. »

[181] For in deepth analysis see à FISH, M., « An Eye for an Eye: Proportionality as a moral principle of punishment », *Oxford Journal of Legal Studies* 28 (1), pp.57-72, (2008) et WALDRON, J., « Lex Talionis », *Ariz. L. Rev*. 34 (25) (1992), pp.25-51.

[182] SCHOENFELD, C.G., *Psychoanalysis and the Law*, Springfield, Charles Thomas, 1973, pp. 18-21.

[183] FREUD, S., *Totem and Taboo*, London, Ark, 1983, p.154.

of life is played and played again. It seems that looking for justice is a permanent cause for most, if not all, societies. According to Nadr and Sursock, the belief in justice, the behaviours which are associated with it, but also the reasons for justice, are universal phenomena. However, the signification of this phenomenon varies with the socio-cultural context, thus creating different forms of justice.[184] To this end, La Fontaine also enlightens us.

Understandably, if justice is both considered as a set of universal phenomena and also as an asymmetrical concept which depends on socio-cultural context, a specific space and time consists in a universal ritual or particular rituals. These always depend upon the vision that the individual and the group will have in their archaic memory of the third-party judge, which revolve around a totem or totems; these archaic social micro-organisations then define more or less 'design rituals'.

Because this book is written in a European context, it will first take European examples, mostly from French law and English law (sometimes British law). It will focus on the analysis of the judge, relying of course, on law, but also on philosophy and psychoanalysis. It will show how a parallel may be drawn between the judge and the totem and how the judge might play a role in a specific narrative of the Oedipus story. In this chapter, I will present the characteristics attached to (the) legal totem(s), and its, or their, quantitative and qualitative differences. Then, the idea of ritual(s) and its (their) links with law and justice will be considered.

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[184] NADER et SURSOCK, « Anthropology and Justice », Op. Cit., p. 205.

Judge, totem and Oedipus.

Before considering the relationship between the three objects here, we will make a preliminary comment on the judge and the legal event in Western legal traditions.

The judge and the legal event in Western legal traditions.

According to Legrand, the two legal traditions present in Western Europe, known by the terms of civil law, and common law, interact within a general legal framework: The Treaty of Rome.[185] Basically, these two legal traditions remain discursive formations of sufficient homogeneity, which generate 'autonomous discursivities'. They allow us to define two ways of understanding the reality (which reflects the two basic mythologies).[186] On this basis, and knowing that, on one hand, comparative law is, as Richard explains, an anamorphosis of legal theory,[187] and on the other hand, for Legrand, a commitment to the interdisciplinary,[188] it seems crucial to look closely at the place of the judge in these two legal traditions. The objective here is to operate this analysis through the prism of what Wittgenstein believes to be a mere mythology, a powerful

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[185] LEGRAND, P., « How to Compare Now », 16 *Legal Studies* (1996), pp. 232–242, esp. p. 232.

[186] Ibib, p.240.

[187] RICHARD, P., « Les Apports de Wittgenstein à la Réflexion Comparatiste », *RIDC* 4 (2005), pp. 899–920, esp. p. 900.

[188] LEGRAND, « How to Compare Now », p. 238.

mythology; the psychoanalytic theory,[189] because if we are confronted with 'autonomous discursivities' it seems that an important space should be given to the language.[190]

The judge, in the two major legal traditions, operates in a legal institution which seems to be similar, but uses a different terminology: trial and *procès*. The legal institution described by the trial and the *procès* may be understood through the concept of legal event. It is a flagship event, powerful – or even magical – which carries value as a specific judgement. It is, in fact, the legal event *par excellence*. It is something, in the courtrooms and in the classrooms of law schools, one can legitimately call an 'event' and that enlightens the judicial process, in particularly by giving an idea of order, of what should or should not be. It is also the expression of a certain kind of magical thinking. It is therefore an open and specific place for the expression of a *raison d'être*, through dramatisation. It is, indeed, what Garapon proposes, when he notices that 'the legal event is part of justice as well as law: it is the foundation'. [191]

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[189] BOUVRESSE, J., *Wittgenstein reads Freud: the myth of the unconscious*, Princeton, New French Thought, 1995, p. 52.

[190] We know that Lacan reckons that the unconscious is designed like the language. According to Freud, language substitutes something for another thing. Lacan considers this second thing as the most important element. We should indicate that my comments will be restricted to Western Europe and solely to common law and civil law cultures. The concept of major legal systems will not be used because we will take into account the recent research of Legrand and Samuel, showing that the common law cannot be considered as a system. LEGRAND, P. et SAMUEL, P., *Introduction au Common Law*, Paris, La découverte, 2008, esp. p. 8. We will also use English law as prototype of the common law and French law as civil law prototype. Finally, we will use the terms of Romano-Germanic and tradition of civil law equivalently.

[191] Garapon, *Bien Juger,* p. 19. Professor Commaille considers that "the 'staging' of the exercise of the function of Justice is one of the manifestations of a traditional conception of representation as one of the embodiments of a power relying on the transcendence principle, which particularly requires to be represented: by an architecture, a work of art, rituals, etc." Therefore, the ars juris would be "one of these

Nevertheless, the use of different words, trial and *procès,* may be a good way to distinguish the particularism of legal events, while highlighting the power of the words (in two different traditions).[192] It is necessary to keep in mind what Heidegger explained regarding the translation from Greek to Latin, which we will here apply by analogy: it is a closing and alienating process.[193] In seeking to theorise both institutions, we may diminish their meaning. The scope of certain facts may be so important, and so exceptional, that these facts influence both the individual and society. Beforehand, the meaning of these realities may be enlightened by using comparative linguistics. The term 'event' implies, through its Latin etymology *évenire* (*e* which means on, *venire* which means coming) that facts *come* and give a result (come out). The term 'trial' in the Anglo-Saxon world, which owes its origin to the French word *triage*, thus is closely tied to what can be sorted or separated. This dynamic process, understood as an event for the parties and for society, must achieve a result: the separation of the good from the bad.

According to the Oxford dictionary, the trial etymologically comes from the word *triage*, from ancient French, which is an act of separation of the good from the bad.

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manifestations, one of these expressions in favour of a conception of society's structure from a certain legal regulation model". Commaille, J.*, L'Esprit Sociologique des Lois,* Paris, PUF, 1994, pp. 226-227. la 'mise en scène' de l'exercice de la fonction de Justice est une des manifestations d'une conception traditionnelle de la représentation comme une des incarnations d'un pouvoir s'appuyant sur le principe de la transcendance et, par là, qui exige particulièrement d'être représenté : par une architecture, par des oeuvres d'art, par des rites, etc».

[192] Tambiah, S.J., « The Magical Power of Words », Man 3 (2) New Series (Jun., 1968), pp. 175–208.

[193] Heidegger, M., *Introduction à la Métaphysique*, Paris, Gallimard, Tel, 1967 (1935), p. 26.

This slightly Manichean dichotomy, expressed in this definition of the legal trial institution, is quite different from that of its "Romano-Germanic" version, although the French equivalent, the *procès*, does not share this idea of selection between good and bad but rather of other operators (such as the legal/illegal binary described by Teubner)[194] and the idea that 'Justice … is the principle of separation of good from bad'.[195] But the trial and the *procès* both start with the idea of dynamic process. The trial refers to the position of the parties before a judge, in a dispute. In order to facilitate the understanding of what underlies the resolution of a dispute, by using a legal institution able to separate good from bad, it seems interesting at this point to refer to Lyotard's definitions. First, a dispute is a conflict between two parties which cannot be resolved without a rule. Then, it may be a wrong which cannot be compensated, where the victim cannot assert his rights. Finally, it is a state where the language is ready to take its place, where "something 'needs' to be put into words/sentence, and suffers from the impossibility of being done at the moment".[196] The word 'trial' itself carries the dynamic of the process, a scheduling of the words. In addition, according to Badiou, the event is the dimension of another process; that of the truth.[197] Then, it appears as a progression towards the legal truth, 'the judgment is the expression of a judicial truth, that is to say a truth whose source, development and finality are defined by the legal as it is realised in the trial'.[198] Indeed,

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[194] Teubner, G., « G Global Bukowina: Legal Pluralism in the World Society », in Teubner, G., (ed.), *Global Law Without a State*, Dartmouth, Aldershot, 1997, pp. 3–28.

[195] Garapon, *Bien Juger*, p. 28.

[196] Lyotard, J.F., *Le Différend*, Paris, Éditions de Minuit, Critiques, 1983.

[197] Badiou, A., « The Problem of Evil » in Badiou, A., *Ethics: An essay on the understanding of evil*, London & New York, Verso, 2001, p. 67.

[198] Poncela, P., « R Regard sur la Vérité Judiciaire », pp.175–183, esp. p.175, in *Dialogue, Dialectique en Philosophie et en Droit*, Archive de Philosophie du Droit, tome 29, Paris, Sirey, 1984, p. 175. Voir

the ‘truth’, moral truth, which differs from scientific or social truth, is supposedly and generally pronounced at the end of the legal procedure of the legal event, which makes this legal institution a sacred place which consecrates the judge’s action.[199] Legal truth operates as a fiction which sanctifies the judicial function.

Consequently, it is important to analyse the symbolic position of the judge and to show that the legal event, in both common law and civil law, is a communication process where judges, lawyers, and parties interact, perhaps in different ways, through a monologue-dialogue system in a dialectical relationship.[200] The judge is related to the totem and to the Oedipus complex, and we will examine the differences between the number of totems and the elements which contribute to the positioning of the judge, in both legal traditions.

également Ravaz, B., « Vérité Judiciaire et Vérité Religieuse », Champs libres n° 3, Paris, L'Harmattan 2002; « Le Juge Judiciaire Gardien de la Vérité Historique ?, », Champs libres n° 2, Paris, L'Harmattan 2002, pp. 225-245.

[199] This happened thanks to the magical power of the words. As Professor Brunet highlights “Thus we realise how applying the law means exercising a power: the power to decide on the meaning of the words. From this point of view, all judges would look like Humpty Dumpty who, (…), pretended to be the master in the field. Brunet, P., « Approche Critique du Vocabulaire Juridique Européen: Le Pouvoir des Juges », Chronique de droit européen & comparé N° 17, Centre d’études juridiques européennes et comparées (CEJEC – Université Paris Ouest – Nanterre La Défense), Les Petites Affiches, août 2008, pp. 7-12, esp. p.8.

[200] This book is not an in depth study of the different levels of justice or judges. It will be limited to the description of the legal event through general features. The kind of trial or *procès* which best fits with the described model is probably that of the criminal trial. With this in mind, I will not mention the differences between legal events with or without juries. It will nevertheless be taking into account as an element of the criminal justice structure in common law, although often used in civil law tradition. I will only consider that the presence or the absence of jury is without prejudice to the position of the judge as it is mentioned here.

The judge as totem, the judge in the Oedipus complex.

Psychoanalytic theory, and, in particular, the notions of totem and the Oedipus complex, may certainly be applied to the judge. More precisely, it is through the differences of quality and quantities of totemic position that the comparison may appear even more relevant.

The trial or the *procès* is an ambivalent legal event. This idea of ambivalence is present in Freud's works on the totem.[201] The totem, this object, this *thing* that holds a symbolic position for both the individual and for a group of individuals, is the foundation of a system of beliefs which creates a micro (social) organisation.

It is quite strange in a way to think that the totem is linked to the law.[202] But the totem is a *thing* which creates rules, and, in addition, which cannot violate the rules that it has itself created. Indeed, the taboos are linked with the sacredness of the totem. Freud explains that 'the clansmen are under the sacred obligation (subject to automatic sanctions) not to kill or destroy their totem and to avoid eating its flesh […]'.[203] Totemism results in 'instinctual renunciations': the worship of the totem, which includes particularly a prohibition to hurt or kill the totem, the brotherly alliance, and the restriction of "the tendency to violent rivalry between [the members of the brotherhood

[201] Freud, *Totem and Taboo*, pp. 1–17.

[202] Idem, p.51

[203] Idem, p.2

Alliance]".[204] The prohibitions, the taboos, revolve around the father, the first two on the father's side, and the last one on the father's contempt.[205] The totem is marked by the taboos that we will present here in a more detailed way, which are attached to it and constitute its heart and specifically the idea that the members of the totem cannot kill the totem (the horror of patricide).

The horror of patricide or the judge like symbolic representation of the father.

This 'thing', the totem, is present in the legal framework. It is present in the normative rules.[206] If we compare this approach to the trial (or the *procès*), considering it as a characteristic of the legal, dynamic, event in the legal arena, we find similar characteristics. The 'legal' totem is a place where judges, lawyers and scholars 'exist'. They belong to it and know that they cannot violate the rules it created.[207] It is there that

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[204] Freud, S., « Moses and Monotheism: Three essays », *SE 23* (1939), pp. 1–138, esp. p. 118. It also includes the desire of the woman in the horde.

[205] Ibid, p. 118. There is also the absolute rule of the abstinence towards all the totem's women (the horror of incest).

[206] Freud, *Totem and Taboo*, p. 51.

[207] The triangular relation judge-party A-party B. The particular totem, the legal totem, must be considered through the Oedipus complex, which evolves around the well-known triangular relationship between a child, the father and the mother. According to Klein, the development of the superego depends for a boy or a girl. It differs although the result is actually the same. In this structure, the boy refers to the father as ideal image, whereas the girl goes to him to find the reproductive system lacking in the mother. Klein makes no difference between boys and girls. For the girls, the proximity with the mother is a long preoedipal period, which changes during the phallic stage converging towards the penis that she doesn't have. Klein, M., *Le Complexe d'Oedipe*, Paris, Payot, 2001 (1945), pp.138–145. In the Oedipus complex, the boy considers, at the same time, the mother as a 'subject of sexual investment' and identifies himself to the father as (ideal) ego, or ideal ego of the boy as mentioned by Chasseguet-Smirgel, J., *The Ego Ideal*, London, Free Association Books, 1985, p. 104. The main problem is that 'the little boy realises that his father is on the

the myth of the primitive horde, presented in Freud's *Totem and Taboo*, is connected with the politico-legal institution of the father, the symbolic Father that we will apply to the judge.[208] This symbolic position in turn, may be filled in by other paternal figures. [209] In fact, political institutions may be considered as involved in the triangular relationship of the Oedipus complex. The father is, shall be, or will be killed, but because we are in the political sphere, where only the representation of a fiction exists, the killing may not be real; it is (always) symbolic.[210] We can conclude with two remarks: a) the father, or rather in this case the Father, represents, and therefore takes a symbolic position,[211] a position

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path leading to the mother as explained in Freud, S., « Identification » in « Group Psychology and the Analysis of the Ego », SE 28 (1921), pp. 105–110. The son wants to be like the father because he loves the mother: thus it is necessary to kill the father. The desire of the mother becomes a desire that is forbidden, so it is taboo. This causes the development of the superego, the censorship of the ego which monitors and tries to define the heir of the Oedipus complex, the parental authority's internalisation

[208] All the pieces of this puzzle, the different elements of the Oedipus complex described by Lacan in many of his mathematical schemas, help the cartography of the complex. He describes the complex by using the position of the subject S (Es), the division of the Ego a, and a' (the other, the mother), contributing in fact to the position of the father (or A) as the place of language, the authority, the law. Lacan, J., Écrits 1, Paris, Seuil, Point Essais, 1999 (1966), p. 53. Voir le « Schéma L ».

[209] This brings us to the story of the Corporal Lortie crime, narrated by Legendre. Lortie, a young corporal of the Canadian army, decided on the 8th of May 1984 to enter the building of the National Assembly of Quebec, with the intention of killing the government. He ran down the corridors using his automatic rifle against the people he met on his way, then, once arrived at the National Assembly Chamber, where nobody was present, because it was a day-off, he entered and sat on the president's chair, having killed three people and wounded eight. Commenting on his crime, Lortie claimed: 'the government of Quebec had the face of my father'. Legendre, P., Le Crime du Caporal Lortie, Traité sur le Père, Paris, Flammarion, Champs, 1989, p. 74.

[210] It is possible to kill the staff of an institution, but not to kill the institution. See, for instance, what Derrida writes about architecture of political institutions buildings. For Legendre, what is important in Lortie's story is that in this ferocious attack, Lortie entered the building which hosted Quebec's institution to kill these specific institutions.

[211] We may refer here to lacanian topography SIR, Symbolic, Imaginary, Real.

in the triangular relationship formed by the Oedipus complex; he is the authority, he is the law, and b) this shall be put in perspective with what Freud stated in *Civilisation and Its discontent,* that what begins in relation with the father ends with something which concerns the group.[212] We clearly see the social and cultural dimension of the superego, the Father representing the authority for a wider group than a family; the Law for society.[213]

One of the explanations for the French revolution is in line with this idea. The king of France himself was placed in a triangular oedipal position. The horde had to kill him. This 'real' murder by the Freudian horde can be put into perspective with the Lacanian symbolic order orchestrated in a democratic society through the elections. Because Lacan brings the *not-the-father (non du pere)* closer to the *name-of-the-father (nom du pere)*, the symbolic position of the 'regulator-father' is a link to the authority. The judge is part of, and comes from, the *Curia Regis.* He relates to the king. Both have a paternal function

[212] Freud, S., *Civilisation and Its Discontents*, London, Penguin, 2002 (1930), p. 133.

[213] This is linked to the society, to the group, and to its metaphors, as the idea of governing body, in the UK and that of 'separated' powers through the myth of the separation of powers. We could go beyond the scope of this book and comment here on the changes that have occurred in Canada and their impacts on Lortie. Indeed, 1982 is an important date for Canada which adopted a Constitution under the direction of Pierre Trudeau (The Constitution Act 1982) thus modifying the organisation of the country and getting 'freedoms' from London and in particular from the 'supreme' parliament of the United Kingdom (Westminster). Moreover, the strong figure himself, Trudeau, decided to quit his role of head of the government in early 1984.

of authority.[214] The Kings' traditional legitimacy and divine law 'pass' is transmitted to the judge, as an element of his court.

Even when the king is replaced by the elected elite (such as an elected head of state or an elected parliament[215]), the sacred aura of the judge is not only based on himself. The judge did not completely quit being sacred, remaining linked to the king and therefore to the divine. Let's take, for example, the *Conseil Supérieur de la Magistrature* (CSM): this council is responsible for the appointment, the nomination and the discipline of judges and procurers. Under Article 64 of the Constitution of the Fifth Republic, the head of State is the guarantor of judiciary independence.

> Le Président de la République est garant de l'indépendance de l'autorité judiciaire.
> Il est assisté par le Conseil supérieur de la magistrature.
> Une loi organique porte statut des magistrats.
> Les magistrats du siège sont inamovibles.

Until the constitutional amendment of 2008, the CSM was thus presided over by the head of state himself (Article 65 of the Constitution). [216] This situation simultaneously

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[214] The Curia Regis is an institution that could be found both in France and England as stated by Adams, G.B., in « the Descendants of the Curia Regis », American Historical Review 13 (1) (Oct. 1907), pp. 11–15. See note 2 « Reference should also be made to the chart of the descent of French institutions ».

[215] See Dicey: « The authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of the law … The royal supremacy has now passed into that sovereignty of Parliament »: Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, London, Macmillan and Co., 1927, p. 279.

[216] The original version of the Constitution stated in article 65:

contributed to favouring the autonomy of the judge and the maintenance of the sacred link 'God/Head of State/Judge'. We may find similar examples in common law countries. The Constitutional Reform Act 2005, chapter 4 s. 12 concerns the transfer of the

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Le Conseil Supérieur de la Magistrature est présidé par le Président de la République. Le Ministre de la Justice en est le vice-président de droit. Il peut suppléer le Président de la République. Le Conseil Supérieur comprend en outre neuf membres désignés par le Président de la République dans les conditions fixées par une loi organiqu~. Le Conseil Supérieur de la Magistrature fait des propositions pour les nominations de magistrats du siège à la Cour de Cassation et pour celles de Premier Président de Cour d'Appel. Il donne son avis dans les conditions fixées par la loi organique sur les propositions du Ministre de la Justice relatives aux nominations des autres magistrats du siège. Il est consulté sur les grâces dans les conditions fixées par une loi organique. Le Conseil Supérieur de la Magistrature statue comme conseil de discipline des magistrats du siège. Il est alors présidé par le Premier Président de la Cour de Cassation. See https://www.legifrance.gouv.fr/Droit-francais/Constitution. Last accessed 21 January 2017. The revision of 2008 modified it. Indeed, as stated in the expose: 'Enfin, **l'article 28** du projet organise la refonte du Conseil supérieur de la magistrature. L'évolution du rôle que joue l'autorité judiciaire dans une démocratie moderne impose que le Président de la République cesse d'en assurer la présidence. Le texte dispose que la formation compétente à l'égard du siège sera présidée par le Premier président de la Cour de cassation et celle qui est compétente à l'égard du parquet par le Procureur général près la Cour de cassation. Le garde des sceaux, ou son représentant, pourront toutefois assister aux séances du Conseil, sauf en matière disciplinaire. Pour garantir, outre l'indépendance de l'institution, sa nécessaire ouverture, il est également prévu que les magistrats (au nombre de sept au total, président compris) seront désormais minoritaires au sein du Conseil. Outre un conseiller d'État désigné par le Conseil d'État et un avocat, dont la loi organique précisera qu'il est désigné par le Conseil national des barreaux, six personnalités qualifiées désignées à raison de deux chacun par le Président de la République, le président de l'Assemblée nationale et le président du Sénat, complèteront la composition du Conseil supérieur de la magistrature. Dans la même logique, une loi organique modifiera l'ordonnance n° 58-1270 du 22 décembre 1958 relative au statut de la magistrature pour permettre la saisine disciplinaire du Conseil supérieur de la magistrature par les justiciables eux-mêmes, avec des filtres appropriés, et non plus seulement par le garde des sceaux et les premiers présidents de cours d'appel. Le projet prévoit en dernier lieu que le Conseil sera appelé, dans un souci de transparence, à émettre un avis sur les nominations des procureurs généraux alors que, s'agissant du parquet, il ne peut aujourd'hui le faire qu'à l'égard des procureurs et substituts.' See http://mjp.univ-perp.fr/france/pjlc2008-2.htm. Last accessed 21 January 2017.

This is the same in Italy. See Richard, P., *Introduction au Droit Italien: Institutions juridictionnelles et droit procédural*, Paris, L'Harmattan, 2004, p. 127.

appointment's functions to Her Majesty. In schedule 3, it provides indeed that 'Her Majesty, instead of the Lord Chancellor, shall appoint to certain functions'. Thus, the monarch is responsible for the nomination and revocation of judges, as the monarch-head of the State is the guarantor of the independence of the judges. This is also applicable to the president head of State.

So, what appears essential seems to be the symbolic position. This position creates authority and is related to what is sacred. It seems closely linked to its archaeology: the religion (God, the Father) and the tradition (the sovereign monarch), gathered through the vertical link 'God-judge'. The position of the judge depends on the horror of the patricide: the members of the totem cannot kill the totem. The 'totem judge' becomes sacred and takes a specific and fundamental position. The judge is also, in many respects, in an oedipal situation similar to that of the king as soon as he is in a totemic position himself, or by the presence of legality. We now need to examine further the second fundamental rule of the totem.

The horror of incest.

In primitive societies, the rule of incest means that certain kinds of relationship – which Freud called customary rules – are prohibited. This rule was respected with religious rigour.[217] The rule can extend to real sex relations in the strict sense. In fact, in certain primitive societies, it is even forbidden for brothers and sisters to shake hands or even to

[217] Freud, *Totem and Taboo*, p. 10.

talk, whereas in others, the father cannot stay at home alone with his daughters. However, the strict rule can be extended to the specific act of concealment. A girl can avoid her father by hiding when he passes, or a man needs to deliberately hide and refrain from looking towards his mother-in-law when she is passing.[218] The totem, sacred, cannot be looked at. It is so feared that even the optical connection shall be avoided. It is thus logical to link this to Bentham and his famous panopticon. The system described by Bentham is based on an optical relationship of power, which Foucault explores in his work, emphasising the effects of the panoptical architecture: 'the major effect of the Panopticon: induces among the inmates a conscientious and permanent feeling of visibility which assures the automatic functioning of power'.[219] In addition, it is clear for Foucault 'that the perfection of the power should tend to render its actual exercise unnecessary'.[220] The idea of the automatic functioning of power thus corresponds best to the unconscious than to the conscious: it is linked to the realisation of the symbolic position of the father and his authority. Bentham wanted a 'visible and unverifiable'[221] power. Obviously, the 'Panopticon is a machine to distinguish the couple seen-be seen'.[222] Individuals within the peripheral ring are always watched but never have the capacity to see; and the individuals (who have the power) in the middle, in the watchtower, can see everything without being seen. What is particularly interesting here, is the notion of appearance of power which shows an ideal form of power.[223] In a way, this point is similar to what Freud

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[218] Freud, *Totem and Taboo*, p. 12.

[219] Foucault, M., *Surveiller et Punir*, Paris, Gallimard, Tel, 1975, p. 234.

[220] Ibid.

[221] Ibid p.235

[222] Ibid p.235

[223] Ibid p.239.

describes in *Totem and Taboo* and at the place of the A according to Lacan, in place of the 'symbolic Father'. We have here the power seen at its source, as a magical thing which is the paramount element of the basic organisation of the primitive society. Hiding, because of a magical belief, contributes to fear of the totem. The visual link becomes crucial. But this magic goes further than the conscious idea of its power: what becomes important is authority. The repressed thoughts imposed by the fear which is, in the case of primitive societies, the avoidance of any links with the totem, visual or optical, suppress the desire for the totem. What remains of the past in our present, is the unconscious fear of the power and the unconscious fear of the totem thanks to the Father and his authority. In the situation of the legal event, one can apprehend this second rule and, in particular, the optical connection. If the parties decide to go on trial or *procès*, this taboo emerges. Nevertheless, it can take different forms. In particular, it can operate as a deterrent, with the consequence of encouraging the individuals to stay in line and conform to the rules in order to avoid facing trial; but it also creates the fear of the legal event for the parties concerned. Lord Phillips' narration concerning his first client's behaviour illustrates this point perfectly: 'I met my client for the first time in the waiting room the day of the hearing. She was obviously very nervous. The first thing that she said to me was "I won't have to give evidence, will I?"' His client was unable to face the judge and the case was resolved between the councils outside the court hearing. Lord Phillips concluded: 'she was relieved to miss her day in court, but I was very disappointed to miss mine'.[224] Lord Phillips' client's behaviour confirms what Lacan expresses, concerning

[224] Discours de Lord Phillips of Worth Matravers, Chief Justice of England and Wales, « Alternative Dispute Resolution: An English Viewpoint », India 29 Mars 2008.

the symbolic order, which reminds us of Eliade and the myth of the medicines: it is one that cures. It's an individual cure, a personal one, but it is also a collective cure for the group. There are therefore mechanisms created that avoid trials. Let's limit ourselves to the story of Lord Phillips' client and how, in common law, very few disputes arrive at the stage of the legal event. Indeed, it is enough to focus on the procedures which exist before the trial, the ADR, alternative dispute resolutions (such as arbitration or mediation) used to avoid the occurrence of the legal event.[225]

To come back to Oedipus, we know that King Oedipus violated both taboos. He was both the incestuous rival of his father, and his murderer. For Lacan, the oedipal identification markers around the paternal totem were guilt, aggression, the murder of the father and the rivalry between the brothers, which structure the subject.[226] The father's position in the symbolic order is simple and clear: he is the place which founds human actions. The social pact created by the brothers' alliance, the moment after the murder, and the transcendence of aggression, concerns the symbol and, finally, the symbolic order. The system created is consciously revealed, while always present in our unconscious. The Oedipus complex links and is linked to the totem and its taboos. The judge collects all the aspects of the totem. But because of the articulation around the two rules, we can consider the case where the totem actually delimits a range of different situations based on the

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http://www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-29032008.
www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf. Au 15 novembre 2010.

[225] See Marrani, D and Farah, Y, 'ADR in the Administrative Law: A Perspective from the United Kingdom', in *Alternative Dispute Resolution in European Administrative Law*, (Heidelberg: Springer 2014), pp.259-279

[226] Lacan, J., « L'agressivité en psychanalyse », in Lacan, *Écrits 1*, pp. 100–123, esp. p. 116.

legal traditions' differences. This means that we are confronted by the quality and the quantities of totemic position.

Quality and quantity of totemic position.

A strict division between the two legal traditions may be traced, thanks to the Lacano-Freudian ideas. The totemic organisation of the *procès* can be considered as a mono-totemic organisation; the organisation of the trial as a bi-totemic organisation. It is one important difference between the two major legal traditions. Both have the underlying and unconscious idea of a totem in their legal activities, but the functions differ and operate on different levels. Indeed, there is a second totem in common law legal events. In the *procès,* a second totem also exists but is situated outside the legal event: inside the legal organisation itself. These structures seem essential to distinguish the judge in common law from the judge in civil law traditions. The quality and the quantity of totems would then result from particular elements: the training of the judge, the speech of the judge, and the symbolic position, itself determined by other variables.

Training of the judge.

The recruitment and the administrative, sociological and politico-legal aspects of the judiciary inform us not only of the origin of the judge but also how they are positioned in the myth of the separation of powers. In both legal traditions, the training of the judge is very important to the concept of the delivering of justice. For Guarnieri and Pederzoli, two basic models of legal recruitment exist; the bureaucratic one which corresponds to

what happens in the civil law environment, and the professional model which corresponds to what happens in that of common law.[227] In common law, only experienced practitioners can become judges. Accordingly, it is a system of training mainly based on scientific knowledge, with universities as main suppliers offering the education of future judges.[228] So, graduates will have to become solicitors or barristers and practise for a reasonable number of years before being authorised to become a judge. At this stage, it is particularly important to note that the legal team involved in the trial; both judges and lawyers, is trained in the same way and speaks the same language. However, Woodhouse underlined that 'the appointment system of the judges in England and Wales has often been criticised because it is secret and discriminatory'.[229] There is no distinction between 'assistant/paralegals' and judges, except the move from an 'active' position to a 'passive' position of arbiter or referee. Just like a monarch or head of state in a parliamentary regime, the judge does not participate in the adversarial system. He acts like an arbiter or referee and not like a captain. The judge represents and seems to be positioned as a totem. This is increased in a circulatory way to what the recruitment of the judges looks like: the judges come from the 'horde'.[230] Here, the judge is the father of the horde: the Father. The young want to take his place and kill him. The symbolic killing operates as a

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[227] Guarnieri, C. et Pederzoli, P., *The Powers of Judges: A comparative study of courts and democracy*, Oxford, OUP, 2003, p. 20.

[228] We can cite here the four discourses of Lacan and specifically the speech of the academic, le discours de l'universitaire, where the professor knows that the student does not know, where the 'sujet supposé savoir est une nécessité'.

[229] Woodhouse, D., « The Law and Politics: More power to the judge – and to the people? » Parliamentary Affairs 54 (2001), pp. 223–237, esp. p. 234.

[230] Judges regularly met and dine with the 'horde'. We are faced with a collegiate ritual, that of the diners taking place in the 'Inns'. Legrand and Samuel, *Common Law*, p. 47.

revolution, a situation which is similar to what Pareto describes as the circulation of elites.[231] The younger will take the place of the elder. If we refer to David's words, the judge is 'the practitioners' heir'; he acquires a symbolic position of the 'father-regulator', the law, the authority of A, the Father, in the Oedipus complex.

In common law, the training place is an experience of the bar, while in the civil law tradition, judges are trained in specialised schools after being selected via competition among the academic graduates.[232] There is a divide between the legal actors who will be on the parties' side, the defence or not, and the legal actor who will be on the side of the State, the judge. Moreover, the judge is qualified as a public servant; it is obvious that he is there to serve the State, and basically the social structure, in accordance with his origin from the Curia Regis. The civil law judge does not seem to be a totem similar to that which we find in common law. The only link between the different actors of the legal team is that of their education. But the way the career of the judges is organised, through its structured form and its public function, itself conditioned by the weight of the authority and the symbolic of public power, creates a strong move among the judges, from the low level (young people) to the upper level (the elderly).[233] In a way, the idea of circulation

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[231] Pareto, V., *The Rise and Fall of Elites: An application of theoretical sociology*, New Jersey, Transaction Books, 1991.

[232] Legrand et Samuel, *Common Law*, p. 47.

[233] Traditionally, young judges will work for lower courts after their initial training; they enter in a bureaucratic career, will be promoted on the basis of their merit and their experience. Article 64 of the Constitution of the Fifth Republic which enshrines the President of the Republic as guarantor of the judiciary Independence, provides, in addition that judges are appointed with security of tenure

of elites and the totem reappear here, but in a separate bubble in the mechanism, though they will have less impact on the *procès* than in the case of the trial.

The training of the judge highlights the characteristics of the totem(s) in both legal events. In the trial, we can first consider the trial itself as totem, and then the judge. In the *procès,* only the latter is a totem. The judge does not have a second totemic position in the legal event, but has one, outside, in the public function and in others among the executive. This point may be demonstrated by the constantly renewed declaration that in England, the judiciary is (considered as) independent, while in France, there is a constant willingness of an independent judicial power, although qualified as authority, implying a lack of such independence, or at least a perception of this lack. As Lord Brown-Wilkinson stated in the *Re Pinochet* case,

> There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] K.B. 256, 259).[234]

See also the correlation with visual taboo and also the Chapter on cameras in courts for instance.

The table below incorporates the ideas developed above:

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[234] https://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm. Last accessed 17 February 2017.

Common law : **structure double totem**		
Trial/Totem 1		
Juge / Totem 2	**Parties**	
Solicitors/Barristers		
Civil law: **structure one totem**		
Procès /Totem		
Parties ; Auxiliaires		**Juge/totem**
		Young judges

There are similar situations in both legal events – but with particularities linked to the quantities of totem. Moreover, the differences seem to increase when one analyses the judge's speech.

Speech of the judge.

Derrida explains that the phenomological space is open in and by the language, and more particularly that because of 'its legal value, the right to a distinction between the fact and the intentional law entirely depends on the language'.[235] The language conditions the distinction between the facts and law. In addition, it gives the legal event its articulation, limits it, and defines it – as it defines, according to Wittgenstein's famous formula, the

[235] Derrida, J., *La Voix et le Phénomène*, Paris, PUF, Champs 3e éd., 2005, p. 21.

world (or even all the worlds).[236] The judge is positioned through his speech which implements a language practice constituting a social link between the actors. The first actor (agent) supports a 'truth' which necessarily determines him every time he addresses the second actor (the other). The second one will only be able to react by producing something that depends on the truth that the first one has determined. However, this product cannot come back to the 'truth'. As Richard demonstrates, this perception structures the link between the two actors around four places.[237]

Agent				Other
		impossible		
	Necessary		contingent	
		possible		
Truth				Production

On the base of this schema and around these structural positions, four speeches may be organised depending on four factors which circulate around the first model to generate the next speech. Thus, a circuit is formed: the master's speech evolves towards the analyst's speech, including the hysteric's speech and the scholar's speech. Their

[236] « The limits of my language mean the limits of my world ». Para. 5. 6, Wittgenstein, L., *Tractatus Logico-philosophicus*, Paris, Gallimard, Tel, 1961, p. 86.

[237] Richard, *Le Jeu de la Différence : Réflexions sur l'épistémologie du droit comparé*, Laval, PUL Dikè , 2007, pp.114-116.

production result from the position of the four terms, constitutive elements of the language: the meaning-master S1, S2 knowledge, the subject (barred) $ and the rest, what remains, the object that we also find in the Lacanian explanation of the Oedipus complex. These symbols mainly formed the master's speech; the fundamental structure base of all the other speeches. It is particularly important here to consider the master's speech and that of the analyst.

The master's speech obeys the following variables $ -> S1 -> S2 -> a. It is dominated by S1, the signified-master (here the agent). Lacan names it the Law.[238] The Law is the law. The law is authorised by justice, without ever being labelled justice. S1 as master-meaning, theoretical knowledge, imposes knowledge on S2 (here the other), and is the favourite ground of the slave. One can reasonably consider that the position of the judge in the trial/*procès* is situated at the master's speech level. In this schema, the judge *is* the Law. His position results from the 'truth' and the understanding that the other knows that he knows. The civil law judge, in a central powerful position, is seated above the other actors; he is the master. He is the 'mouth' which speaks or tells the law. When he speaks, his words are final. But he doesn't speak for himself, he speaks 'on behalf of'; through his authority he represents the society and what he says is not neutral. After a complete circuit, going through the hysteric's speech position, we are faced again with this set of variables: a-> $-> S1-> S2 and to that of the scholar S1->S2->a->$, after a revolution, the analyst's speech appears.

[238] Lacan, J., *Le Séminaire XVII : L'Envers de la psychanalyse*, Paris, Seuil, Champs Freudien, 1991, p. 48.

The analyst's speech is formulated as follows: S2 -> a -> $ -> S1. Object a represents here the substantial speech, resulting from the rejection of the speech. The agent's position in this case is that of neutrality. The other one is the object which looks like the neutral agent expressing the 'truth', because the agent knows from knowledge S2. We know that the analyst in psychoanalysis is a person in a neutral position. The subject is supposed to believe what the agent says, because the agent, here the analyst, is supposed to know. [239] This position also corresponds to that of the common law judge. In this context, the judge does not interfere. He is the totem and he is not the centre of the dialogical process which occurs in the legal event. Ultimately, the production is knowledge which goes through the previous memorised decisions and sentences, the judicial precedents. It is, in fact, 'through the accumulation of precedent', that 'a body of common experience' is created, through memory.[240] Oral becomes 'a word addressed to', having the 'function of a certain pact'.[241] The inversion of the saying *Verba Volant, scripta manent* finds its fullest meaning/expression: 'The *scripta* are *Volant*, whereas the words, […] remain'.[242] The truth, thanks to the trial, is built, following the stages of justice, with the law, while building this law. This is not without relation to the idea of 'chain novel' evoked by Dworkin. Each judge actually becomes a novelist, merely a participant who collaborates on a broader, more complex, but continuous work.[243] One party contradicts the other one to build a verbal joust constituting the real links of a chain.

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[239] Zizek, S., *How to Read Lacan*, London, Granta books, 2006, p. 29.

[240] Glenn, P., *Legal Traditions of the World*, Oxford, OUP 3e ed., 2007, p.125.

[241] Lacan, J., *Le Séminaire II : Le moi dans la théorie de Freud et dans la technique de la psychanalyse*, Paris, Seuil, 1978, p.233

[242] Ibid, p.232.

[243] Dworkin, R., *Law's Empire*, Cambridge, Harvard University Press, 1986, pp.228-238, esp.229.

This thesis confirms the idea of two opposite ontologies; that of the law – of the statute law, the norm voted by a legislature, a Parliament – and that of the case law, the norm emanating from judges. As Legrand explained 'the typical English judgment is the law and is as such regardless of any Act' and does not aspire to its statute. In France 'the decision intervenes as coming from the interior of the law [...] it intends to be the law'.[244] This contributes to a different positioning of the judge, depending on the place where we are, in the *procès* or the trial, which is also conditioned by several elements.

Conditioning elements of the symbolic position of the judge.

There are four of them, including three specific (the judge's perception on his function; the idea of 'in the name of' and, finally, the important question of appearance) and one broader (the civilisation issue of oral and written).

The perception of the judge on his function.

We may distinguish civil law from common law through the different perceptions of the function of judging. It is well known that in common law, judges are imagined as being responsible for the law, whereas in civil tradition, they are supposed to be only interpreters of the laws. Indeed, for Dicey that 'English law is in reality made by the

[244] Legrand, P., *Droit Comparé*, Paris, PUF, Que Sais Je 2e ed., 1999, p. 111.

judges […],[245] whereas Cardozo developed the idea of 'the judge as legislator'.[246] But Dicey considers that judicial legislation is only a delegated or subordinated legislation,[247] whereas for Cardozo the judge-made-law has always been 'secondary and subordinated to the law made by the legislator'. [248] The common law is seen as made by the judges and it seems that at least one important part of what is considered as law comes from judges. In addition, judges proclaim what has always been in the *existence,* but has never been revealed before. When something is revealed, this 'thing' becomes a principle of common law. This vision merges with the psychoanalytic theory. A legal principle is unconsciously present, but needs to be rediscovered. It has been repressed by the social structure. Yet this latter, one day, will need it because of a social affect, the advent of a specific time in history, or when a dispute opposes the members of society. Basically, there is no better solution than the one situated elsewhere… deeply rooted in history: it is the judge's role to bring it back into the light. [249] The 'psychoanalyst-judge', thanks to the use of transfer, extracts, from the built truth of the parties, what has always existed, unconsciously, as a legal principle.

According to Freud, the unconscious is the social, what Lacan considers, thanks to Lévi-Strauss, as the language, the language of the Other, which is also the language of the

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[245] Dicey, *Law of the Constitution*, p. 58.

[246] Cardozo, B.N., *The Nature of the Judicial Process*, New Haven, Yale UP 1921, pp. 103–141.

[247] Dicey, *Law of the Constitution*, p. 58.

[248] Cardozo, *The Nature of the Judicial Process*, p. 14.

[249] We can really see clearly here if history as to be considered as history of the society or as the personal history of the judge. That said, it may be the case that the two are in fact connected.

Father.[250] The repressed principle thus highlighted may be linked with the definition of the two psychoanalysts. The principle is the social. The common law has a social dimension that 'the law of Act', the legislative law, does not share. The practical aspect of one contrasts with the theoretical aspect of the other one. The language contributes to the expression of this principle. The judge, through the legal event, expresses what was hidden. In addition, as soon as a dispute is 'treated' at the highest level of a supreme court, it will become so powerful that its outcome will bind the future decisions.[251] Judicial precedents represent a work to a conscious level. The example of the *speeches* of the former supreme judges, the Law Lords, which are orally developed and exposed (opinions), illustrates well enough this point. The judge 'tells us', and so 'exposes the law'. The judge is the subject who is supposed to know. We believe that he knows the social truth and that he will announce it within the limit of the legal precedents. Dicey sums up this message: '[our judges'] habit of deciding one case in accordance with the principle, or supposed principle, which governed a former case, leads inevitably to the gradual formation by the Courts of fixed rules for decision, which are in effect laws'.[252]

In the civil law tradition, parliaments have the function of creating law. The judge cannot change or even 'touch' the law, because of its 'mythical' power. The French Revolution gave its foundation to the myth – this depoliticised speech[253] – through Article 6 of the Declaration of the Rights of Man and of Citizens of 1789:

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[250] Chaumon, F., *Lacan, le Sujet et la Jouissance*, Paris, Michalon, Le Bien Commun, 2004, p. 18.

[251] As this is compulsory to create such a memory, such au authority, in the exposing the (legal) principle.

[252] Dicey, *Law of the Constitution*, p. 58.

[253] Barthes, R., *Mythologies*, Paris, Seuil, Point Essais, 1957, p.217.

> La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation. Elle doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse. Tous les Citoyens étant égaux à ses yeux sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents.

So, 'Law is the expression of the general will' which implements Rousseau's ideas. Even if one can argue that judges have always been involved in the normative creation (especially in cases where legislation is silent or in specialised areas such as administrative law), the function of judges as legal actors is that of interpreting the law.[254] Judges work by using meta-languages, by interpreting the double semiotic relationship which creates the myth of the law.[255] Basically, this is verified in Article 5 of the French civil code through the idea that 'judges are forbidden to pronounce judgment by way of general and regulatory dispositions in cases that are referred to them' (Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises. This is the same version since 1803). Judges in civil law tradition thus are not in a symbolic position which may be considered as strong as the position of their common-law colleagues. The rules they applied have been decided before their action and they must respect them. Here the rules are conscious, although nothing discourages

[254] Dicey, *Law of the Constitution*, pp. 378–380, esp. p. 380: « It is true of this branch of French law as of the English constitution that it "has not been made but has grown" ».

[255] Barthes, *Mythologies*, pp. 183–190.

anyone to think that unconsciously, the legislator should respect these principles in his legislative work. The most important principle is undoubtedly the one contained in Article 4 of the civil code; 'A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice' (Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice. This is the same version since 1803). Judges are bound by these guidelines; they have no other option but to interpret. This is a specific characteristic of the position of the judge in the civil law tradition. But here again, the judge does not participate to the same level of totemisation as his common-law counterpart. Moreover, the judge relies on another interpretative authority, positioned outside the totem of the *procès*; the doctrine Professor Samuel presents as an important body of professors, binding judges thanks to a science of the law they develop, influenced by the logic and mathematics.[256] The civil law judge interprets but never creates. He follows the principles established by the superego 'State' which, de facto, a member of society may, or must, accept to live in or may decide to leave. The judge must take into account that a member of society does not respect the rules, placing him in a position of guilt whereas the State institutionalised the reparation of the wrong committed by non-complying with the law.

Appearance and protection.

[256] Samuel considers that English judges were never constraint by a legal science and therefore there has never been a body of professors: Samuel, G., « Epistemology and Comparative Law », in Van Hoecke, M., (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, Hart, 2004, p. 72.

The appearance focuses on the court ceremony and how the 'accessories' of the judge's uniform and the place where justice is rendered are essential for the symbolic positioning of the judge. Moreover, appearance creates a distance which is, in a second time, protected.

Appearance and the creation of the distance.

The parties can see the physical reality of the legal apparatus before them. It operates on at least two levels: the architecture of the building and the uniform of the actors. According to Garapon, 'the first act of justice is to delineate a place, to define a favourable space to its fulfilment'[257] while the uniform, the costume, the gown, this furred gown La Fontaine evoked 'covers a double body: the own body of the character who wears it and the invisible body of the social'.[258] The decorum and the ballet of the actors depict an impressive play for the layman. Is the process of justice good or beautiful? It is worth noting that what was considered as important in the decision of creation of the new Supreme Court in the United Kingdom was actually the creation of an independent court, physically separated from the House of Lords, where the most important court decisions, the final ones, had been delivered until then. Thus, what was essential in the choice was

[257] Garapon, *Bien Juger,* p. 23. « [l]e premier geste de justice est de délimiter un lieu, de circonscrire un espace propice à son accomplissement »

[258] Ibid. p.83. « couvre un double corps: le corps propre du personnage qui le porte et le corps invisible du social »

to create a specific place with its own building.[259] At every level, justice must be seen to be delivered. The judge will give judgment in a place where he is identified as a symbolic figure, as the Father, the face of the law.[260] In both traditions, the judge in the space of the legal event holds an "extra", elevated seat, designed to show his strength and to demonstrate his authority. In civil tradition, the judge is centred and becomes the axiological reference. The actors; the jury, the accused and the lawyers, are organised around the judge in a specific triangle. In common law, the judge is centred, but the actors are not organised around him. The judge does not appear as an axiological reference. The jury is to the side and the lawyers directly address the jury. As Garapon notes, two communication axes exist between the lawyers, the two parties and the witnesses, and between the lawyers and the jury.[261] That is mainly why very little 'goes through' the judge, whereas in France, for example, everything goes through the judge. If we reflect on this idea correlatively to that of the totem, the French judges, with more power and less representation, do not position themselves as totem whereas common law judges, with less power, but more representation, appear as totem. Let us not forget that the totem is to be feared. It creates obsessive prohibitions which prevent the individuals from doing certain things, starting with touching or looking at the totem. [262] From physical contact to eye contact, the physical position of the judge in a court stresses (or maybe at least should emphasise) the difference between the totemic positions: the common-law judge is in a

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[259] The Constitutional Reform Act 2005. Voir aussi les commentaires de Lord Falconer's: « [t]he location and the setting for the UK Supreme Court should be a reflection of its importance and its place at the apex of the justice system, and the heart of the constitution »: Hansard 1 Mar 2006: Column WS29.

[260] Lacan, J., « F Fonction et Champ de la Parole et du Langage », in Lacan, *Ecrits 1*, Op. Cit., p. 276.

[261] Garapon, *Bien Juger*, p. 153. Voir ses commentaires sur les juges américains, pp. 149–174.

[262] Freud, *Totem and Taboo*, p. 27.

position which forces the other actors of the legal event to avoid looking at him because he is the totem, and in short, he is taboo. Symbolism of the building imposes the solemnity of the State, its strength, through the authority, which must be linked to the symbolism of the uniform of the judges.

The coloured gowns and the wigs are key elements of the judge's uniform.[263] The wigs are particularly 'considered as a powerful symbol which represents the long story of the British justice'.[264] The silk gowns with ermine, the royal fur, caricatured by that of the cat in the fables, and the gown of the first president of the French Cour de cassation, are also elements of the legal costume, similar to that of drama: 'its role is to be seen'. [265] Thus, distance is created through pageantry, the sublime. As Meltzer writes, 'the apprehension of beauty contains in its very nature, the fear of the possibility of its destruction'.[266] This pageantry, this sublime element, makes us aware of an imposed and necessary majesty: Imposed by transcendence, necessary for social cohesion. The drama of justice contributes to the creation and the continuity of a necessary distance between the legal actors in the legal event. Ultimately, it contributes to the authority of the judge-Father. Indeed, 'the costume of the ritual made those who wear it representatives'.[267]

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[263] Public Perceptions of Working Court Dress in England and Wales, October 2002, 1/3 p. 4 http://www.dca.gov.uk/consult/courtdress/orcreport.pdf. Au 15 novembre 2010.

[264] 4.4.1.p. 14. One of this comments seems closely related to the idea developed by La Fontaine on the « chat fourrée ». « wigs », perruques signify that justice has been served. « the wig signifies that justice is being done ». We may compare this with what is said in In Re Pinochet.

[265] Garapon, *Bien Juger*, p. 72.

[266] Meltzer, D., « The Apprehension of Beauty », in Meltzer, D., *The Apprehension of Beauty*, Strath Tay, Clunie Press, 1988, p. 6.

[267] Garapon, *Bien Juger*, p. 94.

Representation, because of the distance, accentuates the symbolic, as does the ability to represent. The judge's costume, though, is a decisive issue. The judge is the judge because he wears 'something' which distinguishes him from the others. The uniform enables the judge to be identified as such and to identify himself as a judge. He operates thanks to the legal event in a demonstration of the temporary superiority of the social among the individual.

If we come back to a comparison between the traditions, we may say that in the common law the relationship between the architecture and the dress code – and therefore, also the symbolic role of the judge – includes, *ab initio* the idea that the judge is the character who symbolises the existence of the social structure. This seems to refer to the ideal notion of the ego. A contrario within the civil law tradition, the judge is not considered as independent. It seems that in the shift from the king to the judge as source of justice after the French Revolution, the judge has become an element of the 'superego' in what became the 'new' State. In both cases, the parties unconsciously know that the judge is here to correct, to cure, and to remedy. The judge has an orthopaedic role, because he symbolises what must be.[268]

Protection against the failures of the appearance/appearance's failures.

[268] In common law, the parties are in an 'internal' dialogue which creates a monologue, a monolithic dogmatic truth with their legal teams. Both monologues are exposed to the judge. The judge will declare which truth is the best truth, after having confronted the monologues in a dialectical way. In the civil law tradition, the judge is here to create a truth in correlation with the State superego.

One can consider that assaults against judges are related to the presence or the absence of a particular device, such as ceremonial aspects like the uniform. A judge who does not wear his gown does not represent society in the same way as one who does. In fact, we can say that he does not represent society at all: the lack of distance is signalled by the absence of symbolism and demonstrates a lack of authority. The totem is not protected from the horror of patricide. Lucien, who gathered impressive statistics on the issue in his research, indicates that the assaults against court judges constitute the negation of the symbolic of the judge.[269] In order to promote the symbolic position of the judge, a special tool is needed, an additional protection.[270] In the United Kingdom, there is, for instance, contempt of court, which corresponds to the similar provisions of the French Penal code on the offences against the authority of justice (S. III). We notice that a kind of contempt exists which is relevant to the idea of the totem, to the visual taboo: the one which concerns the taking of any photograph, the making of any portrait or any sketch of a judge or a witness, or a party to any proceedings before the court, either in court or in the

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[269] Lucien, A., *Médiation et modernité, Approche communicationnelle de l'institution judiciaire*, Toulon, USTV, Thèse, 2007, esp. p. 241.

[270] Addo, M.K., « Are Judges beyond Criticism under Article 10 of the European Convention on Human Rights? », ICLQ 47 (2) (Apr., 1998), pp. 425–438, esp. p. 429. Article 10 focuses on Freedom of expression
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

precincts of the building (section 41, Criminal Justice Act 1925).[271] The most serious offences, the 'violation of the respect due to justice' as titles paragraph 1 of the section 3 of chapter V of the Penal code, are the abuses and contempt of court. Here, the criticisms against the judicial authority are considered as attacking the symbolic position of the judge. Moreover, the Penal code underlines the function of the 'additional protection'. Everything which is likely to undermine the authority of justice or to harm its

[271] http://www.legislation.gov.uk/ukpga/Geo5/15-16/86/contents. Last accessed 17 February 2017.

Prohibition on taking photographs, &c., in court.

(1)No person shall—

(a)take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b)publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof;

and if any person acts in contravention of this section he shall, on summary conviction, be liable in respect of each offence to a fine not exceeding fifty pounds.

[F1(1A)See section 32 of the Crime and Courts Act 2013 for power to provide for exceptions.**]**

(2)For the purposes of this section—

[F2(a)the expression "court" means any court of justice (including the court of a coroner), apart from the Supreme Court;**]**

(b)the expression "Judge" includes . . . **F3**, registrar, magistrate, justice and coroner:

(c)a photograph, portrait or sketch shall be deemed to be a photograph, portrait or sketch taken or made in court if it is taken or made in the court–room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the court–room or any such building or precincts as aforesaid.

As indicated here, there are many changes that are described in Chapter IV. They concerned S. 41(1A) inserted (15.7.2013) by Crime and Courts Act 2013 (c. 22), **ss. 32(7)**, 61(3); S.I. 2013/1725, art. 2(f) (as F1) and S. 41(2)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), **ss. 47(1)**, 148(1); S.I. 2009/1604, art. 2(b) (as F2).

independence must be fought. These are reminders of what is behind the judge, the 'power', the authority of society.[272]

When the offence is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible. Criminal proceedings are time-barred after three months from the day on which the offence defined by the present article was committed, if in the meantime no act of investigation or prosecution has taken place.

Judging 'in the name of'.

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272 https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000006418663&dateTexte&categorieLien=cid. Last accessed 21 January 2017. Article 434–24 : L'outrage par paroles, gestes ou menaces, par écrits ou images de toute nature non rendus publics ou par l'envoi d'objets quelconques adressé à un magistrat, un juré ou toute personne siégeant dans une formation juridictionnelle dans l'exercice de ses fonctions ou à l'occasion de cet exercice et tendant à porter atteinte à sa dignité ou au respect dû à la fonction dont il est investi est puni d'un an d'emprisonnement et de 15000 euros d'amende. Si l'outrage a lieu à l'audience d'une cour, d'un tribunal ou d'une formation juridictionnelle, la peine est portée à deux ans d'emprisonnement et à 30000 euros d'amende.. Article 434–25 : Le fait de chercher à jeter le discrédit, publiquement par actes, paroles, écrits ou images de toute nature, sur un acte ou une décision juridictionnelle, dans des conditions de nature à porter atteinte à l'autorité de la justice ou à son indépendance est puni de six mois d'emprisonnement et de 7500 euros d'amende. Les dispositions de l'alinéa précédent ne s'appliquent pas aux commentaires techniques ni aux actes, paroles, écrits ou images de toute nature tendant à la réformation, la cassation ou la révision d'une décision. Lorsque l'infraction est commise par la voie de la presse écrite ou audiovisuelle, les dispositions particulières des lois qui régissent ces matières sont applicables en ce qui concerne la détermination des personnes responsables. L'action publique se prescrit par trois mois révolus, à compter du jour où l'infraction définie au présent article a été commise, si dans cet intervalle il n'a été fait aucun acte d'instruction ou de poursuite.

Justice is delivered 'in the name of' a sovereign, whether it is the people, a nation or a monarch.[273] There is a strong reference to the paternal figure of the judge, at the level of the symbolic Father, where the name of the father is declined in *non du* the father, the strict father. Indeed, here again, for Lacan, 'It's in the name of the father that we must recognise the support of the symbolic function which, since the beginning of historical times, identifies his person to the figure of the law'.[274] Legendre develops this point by examining the law of reason and the law of the father, explaining that these are two faces of the same notion, a fundamental reference of the big fundamental story whose function is 'to sort, to separate, to distinguish'.[275] Here we will simply relate that function to the main idea of the trial which is to separate, to sort… The use of the *name of* refers to the big Other, place of the significant, place of the language, where the subject 'receives' its own reversed message.[276] This takes place in the symbolic order where the big Other is located.[277] Actually, in *the name of* we find an operation, an action, the one of asking a third party, the reference, the authority, the law. It is something that the child will achieve when positioning himself in front of the mirror. The child will address the person who

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[273] We may wonder about the question of hierarchy between the three, but I will not discuss the question of legitimacy here. The issue is that of identification created by the 'in the name of'. As Richard analyses, Article 101.1 of the Italian Constitution evokes this idea of justice delivered in the name of the people, showing the importance of popular sovereignty whereas before justice was delivered in the name of the king. Richard, P., Introduction au Droit Italien: Institutions juridictionnelles et droit procédural, Paris, L'Harmattan, 2004, n96, p. 120. In France, justice was considered as the monopoly of the (sovereign) monarch and was delivered in his name. When the exercise of sovereignty 'shifted' to the (sovereign) people, justice was still delivered by the in the name of the sovereign, but the new one. Justice is then still delivered in the name of the sovereign.

[274] Lacan, « Fonction et Champ », p. 276.

[275] Legendre, Caporal Lortie, p. 153.

[276] See Zizek, S., « The Big Other Doesn't Exist », Journal of European Psychoanalysis, Spring/Fall 1997.

[277] Zizek, *How to Read Lacan*, p. 9.

carries him, 'the act by which the child in the mirror, turning to the one who carries him, appeals by glance at the witness […] the recognition of the image'.[278] In fact, 'it is enough to understand the mirror stage as an identification' which is, still according to Lacan a transformation in the subject when he assumes his image after the intervention of the Father.[279] For the parties, the judge is in a position of identification of the ideal of the ego, the ideal model. He operates as a parent, in *loco parentis*.[280] Thus, the judge becomes the parent who punishes or rewards. [281]

It even seems that certain judges identify themselves as their parents or the attorneys to their clients.[282] In civil law tradition, this identification takes place in the conscious. In the common law, the lower courts' judgments are implicitly in line with those of the upper courts. Therefore, they are 'mere' legislature committees acting in the 'name of'. [283] We must keep in mind that, in the United Kingdom, the separation between reality of the monarch and reality of the democracy is at its height. Justice is not delivered 'in the name' of the people but in the name of the monarch. Moreover, this judge representative is a facilitator enabling the man, the parties, to be human. As Lacan underlines, 'if we have to define when the man becomes human, […] it is the moment where he enters in the

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[278] Lacan, J., « R Remarque Sur le Rapport de Daniel Lagache », in Lacan, *Ecrits 2*, Paris, Seuil, Points Essais, 1999 (1966), pp. 155–156.

[279] Lacan, J., « L Le Stade du Mirroir Comme Formateur de la Fonction du Je », in Lacan, *Ecrit 1*, pp. 92–100, esp. p. 93.

[280] Schoenfeld, Psychoanalysis and the Law, p.35.

[281] Ibid, p.93.

[282] Ibid, p.97-99.

[283] Indeed, in this regard, the appellate committee of the House of Lords had a similar function to that of the French and Italian constitutional courts. However, the creation of the new Supreme Court of the UK seems to modify this symbolic.

symbolic relationship'.[284] Indeed, this judge positions himself as symbol, as a third party, 'element of mediation, who situates the two characters, puts them in another level, and modifies them'.[285] The judge, symbolic actor, 'in the name of' will allow the parties to be replaced in the social, in what Lacan calls the human environment which is the symbolic environment.[286] This brings us back to the issue of the language as well as some considerations on how legal traditions relate to a broader level to the written and oral traditions.

Civilisation of the oral tradition and civilisation of written tradition.

Whether a culture uses spoken or written words, the way to express the judicial matter refers to the base and to the heart of its tradition. In the northern part of Europe, law comes from customary laws. This part of the world had to deal with oral transmissions of knowledge, 'thanks to the accumulation of precedents', these memories of the law, giving birth to 'a body of shared experiences' through memory.[287] The core principle of the trial is oral. We find the idea of orality: evidence must be given orally and subject to cross examination, thus acting as a true counter power, a counterweight to the words of the other. In the south, the civil law tradition, rooted in the Talmudic and Chthonic traditions, as Professor Glenn explains, goes even further in the written roots than the Roman Empire, even though this latter had developed a written legal tradition which can be

[284] Lacan, J., *Le Séminaire I : Les écrits techniques de Freud*, Paris, Seuil, 1975, p.178.

[285] Ibid, p.178.

[286] Ibid, p.180.

[287] Glenn, *Legal Traditions*, p. 125. According to Glenn, there are two Torah, one written and one verbal which became written, pp. 238–239.

symbolised by the development of the Codex, the codification. [288]The consequences are manifold and evolve around the dialectical confrontation between secret and transparency.

First, we can consider the classical opposition between inquisitorial and adversarial (or contradictory) systems. According to Guarnieri and Pederzoli, 'while adversarial systems, contradictory, of common law are led by lawyers, continental systems are almost always led by the judge'. [289] In the common law, contradictory and adversarial mechanisms are characterised by a logic where 'each side is in charge of preparing its own brief'.[290] In the civil law tradition, inquisitorial mechanisms need a specific actor to lead the legal event, the investigating magistrate, the *juge d'instruction*. As Article 49 of the French code of criminal procedure states,

> Le juge d'instruction est chargé de procéder aux informations, ainsi qu'il est dit au chapitre Ier du titre III.
>
> Il ne peut, à peine de nullité, participer au jugement des affaires pénales dont il a connu en sa qualité de juge d'instruction.
>
> Le juge d'instruction exerce ses fonctions au siège du tribunal de grande instance auquel il appartient.

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[288] Ibid, p.125.

[289] Guarnieri et Pederzoli, *The Power of Judges*, p. 129.

[290] Eliot C. et Quinn, F., *English Legal System*, London, Pearson, 7e ed,. 2006, p. 361.

Therefore, ‘The investigating judge is in charge of judicial investigations […]’. In consequence, he is the only person ‘in charge of’, under Article 81 of the code ‘The investigating judge undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt’.

> Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge.
>
> Il est établi une copie de ces actes ainsi que de toutes les pièces de la procédure ; chaque copie est certifiée conforme par le greffier ou l'officier de police judiciaire commis mentionné à l'alinéa 4. Toutes les pièces du dossier sont cotées par le greffier au fur et à mesure de leur rédaction ou de leur réception par le juge d'instruction.
>
> Toutefois, si les copies peuvent être établies à l'aide de procédés photographiques ou similaires, elles sont exécutées à l'occasion de la transmission du dossier. Il en est alors établi autant d'exemplaires qu'il est nécessaire à l'administration de la justice. Le greffier certifie la conformité du dossier reproduit avec le dossier original. Si le dessaisissement momentané a pour cause l'exercice d'une voie de recours, l'établissement des copies doit être effectué immédiatement pour qu'en aucun cas ne soit retardée la mise en état de l'affaire prévue à l'article 194.
>
> Si le juge d'instruction est dans l'impossibilité de procéder lui-même à tous les actes d'instruction, il peut donner commission rogatoire aux officiers de police judiciaire afin de leur faire exécuter tous les actes d'information nécessaires dans les conditions et sous les réserves prévues aux articles 151 et 152.
>
> Le juge d'instruction doit vérifier les éléments d'information ainsi recueillis.

Le juge d'instruction procède ou fait procéder, soit par des officiers de police judiciaire, conformément à l'alinéa 4, soit par toute personne habilitée dans des conditions déterminées par décret en Conseil d'Etat, à une enquête sur la personnalité des personnes mises en examen, ainsi que sur leur situation matérielle, familiale ou sociale. Toutefois, en matière de délit, cette enquête est facultative.

Le juge d'instruction peut également commettre une personne habilitée en application du sixième alinéa ou, en cas d'impossibilité matérielle, le service pénitentiaire d'insertion et de probation à l'effet de vérifier la situation matérielle, familiale et sociale d'une personne mise en examen et de l'informer sur les mesures propres à favoriser l'insertion sociale de l'intéressée. A moins qu'elles n'aient été déjà prescrites par le ministère public, ces diligences doivent être prescrites par le juge d'instruction chaque fois qu'il envisage de placer en détention provisoire un majeur âgé de moins de vingt et un ans au moment de la commission de l'infraction lorsque la peine encourue n'excède pas cinq ans d'emprisonnement.

Le juge d'instruction peut prescrire un examen médical, un examen psychologique ou ordonner toutes mesures utiles.

S'il est saisi par une partie d'une demande écrite et motivée tendant à ce qu'il soit procédé à l'un des examens ou à toutes autres mesures utiles prévus par l'alinéa qui précède, le juge d'instruction doit, s'il n'entend pas y faire droit, rendre une ordonnance motivée au plus tard dans le délai d'un mois à compter de la réception de la demande.

La demande mentionnée à l'alinéa précédent doit faire l'objet d'une déclaration au greffier du juge d'instruction saisi du dossier. Elle est constatée et datée par le greffier qui la signe ainsi que le demandeur ou son avocat. Si le demandeur ne peut

signer, il en est fait mention par le greffier. Lorsque le demandeur ou son avocat ne réside pas dans le ressort de la juridiction compétente, la déclaration au greffier peut être faite au moyen d'une lettre recommandée avec demande d'avis de réception. Lorsque la personne mise en examen est détenue, la demande peut également être faite au moyen d'une déclaration auprès du chef de l'établissement pénitentiaire. Cette déclaration est constatée et datée par le chef de l'établissement pénitentiaire qui la signe, ainsi que le demandeur. Si celui-ci ne peut signer, il en est fait mention par le chef de l'établissement. Ce document est adressé sans délai, en original ou copie et par tout moyen, au greffier du juge d'instruction.

Faute par le juge d'instruction d'avoir statué dans le délai d'un mois, la partie peut saisir directement le président de la chambre de l'instruction, qui statue et procède conformément aux troisième, quatrième et cinquième alinéas de l'article 186-1.

Moreover, the investigating judge must determine the quality of the offence and the possibility of submitting it to the upcoming *procès*. [291] In fact, the beginning of the legal

[291] Article 85: Toute personne qui se prétend lésée par un crime ou un délit peut en portant plainte se constituer partie civile devant le juge d'instruction compétent en application des dispositions des articles 52, 52-1 et 706-42.

Toutefois, la plainte avec constitution de partie civile n'est recevable qu'à condition que la personne justifie soit que le procureur de la République lui a fait connaître, à la suite d'une plainte déposée devant lui ou un service de police judiciaire, qu'il n'engagera pas lui-même des poursuites, soit qu'un délai de trois mois s'est écoulé depuis qu'elle a déposé plainte devant ce magistrat, contre récépissé ou par lettre recommandée avec demande d'avis de réception, ou depuis qu'elle a adressé, selon les mêmes modalités, copie à ce magistrat de sa plainte déposée devant un service de police judiciaire. Cette condition de recevabilité n'est pas requise s'il s'agit d'un crime ou s'il s'agit d'un délit prévu par la loi du 29 juillet 1881 sur la liberté de la presse ou par les articles L. 86, L. 87, L. 91 à L. 100, L. 102 à L. 104, L. 106 à L. 108 et L. 113 du code électoral.

Lorsque la plainte avec constitution de partie civile est formée par une personne morale à but lucratif, elle n'est recevable qu'à condition que la personne morale justifie de ses ressources en joignant son bilan et son

event depends on the investigating judge. If he agrees to open/initiate the *procès* he will lead the investigation. The investigating judge acts as a facilitator of the 'truth process' mentioned above and to which Badiou refers. He appears as a guarantor of independence. Indeed, there should supposedly be no pressure from one party to the other one because of the presence of the investigating judge in leading the investigation. In addition, he is the guarantor of the rule of law, as found in the same Article 81 of the code of criminal procedure, through the terms 'in accordance with the law'.

One can obviously comment on the inquisitorial nature of the procedure itself. The truth is built by an investigating judge whose function has been largely criticised.[292] It is well-

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compte de résultat. Article 86: Le juge d'instruction ordonne communication de la plainte au procureur de la République pour que ce magistrat prenne ses réquisitions.
Le réquisitoire peut être pris contre personne dénommée ou non dénommée.
Lorsque la plainte n'est pas suffisamment motivée ou justifiée, le procureur de la République peut, avant de prendre ses réquisitions et s'il n'y a pas été procédé d'office par le juge d'instruction, demander à ce magistrat d'entendre la partie civile et, le cas échéant, d'inviter cette dernière à produire toute pièce utile à l'appui de sa plainte.
Le procureur de la République ne peut saisir le juge d'instruction de réquisitions de non informer que si, pour des causes affectant l'action publique elle-même, les faits ne peuvent légalement comporter une poursuite ou si, à supposer ces faits démontrés, ils ne peuvent admettre aucune qualification pénale. Le procureur de la République peut également prendre des réquisitions de non-lieu dans le cas où il est établi de façon manifeste, le cas échéant au vu des investigations qui ont pu être réalisées à la suite du dépôt de la plainte ou en application du troisième alinéa, que les faits dénoncés par la partie civile n'ont pas été commis. Dans le cas où le juge d'instruction passe outre, il doit statuer par une ordonnance motivée.
Lorsque le juge d'instruction rend une ordonnance de refus d'informer, il peut faire application des dispositions des articles 177-2 et 177-3.

[292] The institution of the investigating magistrate has been under the spotlight for several years. Nicolas Sarkozy while President announced that he wanted to change the institution. M. Sarkozy Envisage de Supprimer le Juge d'Instruction, Le Monde, 6 février 2009. http://www.lemonde.fr/politique/article/2009/01/06/m-sarkozy-envisage-de-supprimer-le-juge-d-instruction_1138259_823448.html. Au 15 novembre 2010.We will also refer to the report on the

known that in common law, the adversarial (or contradictory) nature of the procedure forced the parties and the advocates to build and reveal a partisan truth through an internal dialogue which occurs during the opinions. This truth becomes the judicial truth, a 'justice reality'. In the civil law tradition, the parties are deprived of this possibility. The function of the judge may be, as mentioned above, to create or to expose the law, to confirm or to 'tell' the truth or at least what the truth is. In the common law, the role of the judge is, from his symbolic position, his strength and his authority, to determine which truth, exposed by the parties, will become the reality of justice. In the civil law tradition, the judge must create the truth and expose it to the parties in accordance with the mono-totemic position. In addition, the trial in common law is a verbal exchange (predominantly) between the parties whereas the *procès*, is a written exercise (predominantly). The role of the judge is thus very different.

The judges' role in the adversarial system is in many ways more passive than that of the judge in inquisitorial systems, because in the first case, the judge acts as a major observer and a final arbitrator, and in the second case the judge acts as a more active researcher of the truth and a facilitator of the information. [293]

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malfunction of the investigation in the Outreau case, « Rapport de la Commission d'Enquête Chargée de Rechercher les Causes des Dysfonctionnements de la Justice dans l'Affaire dite d'Outreau et de Formuler des Propositions pour Éviter leur Renouvellement ». http://www.assemblee-nationale.fr/12/rap-enq/r3125-t1.asp#P871_183359, 6 juin 2006. Last accessed 17 February 2017.. Besides, Germany and Italy transferred the investigating judge's powers to the prosecutor in order to avoid possible conflicts with the functions of investigation and judging. We will enjoy referring to the television series Engrenages (Spiral) and the incorruptible figure of the investigating judge Roban.

[293] Van Koppen, P.J., et Penrod, S., *Adversarial Versus Inquisitorial Justice: Psychological perspectives on criminal justice systems,* Berlin, Springer, 2003, p. 184.

Basically, what separates the two legal traditions is supposed to reside in the presence of two resolution mechanisms which are in place, and in their relationships to either written or oral traditions. Thus, the trial differs from the *procès* mainly because of the procedure itself: a legal mechanism of exchanges. The reference point is the social structure. The adversarial or the inquisitorial system is defined by the way society wishes the operation to be carried out. In common law, society reflects on a mechanism providing actions, giving leeway to the parties. In the civil law tradition, society insists on the realisation of the operation, with something which connects to the inquisition, by limiting the liberty of the parties. It is certainly interesting to note, with Foucault, that 'In France, as in most European countries – except England – the whole criminal procedure, until the sentence, remains secret'.[294] As spotted by Foucault, there is an important exception: England. The case of England informs us on two main points. First, in the civil law tradition, where the organisation of the legal event is inquisitorial, the procedure is secret. It will condition and will be conditioned by the use of writing, because of 'the secret and written form of the procedure'.[295] Indeed, Article 11 of the French code of criminal procedure provides that:

> Sauf dans le cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète.
>
> Toute personne qui concourt à cette procédure est tenue au secret professionnel dans les conditions et sous les peines des articles 226-13 et 226-14 du code pénal.

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[294] Foucault, *Surveiller et Punir*, p. 44.

[295] Ibid, p.45.

> Toutefois, afin d'éviter la propagation d'informations parcellaires ou inexactes ou pour mettre fin à un trouble à l'ordre public, le procureur de la République peut, d'office et à la demande de la juridiction d'instruction ou des parties, rendre publics des éléments objectifs tirés de la procédure ne comportant aucune appréciation sur le bien-fondé des charges retenues contre les personnes mises en cause.

Therefore, it is quite clear that 'except where the law provides otherwise and subject to the defendant's rights, the inquiry and investigation proceedings are secret'. Secret towards and from the public, in order to avoid 'trouble' inside and of the 'crowd' or of the people, and secret towards and from the accused, who is not aware of what is happening to him, until the final result, the conviction.[296] Before the French Revolution, the establishment of the truth was a royal prerogative and the king of France was the exclusive source of justice. After the French Revolution, judges became solely entitled to establish justice. During the 'inquisition', the examination, the judge has full authority to 'discover' (the truth). The truth wears the king's clothes (and somehow that of the State), the fur and the clothes underlined by La Fontaine: it is sacred. According to Foucault, in France, 'the investigation as 'the authoritarian research of an identified or certified truth' had clearly been imposed by the king, 'the sovereign power arrogating the right to establish the truth by a certain number of techniques'.[297] This was 'imposed by the old adversarial justice, but through a process coming from the top'.[298] The judge in civil law tradition makes all the decisions from the beginning to the end. There is never a real

[296] Ibid, p.44.

[297] Ibid, p.262.

[298] Ibid, p.263.

dialogue, but rather an intense monologue built on the examination of the parties. In that of common law, the judge does not really examine the parties. The trial is an event which gives a crucial place to orality. The judge relies on the counsels in common law, the judge must appear as a neutral operator, a referee, [299] or an analyst.[300] In fact, the parties are opposed in a dialectical relationship. They will present and expose their ideas in a confrontational way. One party will expose his own truth, and then the other one will do the same. Because the parties do not share the same technical language, and sometimes even speak two different foreign languages, they can only gain access to the level of internal dialogue with their lawyers.[301] They are in a stage of 'negotiation' according to Derrida, [302] which results in an internal dialogue among the parties, this transformation in partisan monologues, dialectically opposed, leaving a symbolic place for the father judge who 'represents', in psychoanalytic terms. The judge is the law when he shows the solemnity of justice's strength through his authority. Besides, in the common law tradition, where the organisation of the legal event is adversarial, the procedure is open

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[299] Jauffret Spinosi, C., « Comment Juge le Juge Anglais? » in Droits, la fonction de juger, Paris, PUF, 1989, p. 57.

[300] He can or must also either disappear or withdraw himself from the situation like the narrator of the stolen letter does. (l'exclusion neutralisante du narrateur). Major, R., Lacan avec Derrida, Paris, Flammarion, Champs, 2001, p. 54.

[301] This does not concern the legal team, because it is supposed to speak the same (legal) language. See also the Directive 2010/64/EU of the European Parliament and the Council of the 20th of October 2010, regarding the right to translation in criminal proceedings. Directive 2010/64/UE du Parlement Européen et du Conseil du 20 octobre 2010 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales, Journal officiel de l'Union européenne, L 280/1 à /7.

[302] Derrida, J. et Laboussiere, P.J., *Alterités*, Paris, Osiris, 1986, p. 85. The 'négociation' may be considered as a legal situation 'a-trial' that does not really (yet) exist in civil law tradition. ADR for instance, or pre-trial actions, bring a resolution of a *différend* prior to the trial totem. See also Lord Phillips comments above.

and verbal. We are here in a dialectical relationship between two parties, in the middle of a confrontational relationship, a relationship with the opposition. The parties expose their views. The monologue truth A is exposed by a legal team and the same goes for the monologue truth B. From these monologues, and because the point is to find who is going to win, the relationship becomes a dialectical one. He appears here as an arbitrator. He is in a neutral position and must not interfere. He observes and watches. He is present and absent at the same time.[303] The judge 'represents' and as a symbolic actor shows, in a precise ritual ceremonial, how solemnity is the strength of justice, in the name of the monarch (as indicated, in the United Kingdom, by the expression Her Majesty's Court Service).[304]

A softening of the dichotomy?

According to Levinas, '[the hitlerian philosophy] questions the very principles of civilisation'.[305] After the Second World War, the idea was that of developing bridges between the countries which had been in conflict, not only between 1939 and 1945, but also during previous centuries. Several developments occurred in Europe, including one which was remarkable, the transnationalisation of the principles of the European

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[303] We can relate this to Freud's essay Freud, S., « Beyond the Pleasure Principle » SE 18, (1920), pp. 14–15, as mentioned by Lacan, Lacan, « Fonction et Champ », p. 317. […] the little boy, Freud's nephew, plays with the ball while his mother is out. The presence and the absence of the object develops in another level, that of the language. It evolves in the symbolic order. See also Derrida, Voix et Phénomène, p. 9 : « le langage est bien le médium de ce jeu de la présence et de l'absence. »

[304] Indeed, the crown, political body of the British Monarch has been in charge of the judicial system for nearly 900 years.

[305] Levinas, E., « Reflections on the Philosophy of Hitlerism » , 17 Critical Enquiry (autumn 1990), p. 64.

Convention for the Protection of Human Rights and Fundamental Freedom (so, as Levinas stated, 'folding back' towards civilisation).[306] The European Convention is linked to what Levinas described as 'the spirit of freedom' or as 'a conception of human destiny'[307] and what Badiou considers a huge return to Kant,[308] with the assumption that human rights are harmless, non-evil rights. [309] The preamble to the European Convention presents us with the idea that governments in Europe are in a same state of mind, sharing both a common heritage and rights of the Universal Declaration of Human Rights of 1948.[310] These may be considered as illustration of the evolution towards 'non-evil':

> [The governments signatory hereto, being members of the Council of Europe], Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.[311]

The move was widely recognised but must be considered as an ideal or a conciliatory objective of national dogmatic speeches. France and the UK were not only the founders

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[306] 156http://www.echr.coe.int/NR /rdonlyres/086519A8-B57A-40F4-9E22-3E27564DBE86/0/FRA_Conven.pdf. Last accessed 17 February 2017.

[307] Levinas, « Philosophy of Hitlerism ».

[308] Badiou, A., « The Problem of Evil », p. 8. Let us consider here this idea of the return to Kant, while Lacan proclames the return to Freud (Lakant?).

[309] Ibid, p.9.

[310] http://www.un.org/fr/documents/udhr/. Last accessed 17 February 2017.

[311] http://www.echr.coe.int/NR /rdonlyres/086519A8-B57A-40F4-9E22-3E27564DBE86/0/FRA_Conven.pdf, p.2. Last accessed 17 February 2017.

of the European Council but also broadly contributed to drafting the European Convention. The hope of a community created by the two legal traditions was thus present in the 1950s. Although the 'non-evil' is present throughout the Convention, the rights, such as those protected by Article 6, are remarkably important for the legal event. It provides that :

> Article 6 § 1 of the Convention – Right to a fair trial "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...".

It is quite important here to focus on 'the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The transnational prescription develops a transnational enforcement which results in an imaginary abolition of the distance between the legal traditions. The resistance against the transnational by national visions was intense and still is. We can take, as example, the rate of ratification of the Convention: 24 years between the signature and the ratification in France, while the UK ratified it 3 years after the signature, but it was necessary to wait

until the end of the 20th Century to see it fully operational.[312] Even recently, concerning the incorporation of the Convention in the UK thanks to the Human Rights Act 1998 (HRA 1998),[313] Sir Carnwath, as President of the Commission of the Laws, expressed that the inability to use the European Convention was the regret of his life as a lawyer. He stated that the HRA 1998 should have been adopted when the right of individual petition was accepted in 1965-1966. He commented that if not only the right of individual petition, but also the whole Convention had been adopter earlier, 'English judges and lawyers would have been able to influence more directly the development of the law of the Strasbourg Convention'.[314] This statement implies that although being the initiator of the Convention, the UK somehow left its operational side aside until 1998/2000.[315] Both legal traditions share common values, but are characterised by numerous differences. Basically, the preamble was prescriptive. A balance between the two traditions was to be found or, in a more 'violent' way, through the idea or the belief of the dissolution of one tradition, giving way to the elements of the other one.

The creation of a *jus commune* associated with general principles of the law led, for example, French researchers to acknowledge, while writing about the Convention, that: 'with such methods of interpretation we are far from the French traditional legal reasoning', because 'it is a pragmatic, Anglo-Saxon approach… to which we have to get

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[312] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG . Last accessed 17 February 2017.

[313] http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1. Last accessed 17 February 2017.

[314] Carnwath, R. (Sir), « ECHR Remedies from a Common Law Perspective », ICLQ 49 (3) (2000), pp.517-528, esp. p.527.

[315] Most of the HRA 1998 came into force on the 2 October 2000.

accustomed'.[316] Researchers and practitioners in both traditions seem to consider the European Convention as something very precious and important, but simultaneously as something which modifies their way of thinking and operating, so that each tradition fears a loss of influence, because it affects the heart of the national dogmatic speeches. Garapon and Allard explained that in Europe, the two legal traditions were mixed in the laboratory constituted by the European Convention.[317] They consider this point as a precise result of the general process of globalisation. The conclusion they reached seems to move towards the common law rather than civil law tradition. That is not therefore surprising that in the legal event, trial and *procès,* what 'disappears' seems to come from the side of the civil law tradition.[318] For example, during the *procès*, the hearing must be public in order to be in compliance with the Convention. We therefore sense how we move away from the inquisitorial system, from the importance of secrecy in the civil law tradition, and we note an evolution towards an organisation of the legal event which looks like that of the trial. Indeed, the hearing is, and it is perhaps a truism, given the etymology of the word (to hear), oral, a practice of communication which, according to Ricœur, has its ethics: *audi alteram partem.*[319] This would only be embryonic. In fact, in this tradition we find neither

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[316] Guinchard, S., Brandac, M., Lagarde, X. et Douchy, M., *Droit Processuel, Droit commun du procès*, Paris, Dalloz Précis, 1e ed., 2001, p. 95.

As highlighted by Strydom, Beck considered, as well, an European laboratory, but constituted by the 'other Europe', the European Union.

[317] Since the end of the Second World War, the European legal space created by both the convention and the community made the European territory a European laboratory. We can particularly observe the transformation of multiple European societies into one European society. See again Strydom Strydom, P., Risk, Environment and Society, Buckingham, Open University Press, 1st ed. 2002, esp. p. 54.

[318] Garapon, A. et Allard, J., *Les Juges dans la Mondialisation, la nouvelle révolution du droit*, Paris, Seuil, La République des Idées, 2005, pp. 35–56.

[319] Ricœur, *Amour et Justice*, p.27.

dialogue between the parties nor freedom of speech in the place of justice. The investigating judge is still, for the moment, the actor in charge of organising the necessary elements, and not the parties. These latter are not considered as adults.

The change of strategy in terms of protection of the rights brought by the European Convention may also be linked with what Meltzer states: '[…] [the atrocities] of war were committed not by the rebels but by the representatives of law and order'.[320] There is here an element of social (re)-evolution to take into consideration. In these symbolic places of power, judges implement the respect of the law with in mind the notion of the rule of law. [321] But we may think that the law itself is the problem.[322] To come back to the idea of 'non-evil', Meltzer analyses tyranny as 'a social perversion in the defense against depressive anxieties'.[323] Anxieties result from unsustainable situations, such as what is discovered by Freud in the experience of the Rat Man. In one of the first analysis of Freud, the Rat Man demonstrates a certain degree of interaction, 'love and hate', towards his father, which evolves in certain aggressiveness. Freud explains that it is the result of fear; in fact repressed hope. A consequence of this unsustainable situation of the conscious love and the unconscious hate of the father is anxiety. The Rat Man had to make amends, to apologise, to repair. If we apply this to the European Convention, we can analyse it in the context of the repair process. It was designed as an ethical ambition to overcome the anxiety after tyranny: 'The operative virtue of the law was followed by an ethical

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[320] Meltzer, D., « Tyranny », in Meltzer, D., *Sexual States of Mind*, London, Karnac, 1973, p. 144.

[321] In its narrow definition, the rule of law organises a mechanism where subordinate rules have to conform to superior rules. This has to be seen sufficient by the judge to demonstrate the respect of the law.

[322] See Agamben, G., *State of Exception*, Chicago, University of Chicago Press, 2005.

[323] Meltzer, « Tyranny ».

ambition through the propagation of human rights'.[324] European society in the 1920-1930s consciously 'loved' (legal positivism, the respect of 'the rule of law' by Nazi Germany confirmed it) but, unconsciously 'hated'. Europe hated perhaps because of the fear (the repressed hope may be a simplistic explanation but a logical one of the ruin following the First World War in Germany and in Italy, the last links in the economical chain as Poulantzas remarked[325]). In the 1950s, it was time to repair, through a restorative process which in fact had two faces. On one hand, this transformation affected the judicial system through the myth of the separation of powers. It strengthened the judiciary, forcing and imposing its independence, in accordance with the belief of a totemisation of the legal event. It is, for example, exactly what happened in the UK. According to Woodhouse, the HRA 1998 (and then the European Convention) 'requires a sharper separation between the judiciary and the other branches of the government […]'.[326] Indeed, we keep in mind the prediction now achieved that 'in the long term, in order to protect their independence, the Law Lords would perhaps need to withdraw from the House of the Lords when it sat as a legislative chamber […]'.[327] The consequence was the creation of a new Supreme Court in the UK, physically separated from Westminster.

The cultural and social dimension of the judge after the restorative process, by the European Convention, also evolves towards a certain idea of democracy. However, nothing advocates the emergence of a convergence between the traditions, which would

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[324] Allard et Garapon, *Juges dans la Mondialisation*, p. 6.

[325] Poulantzas, N., *Fascisme et Dictature*, Paris, Seuil, Point Essais, 1974, p. 24.

[326] Woodhouse, « More Power to the Judge », p. 235.

[327] Ibid.

rather be an ideal goal, a promise of the European Convention, implemented by different evolutions. To a certain extent, it brought the two legal traditions closer; the judge representing society through the legal event. Moreover, the restoration, as ethical ambition, contributes to a cosmopolitan development. This cosmopolitan operation reminds us of the fifth thesis of the Kantian idea from his *Idea for a Universal History from a Cosmopolitan Point of View:* 'The biggest problem for the human species, the one that nature forces it to resolve, is to reach a civil society administering universally the law'.[328] This is applicable both within and beyond Europe. The legal event would then contribute towards clarifying the issue of the social, of its 'law' and basically of structure. But we cannot be sure that the best solution is hidden behind universalism. Indeed, at the same time, and perhaps concurrently, the question of particularism, of pluralism, of the identity and the culture of the other one and its respect, may be evoked. This also relates to the idea of context from which derives the starting point of the variation ritual v. rituals.

Ritual(s), law, justice.

It is perhaps crucial for our societies to remember what was, because what was is often essential for the understanding of what is and what will be. The function of the places of justice, as Garapon indicates and Commaille emphasises, is to tell a story, the story of mankind and its social life, using 'tricks; that are very similar to what is done in drama'. The actors of this judicial 'theatrical play' follow the law and operate on a stage, with one

[328] Kant, E., *Idées d'une Histoire Universelle au Point de Vue Cosmopolitique*, Paris, Bordas, 2006 (1784), pp. 15–16.

or more precise rituals. Therefore, we understand the importance of the link between places of justice, the individual, society and the law, a link which fully manifests in the stages of the (classic) ritual.

Place of justice, ritual(s) and structuring of society.

Broadly speaking, according to Locke and maybe more to Hobbes, the state of nature, what Rousseau considers as the time before the celebration or without the experience of the *continuity,* is a terrible place. It is such a terrible place that human beings need to move to another state, the state of civilisation. That state corresponds to the time after the celebration, according to Rousseau, where one lives the experience of *discontinuity*.[329] Human beings become civilised when they succeed in containing, inside them, individually, but also for the group or society, the empire of the impulses: they become civilised when they can live together, or even when they can *hope* to live together. But behind the mask of the civilised man remains the urge of aggression towards his fellows. Thus, sometimes the mask of the civilised man falls to give way to his origin: the beast. Therefore, the civilised man needs to make lots of effort to contain his impulses, his desires. As ambivalent creatures, human beings are made of their desire for civilisation, but they also keep their desire for criminality. In the state of nature, humans could do anything they wanted, man could just *enjoy*. In fact, the crime in the state of civilisation is a mere occurrence of something archaic. Crime is committed because there is always someone else in front of us who stands as an obstacle to our pleasure. The other 'type' is

[329] Derrida, J., *De la Grammatologie*, Paris, Les Éditions de Minuits, 1967, p.372.

no other than the father. He is the paramount obstacle between the child and the mother, he hinders the child who wants the mother: for Freud, the criminal act number one, the crime *par excellence,* is the patricide. The father shall be killed because he strives to be or to appear as an obstacle to our pleasure. As we have seen in previous chapter, it is the starting point of *Totem and Taboo.*[330]

The totem is linked to the law.[331] But, as analysed previously, it is something which builds rules, and, moreover, which cannot violate the rules it created itself. We need to keep in mind that the taboos are linked to the sacredness of the totem. We recall that the prohibitions, the taboos, operate around the will of the father, either in accordance with it or against it.[332] Thus the totem is marked, as evoked previously, by the taboos which are attached to it and constitute its heart: the members of the totem cannot kill the totem (the horror of patricide), while there is the rule of the abstinence towards all women of the totem (the horror of incest).

Here, the myth of the primitive horde, the totem and the taboos, creates both a history of desire and of law.[333] The patricide takes place within the primitive horde. It shall be contained by the primitive law, the fundamental law, the simplest law of the state of

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[330] Freud, *Totem and Taboo*, pp. 1-17.

[331] Ibid, p.51. According to Freud, the first example of codification is linked to rules related to taboos: « Qui ramène le droit à son fondement l'anéantit ».

[332] Ibid.

[333] Derrida, *Grammatologie*, p.372. Freud wrote that laws are forbidding patricide and forbidding incest. This is at the time of the 'fair' « la fête » that incest becomes also a crime. Before that time, there is no incests, no crime, as there is no interdiction of incest, there is no society.

civilisation: 'You shall not kill'. As soon as this law exists, society may pretend to be civilised. The myth operates as a pact, an alliance, between the brothers, members of the horde. They will not kill the father, because they are now civilised. However, if the crime *is* committed, a mechanism to resolve the wrongdoing is needed. Thus, there will be a specific legal event allowing redress of that wrongdoing, which is outlawed (outside the law), a *procès* or a trial. This event should be conceived as a staging repeating the original pact. This original pact, that Rousseau considers the act of birth of human society, therefore becomes a sacred act. According to Derrida: 'Only one institution is sacred to its view, only one fundamental convention: it is, as the *Social Contract* tells us, the social order itself, the law of the law, the convention which is the basis for all conventions […]'.[334] The brother will be gathered in the *trial* and the crime will be a re-enactment of the primitive act of patricide, the original crime. As in theatre, both the actors and the public participate to this reconstitution, each participant identifying himself to the criminal and reliving the scene of the crime. In fact, in this short tale, we understand that the myth of the primitive horde and the murder of the Father demonstrate not only the way individuals and the group are intertwined, what basically becomes "civilisation", but also what the mechanisms in place to protect this civilisation and in particular the importance of the legal event *are*, and, in turn, the importance of ritualisation in the judicial process.

According to Garapon, there can be no justice without a certain adaptation to a public space, enabling the public to 'see' this justice. In fact, it is necessary 'to reconsider justice

[334] Ibid, p.373.

not against ritual, but with it.' Indeed, for Garapon, the ritual is here as a memory; reminding us of the fundamental ambivalence of the legal event, place and time of the best forms of justice as well as the worst forms of injustice.[335] According to Peter Goodrich, the law itself in the 20th century became 'a theatre of the competition and the incommensurable identities, a visible drama of justice and injustice'.[336] Thus behind the judicial ritual is above all hidden the religion and the magical structure linking time and space.[337]

The issue of time and space has always been a crucial issue: both for soft and 'hard' sciences of course. Plato already worked on the relationship between time and space.[338] In physics, the former 'natural philosophy',[339] the time and a shape of the space, the distance, are linked. The most basic expression of their relationship is probably that of the equation of speed: speed=distance/time. In a discourse regarding space and time, it is inevitable that we will mention Einstein and his space-time concept. He shows that the positioning of space is related, in many ways, to time. This is also true in human life, from the beginning of it, the first spatial positioning, the original position of the *locus* inside the mother, the first place of life, to its end, and the last place of rest, in the

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[335] Garapon, A., « What Should one Think of Judicial Ritual in Law? » in Ralph Lindgren, J. et Knaak, J., *Ritual and Semiotics*, New York, Lang, Critic of Institutions 14, 1997, pp.23.51, esp. p.29.

[336] Goodrich, P., « Europe in America: Grammatology, legal Studies, and the politics of transmission », Columbia Law Review 101 (8), pp. 2033-2084, esp. p.2079.

[337] For a further study on what is a ritual, we can refer to the book of Reick, a student of Freud. Reik, T., *Ritual, Four Psychoanalytic Studies*, New York, Evergreen, 1962 (1946).

[338] Sherover, C., (ed.), *The Human Experience of Time, The development of its philosophic meaning*, Evanston, Northwestern University Press, 2001, p.15

[339] See, for instance, *Principles of Natural Philosophy* de Newtown.

cemetery, the *loculus.* The issue of space and time is also present in philosophical works. For example, throughout Nietzsche's work, from birth (we especially find the birth in the title of his book *The birth of tragedy*), to death (the death of God, the end of God). Freud also considers space and time and develops the idea that their relationship is crucial for our world and for us as Jankélévitch underlines:

> Freud only said that Unconscious does not recognize the chronological time in which we settle the matters of our life and our death. But he never said that Unconscious does not have its own time which punctuates it in such a way that it is never the same, but pure otherness, finding stability only in the fantasy and the symptom.[340]

Freud considers the unconscious as timeless (and detached from our sense of time), while the conscious was always linked to time (attached to our chronological sense of time). [341] The development, moving from the principle of pleasure (a kind of 'state of nature') to the principle of reality (a kind of 'state of civilisation'), in Freudian theory, implies an evolutionary change from a situation outside time to a 'situation with the time', the chronological social time, time where everything is done for, and by, acquisition and integration of social rules, code of conduct, of morale. Time is an element of the social

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[340] Yankelevitch, H., « Qu'est ce qu'un Concept en Psychanalyse », Futur Antérieur 10, Fev. 1992, http://multitudes.samizdat.net/Qu-est-ce-qu-un-concept-en.html. Last accessed 17 February 2017.

[341] Freud, S., « The Unconscious », SE 14 (1905), pp. 160-215. Also Abraham, G., « The Sense and the Concept of Time in Psychoanalysis », The International Review of Psycho-Analysis 3, (1976), p.462.

which appears with otherness, the idea of the other.[342] In this unification of time and space, it seems that the logic of time regards the order of the story, whereas the logic of space creates a stage where events occur, including the legal event.[343]

Lacan merged Einstein's and Freud's ideas. He believed that the context of the analyst's work should exploit space and time. In the essay *Time and Logic*[344] he presented a refusal of all chronological aspects of time, according to Freud's original idea that the unconscious was timeless. This is basically what Lamizet mentions when he describes the idea of 'real event': the event has no duration; it is timeless, and belongs to a space where the subject is placed.[345] This event 'reaffirms' the subject and its relationship with the real. It is the satisfaction of our impossible instincts.[346] But 'impossible is not necessarily the contrary of the possible or, since the opposite of the possible is undoubtedly the real, we shall have to define the real as impossible'.[347] It is perhaps here the link with justice. For Derrida, deconstruction is impossible, and deconstruction is justice, a concept which is not 'deconstructable'.[348]

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[342] As explained by Levinas, « le temps n'est pas le fait d'un sujet isolé et seul mais [il] est la relation même du sujet avec autrui ». Levinas, E., *Le Temps et l'Autre*, Paris, PUF, 1983, p.17.

[343] Lamizet, B., *Sémiotique de l'Evénement*, Paris, Hermès, Lavoisier, 2006, pp. 41-48.

[344] Lacan, J., « Le Temps Logique et l'Assertion de Certitude Anticipée. Un nouveau sophisme », in Lacan, *Ecrits 1*, pp.195-211.

[345] Lamizet, *Sémiotique de l'Evénement*, pp. 31-32.

[346] Renucci, F., « L Les Voix pour le Dire », Actes du Colloque International « l'Evénement dans l'Espace Euro-méditerranéen, Mémoire, Identité et Communication », pp.27-39, esp. p.29.

[347] Lacan, J., « les Fondements de la Psychanalyse », in Lacan, J., *Les Quatre Concepts Fondamentaux de la Psychanalyse*, Livre XI, Paris, Seuil, 1973 (1964) in Renucci, Op. Cit.

[348] Derrida, J., *Force de Loi, Le fondement mystique de l'autorité*, Paris, Galilée, 1994, p.35.

The particular characteristic of an event is obviously its movement. An event is something which comes from outside and affects what is inside. According to Lamizet, the event marks a limit between outside and inside.[349] The limit is a wall of separation between two spaces. This wall separates what is outside from what is inside. Transposed into legal terminology, we can consider that when one comes to a trial or *procès,* one moves from outside to inside, to the sacred place of justice, the courthouse or palace of justice. The walls of the palace or the court delimit, separate, but also define. The subject outside is always anonymous. When he comes inside the courthouse, it becomes 'defined', nominated, identified by a series of masks: the judge, the lawyer, the accused. After this, there is no more anonymity. This presence before a judge, following an eruption of the 'real' in the 'symbolic', is the language. That is what gives, for Derrida, the value of the distance between the facts and the law – which in our case defined the space of the legal phenomenon as legal event.[350] This also describes an event which is framed and orchestrated: there is a precise ritual which builds and structures the legal event and gives it its form. The idea of the event merges time and space through a theatrical ritual, that of tragedy, Greek tragedy mentioned by Nietzsche in *The birth of tragedy*. But this is also a ritual with a dramatic value, as highlighted by Goodrich.[351] Indeed, 'the Roman trial was explicitly a drama, played with actors or rhetoricians, who confronted through competitive versions of the real.'[352] The world is a theatre where human experiences

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[349] Lamizet, B., « Sémiotique de l'Evénement dans l'Espace Euro-méditerranéen », Actes du Colloque International « l'Evénement dans l'Espace Euro-méditerranéen, Mémoire, Identité et Communication », Toulon, USTV, 2006, pp. 17-26.

[350] Derrida, *Voix et Phénomène*, p.21.

[351] Goodrich, « Europe in America », p.2078.

[352] Ibid, p.2081.

occur, but on a gigantic scale, through a certain dramatisation. The courthouse may be transformed into a place of theatre where a play is performed, a ritual is occurring. All actors wear a certain costume, each performing his role, the role of his life (and sometimes of his death). Similarly, the Masonic Lodge opens to become 'a world' by specific rituals.[353] Of course this example is withdrawn from the Temple of Solomon, with its specific organisation, a movement, lighting and darkening effects, symbolising the reproduction of life and death. Each stage in the Temple is a sacred experience of life, in a movement from outside to inside, from the true external light to the symbolic internal light. As Duncan explains, 'we usually think of churches and temples as religious places, of a different nature from laic sites such as museums, courthouses or parliaments'.[354] But our 'supposedly secular culture is full of ritual situations and of events'. [355]

It is therefore not surprising that the typical architecture of judicial buildings is related to sacred places, temples (at least since the 17th century in France), where the sacred seems to link justice to God(s). In a truly Augustinian way, the temple of the God(s) has become the temple of the mortals, which imposes a sensational image: the Doric male, symbol of individual reason and willingness, the female ionic, symbol of imagination, and the

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[353] Wirth, O., *La Franc-Maconnerie Rendue Intelligible à Ses Adeptes*, *Volume II Le Compagnon*, Paris, Dervy, 1994. It is quite important to note here the links between free masons and the Republic. Wirth explains in *La Franc-Maconnerie Rendue Intelligible à Ses Adeptes*, *Volume III Le Maitre*, pp.26-27 that free masons are citizens of the Republic. *Res Publica* in fact belong to them. See also pp.160-161.

[354] Duncan, C., « Art Museums and the Ritual of Citizenship » in Karp, I., and Lavine, S.D., (eds) *Exhibiting Cultures: The poetics and politics of museum display*, Washington and London, The Smithsonian Institute, 1991, pp. 279-286, esp. p.281.

[355] Ibid.

feeling and intuition of the Corinthian columns.[356] We can be even more specific on the image of the temple. The Greek temple has always been put aside/isolated from the city, not only in a sacred enclosure, but also generally on a promontory, a citadel or an acropolis.[357] While 'the Roman temple, like some baroque churches, was a major element of the street, it had a façade with a large stairway leading to a richly carved Corinthian gantry'.[358] The place of justice, for the neoclassical architects, like in France for example, or Gothic revival in England, has always been the courthouse, 'speaking through allegorical and metaphorical forms', playing with the natural movement of the Earth and the Sun, days and nights, life and death, light and darkness, opposing the 'temple illuminated by justice with dark places dedicated to crime'.[359] We feel here the idea of separation, of a strong dichotomy, between white and black so dominant in the word of the legal event in the common law tradition, the trial.[360] Klein's works lead us to consider this idea of black and white through bad and good. For different reasons, the child uses the separation of the good (object) from the bad (object).[361] The judicial ritual in a public building which looks like a temple contributes to this junction between justice and human development. This reminds us of one of the reasons temples were used as a means of justice for many centuries, in the development of the so-called post-primitive societies.

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[356] Wirth, *Le Compagnon*, p.193. Doric is linked to the apprentice, Ionic to the compagnon et Corinthian to the master.

[357] Furneaux Jordan, R., *Western Architecture : a concise history*, London, Thames & Hudson, 1993, p.28.

[358] Ibid, pp.46-47.

[359] Markus, T., *Buildings and Power, Freedom and control in the origin of modern building types*, London, Routledge, 1993, pp.34-35.

[360] We find this in the ritual of the common law trial. As explained earlier, the trial is an operation of separation of the good from the bad, a triage.

[361] Klein, M., « L L'amour, la culpabilité et le besoin de réparation » in Klein, M., *L'Amour et la Haine*, Paris Payot 2001 (1937), pp.87-88.

The place where justice shall be delivered is a sacred place, enlightened by the light of the truth, in contrast with the darkness of criminal places. [362] As with Derrida, we may think that the calling into question of the very idea of building (especially public) is correlative to protesting the institutional authority.[363] All the instruments involved in even the 'creation' of the authority are thus fundamental, the ceremonial being one of the key elements of the ritual, which, according to Moore, would be commutable terms.[364] As Chase and Bruner explain,[365]

> […] challenging the institutions (the courts)[366] require the use of ritual practices in the service of legitimacy. In order this to work, the *borrowed* ceremonies shall resound through the symbolic association with other institutions which are themselves worshipped (religious ritual).[367]

Regarding judicial architecture, it is worthy to note the presence of a specific ritual which mingles with architecture. A complex system of values exists which connects to the speaking architecture, when the building, which imposes the solemnity of the political

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[362] L'on peut avec Lacan considérer que la vérité commence à être établie seulement quand le langage existe. « Truth begins to be established only once language exists ». Lacan, J., *My Teaching*, London, Verso, 2008, p.29.

[363] Wigley, M., *Architecture of Deconstruction: Derrida's haunt*, Cambridge, MIT Press, 1995, p.47.

[364] Chase, O., et Bruner, J., *Law, Culture and Ritual: Disputing systems in cross-cultural context*, New York, NYU Press, 2005, p.134.

[365] Ibid, p.131.

[366] My emphasis.

[367] My emphasis.

institutions, of the State, enlightens, in turn, its authority. It is also related to the Masonic initiation and to the perfect architecture of a lodge: 'a holy ground', a 'temple'.[368] It is the scene of the initiation, the place where ritualisation occurs, where the reception or acceptance rite of the new member takes place. It is a space where the time is organised, through rites, to create a symbolic system of morality. Time, space, the ritual and the moral are here linked. The passage through the initiation allows growth, to mature, thanks to a certain dynamic event. It allows passing from the darkness to the light of the morality system. At the same time, this operates as it does for life, like education, the one provided by the parents, and reiterates an initiatory path, from a beginning to its end, from a start, a new start, and almost a rebirth. This idea is very similar to what Lacan considers in his theory at the end of the psychoanalysis; the cure.[369] The end of the cure is the opening to something else. *Analysus* is the time when the subject knows something different, differently. In the world, or in a palace of justice, a courthouse, experiences of the human development replayed, from the time of birth to a time not of death literally, but of the death of *something*, are a renewal, a transformation into something else. This is asserted and confirmed by a very strong link existing between the myth of birth and re-birth and the rituals attached to puberty.[370] All these rituals go beyond the sole individual experience. They are related to social organisation. They operate as guides in timelessness, similarly to the parenting in human experience.

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[368] Wilmshurst, W.L., in *Masonic initiation* explains what the perfect architecture of the lodge is: a "holy ground", a "temple". The initiation of the Freemason is a ritual of reception, of acceptance of the new member in the lodge, masonry being a moral system.

[369] Lacan, « Temps Logique », pp.195-211

[370] Reik, *Ritual*, pp.91-166, esp. p.156.

Psychoanalysis is often presented as something like parental education, *de facto,* a chronological succession of events from the birth to the re-birth, from birth to death. The analyst's room becomes a temple. Here, the time, which punctuates the speech of the unconscious, in a specific space, creates, as in the case of the Masonic lodge, a symbolic space. It is a space, an arena between two actors rather than a 'specific' construction: the space of the analyst's room is also a space created by the binome analyst/analysand. In contrast with the unconscious' timelessness aspect, the analysis is ritualised: time and space are shaped and reshaped continuously, together. That is why, in *Logical Time*, Lacan modulates the time in three periods: the moment of the gaze, the moment of understanding and the moment of concluding.[371] Each period has a repercussion in the analysis work, from the beginning of the analysis until its end, and acts as help in the movement from pleasure to reality. We may consider that something like the act of judging is playing here; something which looks like parental education. Thus, it is possible to link the space of the legal event and the time of the legal event to space and time of psychoanalytic theory.

Thus, this is not unrelated to the idea of ritual as transformation, which reproduces the general scheme of the passage or transition rites that Moore, van Gennep, Turner and of course Garapon describe as the ritual of justice.[372] The courthouse, the palace, the place where justice seems to be delivered, becomes a space framed by rituals. These places are similar to the *locus*. The architecture of the place of justice, as Garapon mentions, is built on the initiation rites, or passage rites, which revolve around three phases reflecting,

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[371] Lacan, « Temps Logique », pp.195-211.

[372] Chase et Bruner, Law Culture and Ritual, p.134.

more-or-less, the chronology of the Lacanian time.[373] In the discovery of the function of the building, the ritual appears as the link between the construction and the meaning. Meaning for the individual, meaning for the group of individuals, what is ultimately considered as *society*. As Badiou underlined, 'a universal singularity is not of the order of the being but of the order of the *emergence/occurrence* […]. Any universal originates in an event'.[374] This may be applied to the legal event. The idea of ritual also concerns the function which metamorphoses a transition 'of the quotidian life of a different context in which the quotidian is transformed'.[375] The ritual has a 'power of transformation' which is not without interest in the process of justice.[376] It is necessary, in the judicial process, to cause all resistance forces to society to disintegrate; that is to say, what goes against a fluid functioning of a society, of the possibility or the necessity for a group to work in harmony. Therefore, the courts must orchestrate this harmony by means of a ritual, which 're-establishes order in the world by the sacrifice, the hardship or the enlightenment'. [377] For Eliade, myth and ritual are connected. [378] The ritual abolishes the profane time, the chronological time, and retrieves the sacred time of the myth.[379] The sacred time meets the sacred place in the legal ritual: both define the way the staging of the representation is hinged. When we consider what occurs abstractly in the building,

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[373] Garapon, *Bien Juger*, pp.45-49.

[374] http://www.lacan.com/badeight.htm. Las accessed 17 February 2017.

[375] Bowie, F., The Anthropology of Religion, London, Blackwell Publishing, 2000, Excerpts from Chapter 7 « Ritual Theory, Rites of Passage, and Ritual Violence », pp. 151-168, citing Alexander, B., esp. p.139

[376] Ibid.

[377] Duncan, « Art Museum », p.281.

[378] This is particularly true for Eliade who considers that the myth is alive, dynamic, a role model giving meaning and value to the human being. Eliade, *Aspects du Mythe*, p.10.

[379] Ibid, p.172.

the ritual, this spatiotemporal 'thing' institutes justice and makes a certain appearance of the place of justice necessary and specific: 'Both inside and outside the hearing court, everyone feels something about the rule and its application'.[380]

The three phases of the (classic) ritual.

As Duncan explained, 'In all places of rituals, a certain kind of performance takes place'.[381] This occurs in three phases which link the legal ritual to the psychoanalytic experience.

Time of the gaze and First phase of the legal ritual.

The beginning of the analysis is the time to look at something or someone, the time of the gaze.[382] It constitutes a brief moment, a 'time zero' similar to 'birth' and divided in two sub-periods: the face-to-face and the lying on the couch. It is also a time where something appears in front of us, such as the courthouse, which appears in front of us before we enter it. The face-to-face is a characteristic situation of the classic medical visit. It is the moment where the patient, 'subject supposed to believe', is going to be confronted with the 'subject supposed to know'.[383] The psychoanalyst knows because 'once the patient is involved in the treatment, he has the absolute certainty that the analyst knows his

[380] Goodrich, « Europe in America », p. 2077.

[381] Duncan, « Art Museum », p.281.

[382] Lacan, « Temps Logique ».

[383] Zizek, *How to Read Lacan*, p.29.

secret'.[384] In front of the courts, the subject is also put in a position of belief. The most important subject is the patient, the one who is supposed to believe. The courts show the authority of the State and oblige the subject supposed to believe to see justice presents here and now. The patient must quickly abandon the 'facing the analyst' stage to be left alone. The face-to-face style of the medical visit must transform and the patient will lie on the couch. Therefore, the conversation with the analyst will be very different. This change contributes to a situation where the patient needs to face anything but himself, lying on the couch with his back to his analyst. Then, begins the second sub-period which shall lead to the opening of the unconscious. It is the time where the two protagonists, analyst and patient, stand at the foot of the language wall and begin to climb it together.[385] This second period is really a transition between the time zero and the true start of the analysis. Thus, we are in the opening time of the analysis, the opening of the 'Time to Understand', time which will last until the end of the analysis. When he enters the courthouse, the subject will also be confronted with himself.

The first stage of the judicial ritual looks like the time of the analysis. Garapon calls it the preliminary ritual of separation. It is, in itself, a transitional phase between the outside and the inside of the building, separating 'before' and 'during' the event, the time of 'creation' of the legal event while the two other phases are internal to the building, are part of the event, *are* the event. Those who prepare to enter a courthouse or palace of justice, are individuals equal before this majestic façade, but they will become the accused, witnesses, lawyers, judges, after having passed the threshold of the entrance,

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[384] Ibid,p.26.

[385] Lacan, « Fonction et Champ », p. 314.

they will be separated by a dynamic process. The accused will have to go to the dock; the witnesses will be identified as witnesses; the gown or the wig in the case of the common law trial, will allow to distinguish the lawyers and the judges from the other protagonists. The separation of the individual from a fixed point in the social structure, according to Turner, is the factor helping the actors of the legal event to move from anonymous to non-anonymous.[386] It is also understood that some may not regain their anonymous status after the legal event. This phase is 'before', it is a preliminary stage, a pre-threshold per its Latin etymology (*prae+limen*).

The second period is that of the transition between time zero and the start of the analysis, the movement from outside to inside, where the event is created. It is the time to get inside, by entering the building and starting the second phase of the judicial ritual. [387] The analysis really starts and here comes the time to understand, which will last until the end of the analysis, the end of the legal event.

Time to understand and Second phase of the legal ritual.

During the time to understand, the patient's thinking occurs in a particular place, where the staging is essential. In Lacanian clinical situations, the staging takes place in the analyst's room and depends on the time of the session, which allows the articulation of

[386] Chase et Bruner, Law, Culture and Ritual, p.134.

[387] This shall be compare to the non du père/nom du pere (no of the father/name of the Father). As Lacan indicates, the symbolic function of the "naming" positions the subject. Lacan, « Fonction et Champ », p.276.

time and space. The timing of the session is imagined to thwart the resistance of the subject, to disconcert him due to the particular times; what Lacan calls 'our short sessions'.[388] The stop and go, the suspension of the session, operates like the punctuation in the language, and contributes to the definition of a particular space and to the opening of the unconscious, an unconscious considered as 'guilty', which hides behind its alibi.[389] Punctuation not only fixes the meaning, but also transforms the physical space of the analyst's room into something more 'integrating' for the subject.[390] Similarly, the freemasonic lodge built on the model of the Solomon temple, may be a gathering of men, as well as a manmade construction, a building. The assembly of freemasons becomes, symbolically, the lodge itself. In the same way, the second preliminary phase of the legal event, the rite of confinement or reclusion or of transition, defines a stage which is not only physical. Individuals enter the courthouse and wait in corridors, vestibules, in the waiting room. It is a time of transition between two spaces, a time of reflexion. Traditionally in France these spaces are dark, and contrast with the hearing rooms, which are bright. It is not only an anteroom, but also a place which connects in bodily anatomy; the uterus, the vestibule (*vestibulo*). It is also the entry, a court, a, more-or-less, closed space in front of the main entry of a Greek or Roman house or of a building. In fact, the

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[388] Ibid, p. 313.

[389] Ibid. Moreover, it is worth remembering here that for Lacan, the unconscious is structured as language. Ibid, esp. p.267. See also Lacan, J., « The Insistence of the Letter », Yale French Studies, Structuralism, 36/37 (1996), pp.112-147.

[390] Lacan, « Fonction et Champ », p. 312.

It worth noting that the surrealists Breton, Aragon, Prévert, and Eluard decided to use *free verse* characterised by the lack of punctuation with aim to accentuate the automatic writing, closer to unconscious according to them.

liminal space is not limited. It is a grey area situated between two clearly defined areas (the 'outside' and the 'inside').

Finally, the analyst involved in the 'time to understand' becomes the master. When he decides to stop the session, it is time to do it, in sequence, until this moment where the patient is ready to go 'free', after having refocused his mind in reality. In a certain way, the free subject can now take his responsibility as an adult. Parental education will end in the trial, by a dynamic of birth and re-birth: the sentence will make the subject a new one, an adult, a responsible subject, someone able to be integrated or reintegrated into society. The ritual will have operated as a transformation tool. To finish, there is the 'time to conclude' and the last phase of the legal ritual.

Time to conclude and last phase of the legal ritual.

As Lacan's XXVth Seminar title, the time to conclude is the third time of the *Temps Logique* (Logical Time).[391] It is time to finish, to cast off. The analysed is in a hurry. He wants to finish the analytical process as quickly as possible. In a way, this relates and is comparable to the notion of reasonable time of a hearing, contained in the right to a fair trial guaranteed in Article 6 of the European Convention.[392] Lacan calls the '*psychological I'* the time when I becomes linked to the other, thus integrating the social

[391] Lacan, « Temps Logique ».

[392] http://www.echr.coe.int/NR/rdonlyres/086519A8-B57A-40F4-9E22- 3E27564DBE86/0/FRA_Conven.pdf. Last accessed 17 February 2017. See also https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. Last accessed 21 January 2017.

time as Levinas underlines, interacts, links his truth to the others' truth. The time of the end of the analysis is the time where the patient releases himself.[393] This is also when he understands that death is his unique master, allowing him to understand, in turn, that life is his friend.[394] The treatment, the cure, is the extended action of helping the patient, a help which guides him to climb the wall of the unconscious. The analysand, thanks to this process, reaches a level of understanding of his unconscious which is attached to the language. This does not mean that he understands everything, but rather that he knows now what will enable him to live closer to something, to his life, rather than close to a fantasy world where he was living. The time to conclude is the time when the patient decides that he is experienced enough to consider himself as an adult. Let remind us of the meaning of *analysus*. The patient feels free, enabling him to act as himself rather than acting as if he was himself. To conclude is a conclusion, the conclusion of a chapter, a slice of time, which opens to another one. Regarding *Logical Time*, concluding is also deducing. It is the final moment of the psychoanalysis, where the patient deduces from what he knows now that he can be a bit freer, that he can live. Thus, the patient can allow himself to live.

He will live as a responsible subject. This is what will happen after the third phase of the legal ritual, the post introductory aggregation rite or (re-) constitution. This phase comes 'after'. This is the end of the legal event, just as the time to conclude is the end of the analysis. Etymologically, *post+limen*, positions the moment to put an ending after the

[393] Lacan, « Temps Logique ».

[394] Lacan, J., « Variantes de la Cure-Type », in Lacan, *Ecrits 1*, p.347.

threshold. It is moving towards the light, towards the 'truth',[395] towards the solution that will be given. From dark to light, here the sacred nature of the legal event is strengthened, punctuated by the three phases. During this phase, every actor is dressed in their costume and not only do we know who is who, but also who is doing what. Normally the judge will try, in presence of the public. The public attends as representative of the society, as representative of the primitive horde replaying, from the start, the patricide, and helping express the truth. The ritual generally implies the performance (truth being expressed by the judge),[396] which implies the presence of the public.[397] This place is where the judge is identified as a symbolic figure, where the superposition of the judge and the symbolic father of the Oedipus complex is playing.[398]

Justice must be considered delivered. The symbolic attachment to the building of the palace of justice or the courthouse imposes a vision of political power, of its authority. Representation, because of the distance, brings the symbolic as the capacity to represent the signified justice within the signifying courthouse. This is done in a place of light, where the symbol is the sun. Justice becomes symbolic light. It is a similar moment to the end of the analysis because the ritual takes the form of a re-birth.[399] By becoming adult, after having recognised the responsibility of a wrongdoing, the subject can be born again

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[395] Voir ce que déclare au sujet de la vérité Lord Dennings dans *Jones v. National Coal Board* [1957] 2 All E.R. 155, CA.

[396] My emphasise.

[397] Chase et Bruner, Law, Culture, Ritual, p.132.

[398] Lacan, « Fonction et Champ », p.276.

[399] See Eliade, M., *Rites and Symbols of Initiation: The mysteries of birth and rebirth,* Putnam, Spring Publication, 2009.

and can now be integrated again in civilisation, his 'brothers' attending to this rebirth and witnessing. The ritual entails an overtaking of the individual and brings back order. As Eliade said: 'All we have to do/that is needed is to repeat the cosmological ritual, and the unknown territory (the "Chaos") transforms into "Cosmos", becomes a *imago mundi*, a "ritually legitimised home'.[400]

From this link between space and time, we may thus also consider another dimension, linking the two to social life. Each event is indeed a dialectical experience. According to Lamizet, the representation of an event is a dialectic between the singular experience and the collective representation logic.[401] Thus, the meaning of the legal event is something which expresses both singularity and collective. The singular time and the social time create a symbolic mediation of temporality.[402] The singularity of the space and the public space also creates a particular geography, which may be called the symbolic mediation of social geography.[403] But this is not absolutely exact. The wait of the patient, suffering subject, is then transformed into the integration of what he may be, in accordance with the civilisation in which he is situated. Eventually, what is learnt in psychoanalysis and in justice, is only integration, the 'how to be part of' society. But, basically, it is not the end but the beginning of something else. As Zizek exposes, 'Moral is never only a question of individual consciousness'.[404] Nietzsche's self, as well as the Freudian id, have

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[400] Eliade, *Aspect du Mythe*, p.173.

[401] Lamizet, *Sémiotique*, p.305.

[402] Ibid, p.306.

[403] Ibid.

[404] Zizek, S., (2007), « Knight of the Living Dead », *The New York Times* OP-ED Saturday, March 24, 2007.

a social dimension. Stage by stage, the 'private' experience of morality becomes the experience of the group. Genealogy describes the process of a dual development. The intimate experience transmutes in a wider dimension. Self-morality develops like the Big Bang universe in a vast and intense world of experience. This basically gives a full meaning to what Levinas says: 'time condition is in the relationship between humans or in history'.[405] The ritual contributes to a necessary sacrifice, a relived sacrifice which transforms and civilises us, helping us in the movement from pleasure to reality.

Conclusion.

We can understand that the (positioning of the) judge depends on a series of factors, or of more-or-less organised and more-or-less developed variables, following one or several historical, political, social… contexts. Thanks to this ritualised construction, the judge and justice organise, articulate, live. Thus, the event arises as a novelty but also as a witness of a mythical past, which is told in the places of justice. As Levinas writes, 'An event happens to us without a priori having absolutely anything, without having a slightest project, as it is said today'.[406] In the ritualistic dynamic of justice, the project is dual. It concerns a process of communication, where the totem and the Oedipus complex play, especially in the two European legal traditions. This project allows the restoration of order, firstly by resolving the dispute very close to the heart of the individual, the subject. But because of the symbolic position of the judge, the project becomes one of social

[405] Levinas, *Temps et Autre*, p.69.

[406] Levinas, *Temps et Autre*, p.62.

cohesion. It contributes to the diminution of the latent aggression present in the civilisation as underlined by Freud. It concerns both the individual and society.

Some significant and striking differences of ritual in the two European legal traditions, or elsewhere, help to illustrate how in a 'classical' way, we oppose the other of the civil law to the other of the common law. This is probably unconsciously rooted in our minds. The two former, major, imperial powers, those which controlled the pre-modern and modern world, France on one side and Great Britain on the other one, shaped the law and the vision of justice of most of the regions of the world. The development of many legal families was linked to these empires, contributing to the constitution of blocks of countries following either the French or English prototypes. But beyond the oppositions which are presented to us, we discover two ways of seeing and understanding the world and thus the law. In the European regional context, in a post-World War II situation that some call postmodern, dominated by the transnational development of human rights, through an exchange between the two legal traditions which operates, by an increasing permeability between the two, the legal event and the judge, by one or several rituals, informs us of the project and reassures us on the civilisation, reproducing archaic acts which 'speak' to us, which tell us a past story that is, in fact, so present. With Hegel, we can consider that the things which have a different aspect are, in reality, the same, and with Wittgenstein, we can consider that the things which are similar are, in fact, different.

Pierre Bourdieu subtly examined the substitution of the memory by an image. He analyses family photo albums and their function of past trophies, past events. These operate like identification benchmarks. Thanks to them, the family receives confirmation of its unity

of the time by the sight of its past. Besides, the album of the family's photos reassures them of a unique experience giving to the individual memories a common past. These photos act as an exorcism of the past, remembering it and acting here as a ritual similar to the funeral ritual. [407]

If we build an argument on Bourdieu's idea, by analogy, the representation of justice reconfirms a social identity and merges the individual and the group.[408] Moreover, according to Freud, we do not know if our childhood's memories are attached or not to our childhood or if they are recreated memories by recent events which recall our childhood memories. Those memories do not emerge but are shaped at the time where we think of them. They do not have any consideration for historical accuracy, from the process of their formation, and even concerning the selection of the memories themselves.[409] When myths emerge in our modern lives, ceremony becomes a crucial element of the representation of justice. As in the case of the family album, we have a crystallisation of individual memories into collective memories (common memory), through the spatiotemporal relationship that the places of justice communicate to us. Thanks to them, the memories of the myth of the creation of the world, of the horde, of

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[407] Bourdieu, P., « The Cult of Unity and Cultivated Differences » *in* Bourdieu, P., *Photography: A Middle-brow Art*, Cambridge, Polity Press, 1990, p.31.

[408] There are here evident similarities between this theory and that of the mirror in Lacan, in particular the idea of ignorance and unawareness, where the child identifies himself with his image even though it is his external appearance (how s/he sees him/herself) rather than what he feels inside. See « The Mirror Stage as formative of the function of the I as revealed in psychoanalytic experience » delivered at the International Congress of Psychoanalysis in 1949, *in* Lacan, J., *Écrits: A Selection*, (Alan Sheridan trans.), London, Norton, 2004, pp.1-7.

[409] Freud, S., « Screen memories », *SE 3* (1899), pp. 299-322, esp. p.322.

the patricide, of the struggle against aggressiveness and the advent of the 'you shall not kill' make sense.

The recent development of transparent places of justice, detaching from the traditional judicial architecture evokes the idea of a democratic and opened justice. Nevertheless, the place and the time of justice coexist and in this new development. It shows a vision of an egalitarian and non-hierarchical order, which tends to erase the past. In fact, it fails twice, because not only does it not erase it, it also strengthens its ideological dimension.[410] If the architecture of the places of justice is a language which is spoken following one, or even several, time(s), according to the idea of one, or several, ritual(s), then, as any language, it cannot be innocent. The values and the intentions of each author and each participant are present in each second, each stone, according to a speech which represents by its silence something absent.[411] The questioning of 'brutal' architectures of the 'sacred place' courthouses, where rituals are performed again and again, showing a play which encompasses the past, much alike the album of family photos, has a risk: the questioning of the whole conception of the structure of the world. The microcosm which plays in justice goes well beyond the mere resolution of the dispute. It recreates a macrocosm and fully gives back to man the place he has always had as being in the world. We cannot

[410] The use of a classical language does not require knowledge of architecture from the subject. The courthouse perhaps is not always simple but it 'speaks". On another hand, an office building, which share similar designs that a few recent courthouses is easier to understand, more accessible for contemporary subjects of a capitalist, liberal and democratic society. But this one does not speak, or more precisely does evoke neither justice, majesty, nor authority.

[411] Markus, *Buildings and Power*, p.4.

help but refer to Heidegger.[412] The presence of the Dasein in his world is strengthened by a unitary phenomenon that Heidegger describes. We are here in a basic state of the Dasein, [413] in its essential structure, [414] basically its understanding: 'the [act of] understanding is an original determination of the Dasein's existence'. [415]The world is, and exercises, a fascination on the being.[416] Dasein is the world and the world is an element of Dasein. Being-in-the-world belongs to the basic constitution of the being that is in each case mine, that at each time I myself am. Self and world belong together; they belong to the unity of the constitution of the Dasein and, with equal originality, they determine the 'subject'.[417] Without this macrocosmic dimension, there are no individuals. But it is not certain that the individual is absolutely aware of it. This fascinates us and the result is a certain vision of the world.

As with Merleau-Ponty, we understand then that: 'It is true […] that the world is what we see' and 'that we need to learn to see it'.[418] The space and the time of justice, through the ritual(s), leads us to interpret the world. We see it as this large 'thing' that contains us. This vision helps us as an integral moment.[419] The relationship between oneself and the world is interactive. The ritual(s) help this interaction between the being and the world,

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[412] Heidegger, M., *Being and Time*, Oxford, Blackwell, 2007 (1927), p.78.

[413] Ibid, p.86.

[414] Ibid, p.83.

[415] Heidegger, M., *The Basic Problems of Phenomenology*, Bloomington, Indiana University Press, 1988 (1927), pp.275-276.

[416] Heidegger, *Being and Time*, p.88.

[417] Heidegger, *Basic Problems*, p.298.

[418] Merleau-Ponty, M., *Le Visible et l'Invisible*, Paris, Gallimard, Tel, 1964, p.18.

[419] Overgaard, S., *Husserl and Heidegger on Being in the World*, Dordrecht, Kluwer Academic Publishers, 2004, p.12

and the being and its interpretation of the world, making us what we are, positioning us in time and in space, enabling us to understand this membership.[420] The world is a playground for the Dasein, a dynamic space where it evolves, from the past to the present, from the present to the future. The being in the world is a spatiotemporal thing. The world, as ontological structure of the Dasein, evolves.[421] As with Bettelheim,[422] we may think that mythical explanations of the eternal problems of life give way to more rational explanations as soon as man feels safe. Then we reject, repress, forget, or pretend to forget the essential, by creating soft and sweet places of justice, rational and friendly spaces. At the same time, by doing so we erase the origin of civilisation, with rejection of aggressiveness and the patricide as core element of the socialisation. The fundamental character of interaction with the cosmos shall therefore be a continuous research that only the ritual(s) enable it to relive.

After considering in Chapter 2 the closer link between space and time, the question of ritual/s and spaces of justice, we should now analyse deeper the point of contemporary places of justice and the connection with transparency.

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[420] Heidegger, *Being and Time*, p.118.

[421] Heidegger, M., *The Metaphysical Foundations of Logic*, Bloomington, Indiana University Press, 1984 (1928), p. 170.

[422] Bettelheim, B., *Psychanalyse des Contes de Fées*, Paris, Pocket Lafont, 1976, p.82.

IV. Chapter Three: Contemporary spaces of justice: use and abuse of transparency.

In this chapter, I will further analyse the question of spaces of justice. This chapter reiterates some of the arguments already made in the previous ones, but focuses more on the contemporary development. Empirical evidence suggests that there is a link between the architecture of courts of justice and respect for the law. Court architecture may influence the efficiency of the law in terms of individual case resolution, which has an impact on the cohesion of society. Law courts operate like a microcosm of the social organisation, where rituals of birth and re-birth take place, alongside the re-creation of the original transgression that marked the first step towards society. Courthouse design is important because courts a) constitute long-term investments that will be used for many years,[423] and b) convey a specific message of authority. Courthouses are spaces where the law is 'spoken' and where 'divine justice' results. In the past, the original myth of authority was represented by neo-classical (in civil law countries such as France) or gothic revival architecture (in common law countries such as the UK) in 'palaces of justice'. In more recent years, we have witnessed a radical shift in courthouse design. The representation of authority through judicial architecture has now been replaced by a contemporary 'post-modern' approach that seems to modify the original myth. This article examines the use of transparency, or what is termed here the new opacity, as an integral aspect of contemporary courthouse design.

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[423] HM Treasury, "Green Book." 2003, pp. 69-72.

Preliminary remarks.

A post-modern approach to places of justice has seen judicial architecture moving away from more traditional designs, which has had the effect of 'deconstructing' these palaces of justice. The key question would seem to be: does this affect the importance of the concept of justice and, in particular, the idea that justice has to be 'seen to be done'. As Krier notes, 'All great human institutions are to this day symbolised by classical monuments: St Peter's in Rome, the Capitol in Washington, Westminster in London',[424] and we should add to this list all the great palaces of justice. In fact, 'The dignity, authority and self-respect of such bodies [including the palaces of justice][425] are made visible in the majesty of their architecture'.[426] The risk with post-modern courthouse design, however, is that there is no recognition of such aspects: the new Civil Justice Centre in Manchester provides a useful example here. As observed by Mulcahy in her account of an exchange about the building between Stephen Quinlan and an architectural historian, 'the new Manchester centre [is] not recognisable as a courthouse'.[427] This statement mirrors the results of interviews conducted on the other side of the Channel by Lecourtois about the new Caen courthouse in Normandy. Lecourtois notes that the design triggered a range of public reaction: 'From the exterior it is not as representative of justice as the old courthouse', or 'In the former one, there were the columns, and that is more Roman

[424] Krier, L., *Architecture: Choice or Fate.* Winterbourne: Papadakis Publisher, 2007, esp. p.177

[425] My emphasis.

[426] Krier, *Architecture*, p.177.

[427] Mulcahy, L., *Legal Architecture.* London: Routledge, 2011, p.14.

… Viewed from the exterior one cannot know that it is a courthouse'.[428] Furthermore, in relation to the issue of recognition of a building, we need to assess carefully the perceptions, or lack of perceptions, that derive from a building that is unrecognisable.

Fig. 3. Manchester Civic Centre, UK.

[428] Lecourtois, C., "Perception Architecturale et Image." *Colloque International « Images et citadinité ».* Alger, 2005. pp. 1-10, esp. p.5.

Fig. 4. Palais de Justice de Caen, France.

For centuries, 'traditional' courthouse architecture has clearly 'shown' its judicial authority.[429] Post-modern designs seem to remove clarity from this message conveyed by the buildings, however. Classical judicial architecture has always shown a certain transcendence, something vertical in the design features that express, make visible, the links between God–Monarch–Judge; traditional design suggests something 'sacred', then, that perhaps conflicts with the immanence, the horizontality, of contemporary democracy. If we assume that the signified 'justice' is immutable and the signifier 'place of justice' is not, we must look carefully at the representation of justice in a postmodern democratic environment in which 'horizontality' rather than 'verticality' is supposed to be the defining trait, and in which courthouses have left the sacred in order to enter the capitalist market. As stressed by Resnik and Curtis, 'Most of the new courthouses, often

[429] Markus, T. *Buildings and Power, freedom and control in the origin of modern building types.* London: Routledge, 1993, pp. 34–35

clad in glass to make justice's transparency, celebrate courts without reflecting on the problem of access, injustice, opacity, and the complexity of rendering a judgement.'[430]

Some philological remarks.

We may have forgotten in the contemporary era that to apply the law is to exercise a power – the power to decide on the meaning of words. From this perspective, we are all like Humpty Dumpty, who pretended to be a master of this game.[431] Thus, I will open this enquiry by looking at the words 'palace' and 'justice', which are connected in the English phrase 'palace of justice' (as it is used in the *Oxford English Dictionary*) or in French, '*palais de justice*'.

'Palace'

The dictionary definition of a palace of justice is as follows: 'In France and French-speaking countries: a building housing a court of law; a law court'.[432] But courts of law, law courts, or courts of justice are, rather, an assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause – civil, ecclesiastical, military, or naval. The palace of justice is a law court, a place where law has, or founds, its space, similar to the 'vast and luxurious residence belonging to or having belonged to

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[430] Resnik, J., Curtis, D., *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms,* Yale: Yale Law Library Series in Legal History and Reference, 2011, esp. p. xv.

[431] Brunet, P., "Humpty Dumpty a Babel? Les juges et le vocabulaire juridique." *Chronique de Droit Européen et Comparé* (Les Petites Affiches) 17 (2008): pp. 1-9, esp. p.2.

[432] Dictionary, Oxford. 2011.

an important person, a royal residence'. The word palace or *palais* comes etymologically from the classical Latin word *Palatium*, which was the name of one of the seven hills of Rome (also called *Mons Palatinus*).[433] It refers to the imperial residence or temple located on the Palatine Hill, imperial or royal residences in general, and in post-classical Latin, it also refers to (*palatium*) the emperor (4th century), royal officials (7th century), the bishop's palace (9th century), the prince's manor (11th century), and a town hall (12th century). Justice is so intangible, so noble, so sacred, that it needs a strong signifier: it needs to be hosted in a place similar to one devoted to other incarnations of power (emperors, kings and bishops).

'Justice'

According to the *Oxford English Dictionary*, there are three definitions of justice.[434] It is primarily the quality of being just. It also means the administration of the law (linked to the idea of the court and the king) and, finally, it refers to the person administering justice (which is also linked to the court and the king). If these three definitions appear *prima facie* to be naturally connected, the connection occurs, in my opinion, at different levels. If we respect moral values, or divine laws, as 'just' (in the first definition) then there is no need to go further, and no need for the other two definitions. We may reasonably assume that this form of justice can only exist in some sort of ideal society. The organisation of a 'normal' society requires a system that implements respect for the rules

[433] Ibid. Although it is likely that palaces were a Greek 'invention'. See, for example, C. F. Macdonald, 2003, 'The Palaces of Minos at Knossos', *Athena Review*, Vol.3, no.3: Minoan Crete. http://www.athenapub.com/11knoss.htm.

[434] Ibid

of that society, perhaps by way of sanctions, as it is generally agreed that there is a distance between the theoretical vision of contractarian theories and their application. Moving from a state of nature to a state of civilisation should be something that is desired by those involved, so that the rules they give themselves should be automatically respected. The place of justice that is the palace of justice becomes such an important space, such a central element of the 'real' existence of the law, that this is where it takes its full signification: it is a social dimension in which the administration, and the administrator, of the law are positioned. It illustrates perfectly the idea that the function of a building and the look of the building are intertwined, and in the case of palaces of justice, the perception of the building conditions the process of justice. Justice, Derrida notes, is the impossible. Indeed, 'La justice en elle-même, si quelque chose de tel existe, hors ou au-delà du droit n'est pas deconstructible'.[435] The signified 'justice' is not subject to any deconstruction and is therefore immutable; however, its representation – the signifier 'justice' – is.

This hypothesis, which mixes Derrida's definition and semiotics, leaves us with a signified (justice) and a signifier (the place of justice): the signified cannot be deconstructed and is immutable, but the signifier, a representation of this concept through buildings, is subject to evolution, fashion and trends. The following section will discuss the evolution in courthouse design, from a traditional architecture used in the main representatives of common and civil law legal traditions (in England and France) to a post-modern architecture that claims to be 'transparent'. I will then consider the dilemmas

[435] Derrida, J., *Force de Loi, Le 'fondement mystique de l'autorité'.* Paris: Galilée, 1994, p.35.

posed by such post-modern courthouse design, and the differences between notions of opacity and theories of transparency.

Evolution of places of justice: From traditional (opaque) to post-modern (transparent) law courts.

In matters of law court design, according to Lecourtois,

> Trois principes programmatiques paraissent inviter à la mise en œuvre d'une échelle symbolique formelle. Ces principes se présentent sous forme de propositions par lesquelles les architectes sont invités à penser de manière spécifique certains éléments d'architecture. Ces éléments sont: 1) la monumentalité qui doit passer par un vocabulaire architectural spécifique (colonnes, frontons, emmarchement, statuaire); 2) l'ouverture à penser relativement à un traitement de la transparence et 3) la théâtralité ou pédagogie qui doit être mise en scène relativement aux temporalités de la justice. [436]

Justice has to be 'seen to be done': thus its signifier, the place of justice, combines monumentality, a particular use of transparency and theatricality. The place where this occurs plays an important role in the administration of the signified (justice) and for its

[436] Lecourtois, C., ""Espace de la conception" d'architectures judiciaires: les nouveaux palais de justice (Caen, Melun, Nantes, Grenoble et Pontoise)." *Diagonale Phi. n°4, Université Lyon 3*, 2010, pp.31-52, esp.p.38.

administrator. Traditional courthouse architecture is an example of the secularisation of the religious architecture of England and France, which I will compare here; it has been questioned recently in discussions among architects about the necessary transparency of post-modern design.

Comparing the traditional architecture of places of justice in France and England.

For traditional architects, the place of justice was a palace of justice in which a complex system of values and ritual(s) were connected to the *architecture parlante*, (speaking or talking architecture). The monumental building opens up the mind through its theatricality, imposing upon the viewer the solemnity of the state and of authority.

The typical architecture of judicial buildings relates to sacred places – temples or churches; in this way, the link to holiness appears to link justice to god(s). In a truly Augustinian way, the temple of the god(s) has here become the temple of the mortal, which imposes a sensational image. Interestingly, the Greek temple 'was always set apart from the town, not only being put in a sacred enclosure, but usually also upon a headland, a citadel or acropolis',[437] while '[t]he Roman temple, like some Baroque church, was a feature in the street; it had a façade with a great flight of steps leading to a richly carved Corinthian portico' (Furneaux Jordan 1993, 46-47).[438] It is no surprise, then, that an

[437] Furneaux Jordan, R., *Western architecture : a concise history.* London: Thames & Hudson, 1993, p.28.
[438] Ibid, pp. 46-47.

architect such as Krier notes that the kinds of buildings discussed here are classical in origin:

> Classical: from Latin classical, of highest class ... make[s] [with the vernacular] distinctions of rank at different levels, between private and public, between individual and collective, between urban fabric and monument, between house and palace ... It is concerned with symbolic language, with the construction and decoration of public structures, with buildings, (…), and monumental features in general.[439]

For neo-classical architects, the place of justice was a palace, 'speaking through allegorical and metaphorical forms', which played with the natural movement of the Earth and the Sun, days and nights, life and death, light and darkness, contrasting the 'temple illuminated by justice' and the 'dark places devoted to crime'.[440] We might sense here the idea of a separation, of a dichotomy, a black and white vision of life and of the world.[441] The place where justice must be rendered is a sacred place because it is illuminated by justice and the light of the truth, which contrasts with the dark places devoted to crime.[442] We may, like Derrida, think that 'questioning … the very idea of building is aligned with

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[439] Krier, *Architecture*, p.53.

[440] Markus, T., *Buildings and Power, freedom and control in the origin of modern building types.* London: Routledge, 1993, esp. pp.34-35.

[441] We find this in the ritual of the trial itself, which is, in fact, the act of separating the good from the bad, the *triage*.

[442] We may agree with Lacan that 'Truth begins to be established only once language exists'. Lacan J., *My Teaching*, Verso 2008, p.29 Hence, the notion of jurisdiction, *juris diction*, the place where the law is said.

a questioning of institutional authority'.[443] All the apparatus involved in the 'creation' of authority is therefore fundamental. In the case of judicial architecture, what is interesting is the presence of specific judicial ritual(s) that mix with the architecture.

Rather than the neo-classical, architects in England have traditionally used a different type of signifier: the gothic revival. This term (sometimes referred to as Victorian gothic or secular gothic) usually refers to the period of architecture practised in the second half of the nineteenth century (around 1830 to 1870). Eastlake observes,

> The renewal ... of a taste for Mediaeval architecture, and the reapplication of those principles which regulate its design, represent one of the most remarkable phases in the history of art.'[444]

Eastlake traces the gothic to the sixteenth and seventeenth centuries, while also examining its re-appropriation in the Victorian era. It is another type of sacred design, as demonstrated by the 'Monasticon Anglicanum'.[445] The 1818 Church Building Act emphasised that Gothic was to be the ecclesiastical style. The commissioners responsible for the financial side of things essentially discovered that a Gothic church cost less to build than a neoclassical one. However, Eastlake notes that the design was adopted for civic buildings when the government decided that the new Houses of Parliament should

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[443] Wigley, M., *The Architecture of Deconstruction: Derrida's haunt.* Cambridge: MIT Press, 1995, p.47

[444] Eastlake, C. L., *A History of the Gothic Revival.* London: Longmans, Green and Co, 1872, p.1.

[445] Ibid, p.2.

be gothic.[446] This was reinforced by an acknowledgment of the versatility of the style and its obvious possible secularisation: 'the revival of the Gothic as a versatile style with secular application was the reconstruction of the Palace of Westminster'.[447] Pugin and Barry's design, which won the 1835 competition to redesign the Palace of Westminster after its destruction in a fire in 1834, employs the perpendicular Gothic style both inside and out.

Fig.5. The Square House', Roman Temple, Nimes (France), 16 BC.

Fig.6. Lincoln Cathedral, Lincoln (UK), 1185-1311.

[446] Ibid, p.187.

[447] Sutcliffe, A., *Architectural History of London.* New Haven: Yale University Press, 2006, p.100.

Fig.7. Palais de Justice, Marseilles (France), A. Martin, 1856-1862.

Fig. 8.Victoria Law Courts, Birmingham (UK), A. Webb & I. Bell, 1887-1891

The Royal Courts of Justice (the Law Courts) was probably the most successful Gothic public building after the St Pancras railway station. A restricted competition involving major architects of the day, including Barry, Waterhouse, Scott and Street (among 11 entries) was held in 1866 (Port 1968). The judges made no award at first but after much confusion selected Barry's plan and Street's elevation. In 1868, however, the contract was given to Street alone[448]. [449]The main frontage was a multi-element stone design in a thirteenth century French style. The Gothic hall leading from the entrance was supposed to be similar to that found in the ritual of justice in France, a *salle des pas perdus*, with

[448] In appendix 283, he explains that St Pancras was a Venetian Gothic design, the 'first instance of the adaptation of medieval design for such a purpose in London'.

[449] Eastlake, *Gothic Revival,* p. 128.

dimensions of 70m by 15m by 25m, like Lincoln Cathedral – another demonstration of the connection with the sacred.[450]

Fig.9. Royal Courts of Justice, London, UK.

The Gothic Revival seemed to give a form to a particular feeling for the spiritual and for tradition, which were already associated with the monarchy and traditional English conservatism; neo-classical style, on the other hand, seems to voice the rational and the radical that is associated with the republicanism of France and the USA. It was therefore a nationalist or even a dogmatic nationalist discourse of 'speaking architecture' that developed in the nineteenth century. We should add that for Krier,

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[450] Sutcliffe, *Architectural History of London,* pp. 106-107.
Pugin was strongly influenced by Lincoln Cathedral. See for illustration Pugin: God's Own Architect, http://www.bbc.co.uk/programmes/p00n58pm. Last accessed 15 March 2015.

> In traditional cultures, invention, innovation and discovery are the means to modernise time-honoured and practical systems of thinking, planning, building, representing, communicating in the arts, philosophy, architecture, language, the sciences, industry and agriculture ... They are the means to an end ... Fundamental aesthetic and ethical principles are deemed to have universal values which transcend time and space, climate and civilisation. In modernist cultures, invention, innovation and discovery are ends in themselves ...There are no longer any universal ethical and aesthetic categories.[451]

Questioning what is here.

The design of law courts matters. It matters particularly because recent years have seen the construction of radically different designs of courthouse buildings. I believe this should be questioned, and that we need to analyse how this new trend in courthouse design affects public understanding of the places and spaces where justice is done. One of the problems encountered in the representation of justice is that palaces of justice have imitated temples and churches, which has connected them with the religious and the spiritual.[452] According to Latour, 'Now that the modernity of our world is coming to a

[451] Krier, *Architecture*, p.51.

[452] This has also been the case for museums, as explained by Duncan in Duncan, C., "The Art Museum as Ritual." In *Civilising Rituals, inside public art museum*, by C. Duncan, London: Routledge, 1995, pp.7-20, esp. p.7

close, we understand that it was no more secular than any other'.[453] The divide between the religious/the secular seems to vanish, or to have vanished. As a space where the ritual of justice develops, the place of justice is a microcosm that evidences the vanishing of this divide. As Duncan notes, 'A ritual site of any kind is a place programmed for the enactment of something. It is a place designed for some kind of performance', where 'participants perform or witness a drama – enacting a real or symbolic sacrifice'.[454] Could we apply this statement to 'post-modern' courthouses? For centuries, the traditional architecture of courts has clearly demonstrated authority[455]; modernism seemed to follow the same trend, but post-modern designs seem to be removing the clarity from the message conveyed by the buildings. For Jencks, 'Modern architecture died in 1972'[456]; postmodern architecture emerged as a critique of modernism. It is 'committed to pluralism, the heterogeneity of our cities and global culture, and acknowledge[s] the variety of tastes, cultures and visual codes of the users';[457] it employs 'curves, blobs, folds, crinkles, twits or scattered patterns', and 'sends complex messages, ones that often carry ironic, dissenting or critical meaning, those that challenge the status quo'.[458] This statement goes to the heart of the main issue: the function of the building and its design are connected, linking the appearance and the institution. For Heidegger, 'to appear' is

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[453] Latour, B., "Visualisation and Social Reproduction : opening one eye while closing the other...a note on some religious paintings." In *Picturing Power: Visual Depiction and Social Relations*, edited by G Fyfe and J Law, London: Routledge, Sociological Review Monograph 35, 1988, pp.15-38, esp. p.34.

[454] Duncan, "The Art Museum as Ritual.", esp. p.12

[455] Markus, *Buildings and Power,* pp.34-35.

[456] Jencks, C., *The New Paradigm in Architecture: The Language of Postmodernism,* Yale University Press, 2008, p.9.

[457] Ibid, p.2.

[458] Ibid.

what is in front of us; what 'appears', as in ancient Greek 'what is instituted', always meant what was left in front of us[459]. It could therefore be the case that as the signified justice is immutable, its signifier should not depart too much from the traditional way of representing it, otherwise the meaning of the complex messages given out could be lost. In other words, we cannot play with the architecture of the courts of justice as we may play with other types of buildings, even those of other political institutions, without facing the risk of justice losing meaning.

We must question judicial architecture because, as explained by Derrida, 'the questioning of the very idea of building is aligned with a questioning of institutional authority'[460]. It is indeed the case that the design of public buildings resounds throughout the society of which they are supposed to be a part. Primarily, as previously mentioned, they represent a huge and long-term investment.[461] In fact, 'institutions are understood as buildings that can be displaced only by rethinking architecture'.[462] For Derrida, therefore, the rethinking of institutional politics turns out to be architectural.[463] What we see, what is put in front of us, what appears, is thus of significance. What is re-*presented* becomes a necessity in the buildings of political institutions, as 'we have delegated to hundreds of non-human lieutenants the task of disciplining, making, and moving other humans or other non-

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[459] Heidegger, M., *Qu'appele t'On Penser?* 3rd. Paris: PUF, 1959, p.189.

[460] Wigley, M., *The Architecture of Deconstruction: Derrida's haunt.* Cambridge: MIT Press, 1995, p.47.

[461] See HM Treasury, pp. 69-72. Also http://www.ogc.gov.uk/documents/CP0067AEGuide7.pdf. In addition, 'The long lifespan of the existing building stock means the majority of it will still be in use between 50 and 100 years' time'**Invalid source specified.**. in http://www.rics.org/site/download_feed.aspx?fileID=2162&fileExtension=PDF.

[462] Wigley, *Architecture of Deconstruction*, p.47.

[463] Ibid, p.48.

humans'; we thus have 'instruments [that] bring faraway places, objects and times to us which are thus represented – this is presented again – for our inspection'.[464] These public buildings are in fact the only proof, the sole evidence, of political power, its main and only representation, its main and only signifier: they give *soul* to the political through the eyes of whoever looks at them. Let us not forget that there is a crucial difference in law between the natural person and the legal person (artificial): in the case of a natural person, we have a real person; in the case of a legal person, we have a fiction. In consequence, one 'exists' while the other does not; one is 'alive', the other is not. Krier considers this issue when he writes, 'the value of ancient monuments does not reside in their material age but essentially in the quality of the ideas that they embody'.[465] These buildings are the signifier of signified ideas: they give them a 'body'. This is particularly true for ideas such as justice and the law. Legal persons, including public persons, like corporations or states, need something, perhaps like a magician's trick, to give us the feeling that they are what they are, because '[t]he language of institution is that of buildings'[466] and, of course, because 'there is no institution without representation'.[467] An institution is supposed to create the presence of a fiction (a legal person) that is absent. Representation is the presence of the absent. In this sense, representation gives life to the institution, and 'institutionalises' it.

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[464] Latour, "Visualisation and Social Reproduction", p.15.

[465] Krier, *Architecture,* p.73.

[466] Wigley, *Architecture of Deconstruction*, p.51.

[467] Ibid, p.51.

We could apply here, by analogy, Derrida's considerations on representation in his comments on Rousseau. He states that the signified 'sovereign people' are represented by 'the assembly', and therefore they are the representative signifier.[468] The institution will rule for, and on the behalf of, the sovereign. The representation follows a primitive presence and brings a final presence and occurs when the signified is absent – as in the present case of justice. Derrida goes on to demonstrate that the representative is not the represented (the signifier is not the signified) but is only the representative of the represented (only the signifier, in fact). As representative, it is not simply the other of the represented.[469] This re-presentation brings the absent into the moment. It focuses on the signifier by giving it the function of representing the absent signified. Justice, our signified, is represented by the palaces of justice – its signifier. It brings us the impossible, the absent, and of course, the design that is adopted matters: depending on the radical nature or even the brutality of the design, it will give different representations of what justice is (or is supposed to be). From those designs, we may feel or perceive the authority of political power, what it wants to say about itself and about us, about individuals and society. It seems significant then that in our contemporary world all is being done to 'dismantle' traditional representation. While 'in democracy popular taste continues to have easier access to aristocratic than democratic high art',[470] signifiers of the places of justice are becoming transparent and architects claim to be in a process of opening up the old opaque courthouses.

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[468] Derrida, J., *De la Grammatologie.* Paris: Editions de Minuit, 1994, p.418.

[469] Ibid, p.419.

[470] Krier, *Architecture*, p.21.

Discourses of transparency.

It seems extraordinary to witness the almost constant use of (the argument of) transparency by architects involved in the design of new courts. It seems obvious for contemporary designs to be using glass and steel or aluminium. But if these are used for private dwellings and commercial buildings, does it mean we should or could use these materials everywhere, in all cases? We know that a legal person needs representation, and that a legal person encompasses public and private entities. But does applying the same treatment to the design of a commercial office block and to a public building make sense? What about in courthouses? To illustrate this point, I will use the case of the new Bronx courthouse designed by Uruguayan architect Viñoly. Viñoly is well known for designing commercial buildings that use a lot of glass. His design was a typical example of a post-modern courthouse, which opened in 2007. The façade of the courthouse is a great example of the use and abuse of glass and aluminium. But there is something more interesting here than the use of specific materials: the discourse supporting this use. Given the frequent use of glass, it is perhaps unsurprising that we find a systematic use by the architect of 'transparency' in the justifications for, and explanations of, his design:

> Rafael Viñoly, architect of the Bronx courthouse, sought a design that would give the judicial system an image of openness and transparency, rather than the opaque, closed feeling of the traditional courthouse. 'What interested me was transforming the public's perception that the building ... represented an institution that was seen as closed and in need of protection from the community' … The [new] building

speaks to the participatory and the democratic nature of the judicial system and its fundamental and constructive mission in our society. [471]

Fig. 10. Bronx County, Hall of Justice, New York, USA.

Womack-Weidner goes on to note,

> The feeling of transparency and openness permeates the building. The courtrooms, jury deliberation rooms and robing rooms, all of which are in the interior of the building, have natural light from clerestory windows that 'borrow' daylight from the corridors between the courtrooms.

[471] Womack-Weidner, A., "New York Opens Second Mega-Courthouse." *Benchmark, Journal of the New York State Unified Court System* 2, no. 3 (fall 2006), pp.1-2.

A non-exhaustive selection of articles in specialist and non-specialist publications brings further clarity to the argument, in which transparency is everywhere:

> This is achieved [transparency][472] by not concealing the building functions behind a representational face, but by allowing the buildings' program, structure and circulation to be viewed, providing a literal and metaphoric transparency of the judicial process.[473]

> The Bronx Criminal Court Complex, through its form and transparency, will redefine the relationship of the courthouse with the surrounding community. Glass is used to convey a sense of openness that stands in sharp contrast to traditional courthouse design.[474]

> 'The architects believe that this facades system gives the building an open and unintimidating appearance –all of its functions remain on public view, providing literal and metaphoric transparency to the judicial process.[475]

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[472] The author emphasis.

[473] *Bronx County Hall of Justice.* 2011. http://architypesource.com/projects/61-bronx-county-hall-of-justice/description. Last accessed 15 March 2015.

[474] *The Bronx Criminal Court Complex.* 2001. http://wirednewyork.com/forum/showthread.php?t=3685&page=1. Last accessed 15 March 2015.

[475] *Open curtain wall gives transparency to the judicial process.* 2011. http://archrecord.construction.com/projects/bts/archives/civic/07_bronxhall/default.asp. Last accessed 15 March 2015.

Its project director, Fred Wilmers, called the courthouse 'a metaphor for the transparency of the judicial system, the openness of government'.[476]

> Located on 161st and 162nd Streets between Sherman and Morris Avenues, the Hall of Justice is a visually dynamic glass building where judicial transparency is not only a metaphor but also quite literal. With forty-seven courtrooms, seven grand jury rooms, the Department of Corrections, the Department of Probation, and the Bronx District Attorney's office, it is one of the largest courthouses in the country.[477]

Sometimes, a critical but rather isolated view is expressed:

> But just as we recognize the protective value of transparency in government, and in the justice system, literal transparency can be a security feature, too. In the eighteenth century, the philosopher Jeremy Bentham envisioned a prison – the Panopticon – in which inmates could be under constant, surreptitious observation. Viñoly's courthouse is a compassionate Panopticon: It allows everyone to observe everyone else. This doesn't obviate the need for cameras or guards, but it limits the possibility of nasty surprises.'[478]

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[476] Hilferty, R., *Jury Beauty.* 26 February 2008. http://www.nysun.com/arts/jury-beauty/71877/. Last accessed 15 March 2015.

[477] "'Viñoly in the Bronx' Opens in Art Gallery." *Lehman College E News.* Vol. 3. NY, 2009.

[478] Davidson, J., *Bronx Clear, How a courthouse polices us through the glass.* 4 February 2008. http://nymag.com/news/intelligencer/43599/. Last accessed 15 March 2015.

It is perhaps logical to have such a glass building and the many resulting statements about transparency in this context, but we should carefully consider this discourse about the use of glass/transparency because it collides with notions of openness and democratic processes. In fact, 'an equation of glass and access to justice is simplistic (..)'.[479] Transparency has been used by architects to push certain post-modern designs, certain representations of buildings, of legal persons, and they have not differentiated between public and private functions in so doing. It does not mean the design is actively wanted by the decision makers, as a true choice, but rather that the decision makers have followed the statements made by those who are supposed to know about buildings – the experts – the architects.[480]

According to Supreme Court Justice Felix Frankfurter, 'Justice must satisfy the appearance of justice' (*Offutt v. United States* 1954).[481] We could interpret this idea of the appearance of justice in many ways. Notably, I could drag this idea to the extreme end of the spectrum of 'appearance'. Here, the notion that justice has to be 'seen' to be done is fully translated by a glass building – a building so transparent that anyone can see inside it. For Mulcahy, 'Transparency is seen as undermining mystique and inviting public participation by rendering surprises less likely.'[482] The place where justice is (or is

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[479] Resnik, Curtis, *Representing Justice,* p.341.

[480] We should keep in mind the lacanian 'subject supposed to know', the analyst, who is thought by the 'subject supposed to believe', the patient, to know everything, including his secret.. Zizek, S., *How to Read Lacan,* London: Grant Books, 2006, pp.28-29.

[481] Bruner, J.S., *Law, Culture and Ritual: Disputing systems in cross-cultural context.* NY: NYU Press, 2005, p.xi.

[482] Mulcahy, *Legal Architecture*, p.152.

supposed to be) done should be 'opened' through the use of glass in post-modern court buildings. A new myth, a new great narrative, seems to emerge and to be based on a new paradigm: transparency. It is as if we were taking the affirmation that justice must be seen to be done a step further. Indeed, what is better than a transparent process, delivered in a transparent building? We are facing a new dilemma of post-modernity, of post-modern architecture: we want a transparent process in a transparent building, but are we certain that a transparent building is the way forward for conveying this new transparent process?

The dilemma of post-modern courthouse design: Transparency v. Opacity / Opacity v. Transparency.

This section will further develop the discussion of transparency put forward by the architects. As mentioned, courthouse architects should operate on a symbolic scale. They should implement elements such as monumentality to demonstrate power and authority, together with a certain amount of transparency to open minds and theatricality for pedagogical purposes.[483] Lecourtois refers here to a certain level of transparency, not to full transparency, and she also notes that it merely concerns any demonstration of democratic values.

[483] Lecourtois, C., ""Espace de la conception" d'architectures judiciaires: les nouveaux palais de justice (Caen, Melun, Nantes, Grenoble et Pontoise)." *Diagonale Phi. n°4, Université Lyon 3*, 2010, pp. 31-52, esp. p.38.

Transparency is fashionable in general architecture. We can walk the streets of many cities around the world and see clear examples of 'transparent' architecture, where buildings have a considerable amount of glass on their façades. But if perhaps it seems unimportant to question transparency in commercial buildings, this 'fashion' in architecture overspills into public building design and, more crucially, to the design of courthouses. To question this, we will next consider transparency in architecture and in psychoanalysis and analyse how opacity is in fact the true transparency: the use of 'transparency' is more concerned with power. Finally, the next section will 'gaze', with Lacan, at (or through) a transparent building.

Transparency: Architecture and Psychoanalysis.

If, using transparency, I completely deconstruct the opaque, old fashioned court of justice (or rather what we are told is an opaque, old fashioned design), I cannot really 'see' the place of justice as a palace anymore, because it does not seem to suit the historical and human context of the 'liberal democratic/capitalist' era. The word 'transparent' comes from Medieval Latin, *transpārēnt-em*, and is a present participle of *transpārēre*, composed of the prefix *trans* and the verb *pārēre*, to appear, to be visible. It also relates to *transpicio*, to see through. In addition, transparency relates to parenting: trans-parent. We therefore have a word that tells us the story of something that moves from one side to another and opens something. 'Trans' comes to us with the sense of coming 'across, through, over, to or on the other side of, beyond, outside of, from one place, person, thing, or state to another', but also 'across, crossing', or 'beyond, on the other side of', and finally, 'beyond, surpassing, transcending'. The trans-parent is, accordingly, something

that goes beyond, or on the other side of the parents (both parents), that gives access to the parents. What more is needed to convince us that transparency is about hierarchy and verticality, about power and control, rather than about openness and democracy?

It should be noted that there are many discussion of parenting in psychoanalysis, and we find the notion of transparency in psychoanalysis, particularly its loss; indeed, 'while Freud preached the loss of transparency, the Enlightenment philosophers emphasised the gain of transparency'.[484] If transparency appears important, it is through its loss that psychoanalysis considers it. Transparency is not new. Resnik notes its political roots in the philosophy of Rousseau. (Judith Resnik 2011, 342)[485] For Bessire, transparency has been around since at least the nineteenth century, moving from the aesthetic into every field of study[486]; it is therefore not surprising to see transparency in fields such as architecture and law. However, we should consider the relationship between the two, in light of new court design as it relates to 'justice', and should keep in mind that psychoanalysis could provide some useful insights here. But first we should return to architecture, and to do so I will refer to Rowe and Slutzky's 1963 article on transparency both literal and phenomenal.[487] Rowe and Slutzky demonstrate the polysemy of the word transparency as follows:

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[484] Friedel, W., "Chapter 3. Sigmund Freud: the loss of transparency." In *Copernicus, Darwin and Freud: Revolutions in the History and Philosophy of Science*, 185-270. Wiley-Blackwell, 2008, p.188.

[485] Resnik, Curtis, *Representing Justice,* p.342.

[486] Bessire, D., " Transparency: a two-way mirror?" In *30 years of IJSE: Festschrift in honour of Professor John O'Brien*, edited by D. (ed.) Pettman, 424-438. Bradford: Emerald Group Publishing, 2005, pp.424-438, esp. p.425.

[487] Rowe, C., Slutzky, R., "Transparency: Literal and phenomenal." *Perspecta* 8 (1963), pp. 45-54.

> According to the dictionary definition, the quality, or state, of being transparent is both a material condition – that of being pervious to light and air – and the result of an intellectual imperative, of our inherent demand for that which should be easily detected, perfectly evident, and free of dissimulation. Thus, the adjective transparent, by defining a purely physical significance, by functioning as a critical honorific, and in being dignified with far from disagreeable moral overtones, becomes a word which from the first is richly loaded with the possibilities of both meaning and misunderstanding.[488]

This striking statement shows *prima facie* the difficulties we face: the many possible meanings of the term and, of course, the potential for misunderstanding. It is also critical, I believe, to any study on court buildings. If the possibilities for diverse meanings and misunderstandings are vast, then the use of 'transparency' in court buildings carries these diverse meanings and misunderstandings, although the signified 'justice' remains unchanged. For Rowe and Slutzky, 'Transparency means a simultaneous perception of different spatial locations'[489]. Transparency not only abolishes distance but also produces immediacy: there is nothing to mediate, no 'protection'. Rowe and Slutzky open their enquiry by defining transparency in relation to painting, then move to architecture, in a process reminiscent of what Lacan did when he introduced architecture to the discussion of 'anamorphism ... in a discussion of the role and function of projection' again

[488] Loc. Cit.

[489] Loc. Cit.

emphasising the connection between architecture and psychoanalysis.[490] Rowe and Slutzky consider two types of transparency: 'Transparency may be an inherent quality of substance, as in a glass curtain wall; or it may be an inherent quality of organisation. One can, for this reason, distinguish between a literal and a phenomenal transparency'. [491] Literal transparency here means the use of materials that make a building transparent (the glass walls and open floor plates of Gropius's Dessau Bauhaus, for example, while phenomenal transparency refers to an effect, a perception of what is created by a particular organisation of 'things' (the facades and interior spaces of Le Corbusier's Villa Stein at Garches, for instance).[492] Rowe and Slutzky observe:

> Literal transparency ... tends to be associated with the *trompe I'oeil* effect of a translucent object in a deep, naturalistic space; while phenomenal transparency seems to be found when a painter seeks the articulated presentation of frontally displayed objects in a shallow, abstracted space.[493]

They add:

> Provided with the reality rather than the counterfeit of three dimensions, in architecture literal transparency can become a physical fact. However, phenomenal transparency will, for this reason, be more difficult to achieve; and it is indeed so

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[490] Holm, L., "What Lacan said re: architecture." *Critical Quarterly* 42 (2000), pp. 29-64, esp. p.31.

[491] Loc. Cit., esp. p.46.

[492] Loc. Cit.

[493] Rowe , Slutzky, Transparency, p.48.

> difficult to discuss that generally critics have been willing to associate transparency in architecture exclusively with a transparency of materials.[494]

As summarised by Holm, 'Colin Rowe and Robert Slutzky define phenomenal transparency as a conceptual effect of modern spatial configurations, to be distinguished from properties of glass and other materials that allow for the penetration of the vision'.[495] Phenomenal and literal transparency are related to architectural *trompe l'oeuil*, one being the opposite of *trompe l'oeil*, while the other is linked to *trompe l'oeil*,[496] creating a (literal) transparency that has as its corollary a (phenomenal) opacity. [497]

'Transparency' is therefore not as simple as it seems, and we can, therefore, understand why decision makers might rely too much on 'those in the know': architects are supposed to know how complex these issues are. Another issue it seems relevant to question is the reason for using transparency, or the reason for using opacity. What are we hiding, and what do we want to show? Looking at (primitive) architecture, Holm observes that it is 'organised around emptiness', and 'enters the symbolic order by a process of "primitive sublimation"';[498] it thus relates to Freud's *Das Ding* 'the Freudian Thing'.[499] This emptiness appears as 'the presence of a hollow, a void, which can be occupied by any object and whose agency we know only on the form of the lost object, the *petit a*.' *Petit*

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[494] Loc-cit. p.49.

[495] Holm, L., "The New Yorkers." *Architectural Theory Review* 12, no. 2 (2007), pp. 104-120, esp. p.115.

[496] Holm, What Lacan said, p.47.

[497] Holm, "The New Yorkers", p. 15.

[498] Holm, What Lacan said, p.29.

[499] Loc. Cit.

a in lacanian theory is that which is lacking; as Zizek states,[500] it is something that will never be, 'except by circumnavigating the eternally lacking object'.[501] Architecture therefore both encloses emptiness and circulates around the lost object: the transparent quality of a building might correspond to the search for what is lacking. The opacity of traditional court buildings shows something that is present, while transparency shows us something absent that *should be* present: transparent court houses show us the entrance to the void. However, 'the signifier (symbolic order) screens us from the real'[502] and the opacity of the building appears to be crucial in the mechanism of mediation, creating distance and authority. That said, Holm goes on to state, 'Architecture is an empty temple awaiting the entry of God in a "lightning -flash of individuality"'.[503] This is a clear statement on the quality of the signifier, the building, and the link between the 'temple' (the sacred signifier) and individuality, or even subjectivity, which is instrumental in the perception of courthouses. To paraphrase Holm, architecture evolves and becomes not only something that encloses emptiness, but that represents it: it represents the absence of what is represented[504].[505] We arrive at the postulate that 'an architecture which represents itself ... might appear behind its representation. [this would be an architecture] that 'signif[ies] the presence of an absence'. In the case of post-modern design, we do have the feeling of a complete absence. The signifier has 'opened' its facade in order to

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[500] Zizek, S.,*The Fragile Absolute: Or, why is the christian legacy worth fighting for?* London: Verso, 2000, pp.145-146.

[501] Holm, What Lacan said, p.33.

[502] Loc. Cit., p.34

[503] Loc. Cit., p.36.

[504] See also Derrida here. Derrida, *Grammatologie,* p.418.

[505] Holm, What Lacan said, p.43

'show' what is inside but there is nothing there – nothing but the '*objet a*, the absent object which is the cause of desire, but which never satisfies desire' .[506] The void is authority, in my opinion, and the interaction between opacity and transparency highlights the true misrepresentation designed by the expert architects.

Transparency as the true opacity, opacity as the real transparency.

Because I am analysing buildings, and perhaps because of the pertinence of psychoanalytic theory to this analysis, this section looks at the setting of the first psychoanalytic place: Freud's office. Freud's study in Vienna creates a space that is specifically organised for the then-new technique of analysis. In his papers on technique, Freud indicates that 'the doctor should be opaque for his patients and, like a mirror, should show them nothing but what is shown to him'.[507] What is important is the specific space created, which will foster the dynamic between the analyst and the analysand; the positions of the actors are, to Freud, adequate for the purpose. The location of the patient at initial contact is the classical doctor-patient face-to-face situation. The patient faces the doctor, but with a twist. He is central but is facing a mirror placed on a window. The patient sits and faces his own image. What he sees is his reflection in the mirror. When Freud sits, he blocks the view of the mirror.[508] The mirror functions simultaneously as a window, as do the mirrors in Etruscan tombs, assisting the passage to the other world.

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[506] Loc. Cit., p.44.

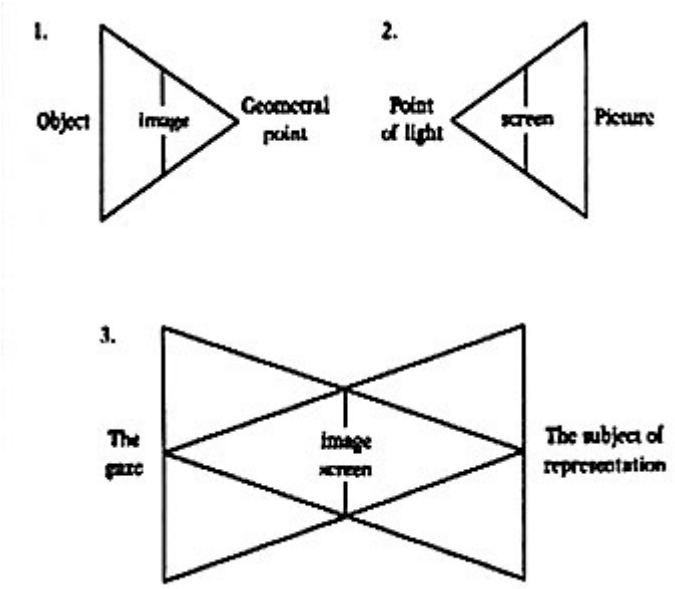
[507] Fuss, D., and J. Sanders, "Bergasse 19: Inside Freud's Office." In *Stud: architectures of masculinity*, edited by J. Sanders, Princeton: Princeton Architectural Press, 1998, pp.112-139, esp. p.120.

[508] Ibid, p.120-121.

Lacan's analysis of the mirror instructs us to 'think of the mirror as a pane of glass. You'll see yourself in the glass and you'll see objects beyond it'.[509] He dislocates the opposition between transparency/reflexivity, as with the position of the mirror on the window in Freud's study. The relationship between opacity and transparency in psychoanalytic theory is, therefore, as in architecture theory, not as straightforward as we might think. In the building, the bricks or concrete block the view from outside to the inside. They elaborate a psychic image of what is inside, because the facade (face), and hence the importance of its design, creates a specific feeling when 'it appears'; it is put in front of us, as Heidegger observes.[510] In a building made mostly from glass, there is no separation, no distance, because of its transparency. There could be an elaboration of an image, but this image would be of another type of building: a shopping mall, an office block. The brick or concrete wall operates like the mirror that reflects an image of authority while a transparent glass wall cannot foster that psychic image.

[509] Ibid, p. 121.

[510] Heidegger, *Qu'appele t'On Penser?*



The image|screen of the linear perspective found in Lacan's diagram is 'both transparent (image) and opaque (screen). Any image is both a transparent window onto the world (Alberti the perspectivist's metaphor) and a solid surface that reflects light'.[511] It is 'the negotiated locus of identity and desire'[512] but also, and more importantly for our case, it provides a view of the world.[513] However, the view of the world appears to be different for a subject facing one type of court and a subject facing another type. The notion of the view of the world is therefore primordial to this essay as it refers to an additional process, that follows vision, the one of interpretation, which connects with the symbolic order found in lacanian theory. According to Holm, 'A plane reminded us that a twin tower is a symbol',[514] and if we transpose this point to courthouses, we find that a building that

[511] Holm, "The New Yorkers.", p.109.

[512] Loc. Cit.

[513] Loc. Cit., p.110.

[514] Loc. Cit., p.114.

hosts the process of justice may be a 'real' building but it hosts one of the fundamental institutions – justice (and is therefore also 'symbolic').

In order to look further at the transparency of the building, we need to return to our earlier questions: transparency – to what end? Opacity – for what purpose? What are we hiding and what do we want to show? The function of the building and its face/ façade are connected. According to Lacan, the interior is present in the exterior. In addition, Miller notes, 'the most interior – this is how the dictionary defines "intimate" (*l'intime*) has, in the analytic experience, a quality of exteriority'.[515] Thus, the façade of a building explains the inside. What appears in front of us tells us what is behind. The term 'interior' is connected to the term *intimus*. It helps us to reach the deepest point in the interior: 'the most intimate is at the same time the most hidden'.[516] The point made by Miller about Lacan's work in this regard is that 'the most intimate is not a point of transparency but rather a point of opacity'.[517] The argument many architects make about transparency can therefore be read through lacanian theory: the idea that being able to see through a building will tell us the story of the process of justice being done inside, according to a democratic ideal, may make the design of a transparent building seem obvious. However,

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[515] Miller, J.A., "extrémité." In *Lacanian Theory of Discourse: Subject, structure, and society*, edited by M. Bracher, F. Massardier-Kennedy, M.W. Alcorn and R.J. Corthell, NY: NYU press, 1997, pp.74-87, esp. p.76.

[516] Ibid. Miller also describes the notion of extimacy, a lacanian neologism created to explain that what is intimate is something or somewhere else. Interestingly, Lacan considers that extimacy is (p.78) related to the Other of the Other of the signifier, the Other of the law, the Other that lays down the law to the Other, the Law as absolute, a metalanguage, see Ibid, p.78.

[517] Ibid.

the notion that one may show the interior of the building through use of literal transparency (glass, windows) as a means to show its intimate mechanisms, to reach deep inside the process of justice, is false; one has to be able *not* to see through, even though this may seem prima facie to be contradictory. These things have to be hidden, as it is through opacity rather than through transparency that the most intimate level is reached. Psychoanalytic theory tells us that transparency does not give us access to the inside. A transparent palace of justice does not bring so much as a glimpse of the democratic process inside, for instance, or show that a fair trial has taken place.

For Holm, 'It is a dual paradox of the transparency of vision and the opacity of representation that seeing them *as if* they get smaller is to see them *as* the same size'.[518] Indeed, the 'visual field is composed not only of what I see, but what you see – this latter is usually more important – in so far as what you see is communicated to me by words, pictures, and other media, all of which constitutes what Lacan calls the field of the Other'.[519] What becomes important, then, is what you see: 'I do not see your view, but I frequently know what you see, especially if I am in it'.[520] The gaze becomes another key variable here. It is the presence of the Other: the subject is viewed not only as subject but also as the internalised presence of significant others.[521]

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[518] Holm, "The New Yorkers.", p.106.

[519] Loc. Cit., p.108.

[520] Loc. Cit.

[521] Loc. Cit.

I gaze at a transparent building…

Allow me to look at this point at gaze.[522] After all, the building I consider, like any building, is positioned or located in front of me; it appears to me, as Heidegger puts it. I need to recognise it, to perceive it. It is a normal activity for me to look at it, and I gaze at it. I refer to Lacan here and his essay 'What is a picture?' in *The Four Fundamental Concepts of Psycho-Analysis*.[523] Of course, a building is not a picture; however, two observations are useful here. Firstly, with the increase of web browsing and digital photography, what we have most of the time is a series of (2D) pictures of (3D) buildings.[524] Furthermore, architects start with a 2D representation of future 3D buildings, so they conceptualise the building on plan before its construction. Secondly, the process of representation and the ways in which it is instituted – through pictures of a façade, or through the façade itself – is similar enough to art for us to use what Lacan describes in this essay on the picture. I suspect that post-modern buildings operate as what Lacan calls *trompe-l'œuil* ("deceive the eye"). Lacan narrates the story of a competition between two ancient painters, Zeuxis and Parrhasios.[525] Zeuxis receives acclaim for painting grapes so life-like that even the birds that try to peck at them are fooled. In his pride, Zeuxis then goes to look at the work of Parrhasios. But Zeuxis sees only a veil, and so he asks to see the painting that Parrhasios has hidden behind the veil. Well, Parrhasios'

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[522] Some readers may consider that I am biased here, using only Lacan to analyse the notion of the gaze.

[523] Lacan, J., *The Four Fundamental Concepts of Psycho-analysis.* Edited by J.A. Miller. London: Vintage, 1998, pp. 105-123.

[524] This might change of course. Technology will allow for 3 D presentations. But they will remain presentation on a 2 D screen.

[525] Lacan, *The Four Fundamental Concepts of Psycho-analysis*, pp. 11-112.

painting *was* the veil, so well done that it fooled even the master of deceptive painting. Lacan points out, 'it is clear that if one wishes to deceive a man, what one presents to him is a painting of a veil, that is to say, something that incites him to ask what is behind it'.[526] This is the purpose of the *trompe-l'œuil*:

> What is it that attracts and satisfies us in *trompe-l'œuil*? When is it that it captures our attention and delights us? At the moment when, by a mere shift of our gaze, we are able to realize that the representation does not move with the gaze and that it is merely a *trompe-l'œuil*. For it appears at that moment as something other than it seemed, or rather it now seems to be that something else.[527]

In a way, like Lacan, I consider that palaces of justice (like icons, or Holms' symbols) hold us under their gaze. But what makes evident the 'value' of the building is that whomever/whatever it represents (again, like icons), it has to do with God, and with the fact that God is also looking at it. Behind the building stands the social pact, articulated by the Names-of-the-Father.[528] Freud, says Lacan, was led irresistibly 'to link the appearance of the signifier of the Father, as the author of the Law, to death, even to the murder of the Father, thus showing that although this murder is the fruitful moment of the debt through which the subject binds himself for life to the Law, the symbolic Father,

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[526] Ibid, p.112.

[527] Ibid,

[528] 'Parce que Lacan rapproche le non-du-Père au nom-du-Père, la position symbolique du « père-régulateur » est un lieu de l'"autorité'. See the connection made by Lacan between the 'no of the father' and the 'name of the father.Marrani, David. *Rituel (s) de Justice? Essai Anthropologique sur la Relation du Temps et de l'Espace dans le Procès.* Fernelmont: EME, 2011, p.28.

in so far as he signifies this Law, is certainly the dead Father'.[529] We know that the building is the signifier but we also know that it must always relate to a signified. Indeed, 'the peculiarity of the signifier [is] the fact that it is unable to signify itself.[530] When I gaze at the building hosting the courts of law, then, where the work of justice takes place, I should immediately interpret (recognise) that it is a place where justice is going to be done. Subjectivity plays a strong part here: multiple subjectivities, of course. I understand immediately what I face, what I gaze at, when a *Palais de Justice* looks like a *Palais de Justice*. I realise that this is a partisan assumption because if I consider a 'vertical' building, showing and expressing the transcendence of God/King/Judge, I refer to a certain type of society. But when I consider a post-modern 'transparent' building, it brings another type of society to mind, because it is merely a *trompe-l'œuil*. [531]

Perhaps, then, we need to turn to Benjamin here, and consider what is actually socially at stake with the use of glass. In Benjamin's work, the role of glass in architecture is aligned with the exposure of bourgeois hypocrisy and the negation of commodity fetishism.[532] Glass lacks aura and is the enemy of the secret: 'Like the camera, the function of glass is to liquidate cultural tradition, reshaping the entrenched social relations of domestic space'.[533] There is a feeling of revolution behind Benjamin's consideration/observation:

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[529] Lacan, J., *Ecrits: A Selection.* Translated by A. Sheridan. London: Routledge, 2005, p.152.

[530] Lacan, *The Four Fundamental Concepts of Psycho-analysis,* p. 249.

[531] On another level, it could well be the case that as a legal academic, I am 'educated' to understand what is in front of me, while this is perhaps not the case for everyone.

[532] McQuire, S., "From Glass architecture to Big Brother: Scenes from a cultural history of transparency." *Cultural Studies Review* 9, no. 2 (2003), pp. 103-123, esp. p.106.

[533] Loc. Cit.

he advocates the use of glass not in order to create a 'wall of windows', like the modernist architecture of Le Corbusier,[534] but to destroy the established order, not to open the interior onto the exterior, but to make the interior permanently available to the exterior. As 'opened', transparency equates here to openness: 'Faith in openness and transparency forms one of the pillars of architectural modernism'. [535] A close connection therefore exists between 'the aesthetic of the new architecture and the emergence of a more general 'openness' in society'.[536]

What we arrive at is the replacement of one signifier by another. According to Lacan, this replacement takes place 'along the vertical substitutive axis of language'.[537] The signifier 'justice' thus moves from one type to another. The glass building becomes a metaphoric interpretation of Justice that builds its meaning in accordance with a new ideology for which the architect acts as the voice.

What society seems to want (we are told) is accountability, feedback, self-reflexivity. This trend towards the self-reflective seems to be pro-active (again, we are told). If I want to be certain of what is going on somewhere, I need to be able to see, to *see through*. And it seems obvious that I may gaze better if the wall I face is not a brick wall but a glass wall. [538] As such, transparency has become the true deconstructed architecture. Its

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[534] Loc. Cit., p.107.

[535] Loc. Cit., p.108.

[536] Loc. Cit., p.108.

[537] Holm, What Lacan said re: architecture, p.56.

[538] I am still considering something that separates – some kind of wall, but one that is transparent; I imagine an open space, like an open-plan contemporary office space.

physical expression is the use of glass in buildings, creating clear constructions that have an affinity with other contemporary products – such as the cosmetics of Neutrogena: transparent products are equated with a 'guaranteed purity'.[539] 'Purity guaranteed' underlays the design of Foster and Partners, the firm that won the 1992 commission to transform the Reichstag into the new home for the unified Germany's parliament. Foster's team focused on making the processes of government more transparent: 'not every part of the Reichstag can be open to the public but we have ensured that where possible it is transparent and its activities are on view'.[540] Here, too, definitions across disciplines collapse and end up blurring the meaning of words.

Conclusion.

Transparent public buildings are seen as buildings without secrets. Foucault believes that transparency gives power: 'If Bentham's project [the Panopticon] aroused interest, this was because it provided a formula applicable to many domains, the formula of "power through transparency"'.[541] What lies beneath transparency, then, is an insidious capturing of power: power through transparency. We know by the observations made in relation to courts that transparency has now replaced opacity in court design. The old opacity was

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[539] Bessire, " Transparency: a two-way mirror?", p.425.

[540] Ascher Barntones, D., *The Transparent State: architecture and politics in postwar germany.* London: Routledge, 2005, p. 201. Glass was also used in the German Federal Constitutional Court to 'create actual and metaphorical transparency in the aftermath of the horrors of the Third Reich.. Mulcahy, *Legal Architecture*, p.152.

[541] Foucault, M., "The Eye of Power." In *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, edited by C. Gordon, NY: Pantheon books, 1980, pp.146-165, p.156.

not the result of secrecy, however, but had a purpose: it was intended to contribute to the process of justice, which – via a specific ritual ('the hearing') taking place behind the wall, inside the building, including the use of light and shadow – symbolised the 'truth'.

One of the main problems of transparency is the abolition of distance, which is an essential element of the ritual of justice, so necessary to create authority and to render justice 'correctly'. The concern of transparency is immediacy: as in capitalism, what is important is immediate profit. But 'immediate' also means the abolition of the mediating process, in a situation where there is nothing in between – without mediation. According to Bud on Silverstone, a medium such as television may be described as a 'mythic phenomenon'. Silverstone's point is that 'we of the profane world have access to something which in its unmediated state and by its very distance is sacred'. Bud, by analogy, recognises 'the mythic role of the museum in providing a specially authentic, intense, or direct contact with the "sacred" subject', which 'acts to reduce fear and provide "understanding" of the special phenomenon'.[542] I will, in turn, apply this idea to court buildings, for this is, in essence, what happens in post-modern designs of places of justice: the mediation is removed (transparency), and we end up in contact with the 'sacred'. The *Palais de Justice* has become a glass palace. Contemporary office buildings are made of steel and glass that can easily be seen through. Transparent office buildings signify something of the transparency of capitalism and democracy, and something of the

[542] Bud, R., *On the Social Production of Visual Difference, the myth and the machine: seing science through museum eyes.* Vol. 35, in *Picturing Power: Visual Depiction and Social Relations*, edited by Fyfe, G. and Law, J., London: Routledge, 1988, p.134.

emptiness of the ideas that surround them.[543] But behind this permanent opening is concealed a permanent facilitation of surveillance and control[544].[545] The gaze is everywhere, on everything. There is a totalitarian aspect to this transparency that leaves the signifier 'justice' empty. We seem to be moving towards what is presented to us as democratic: a transparent democracy. However, we should remember that '[d]emocracy is defined by the insurmountable boundary that prevents the political subject from becoming consubstantial with power',[546] and that this particularity 'means that [in the language of psychoanalysis] the place of authority is "a purely symbolic construction" that cannot be occupied by any "real" political official'.[547] In other words, immediacy is not consistent with democracy.

We should not forget that transparency points to a generalised surveillance, which has always constituted the favourite means of dictatorships. Zizek explains that in a democratic society, the monarch (and I extend this to any figure of authority, such as heads of state or judges) guarantees the non-closure of the social.[548] Medieval jurists were aware of this when they designed fictions to help the 'uninterrupted line of royal bodies natural, with the permanency of the body politic represented by the head together with

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[543] Even the use of glass in stadium seems to voice the link between transparency and democracy. Resnik, Curtis, *Representing Justice,* p. 341.

[544]. As noted here, transparency has invaded most discourses.

[545] Bessire, " Transparency: a two-way mirror?", p.426.

[546] Breger, C., "The Leader's Two Bodies, Slavoj Zizek's postmodern political theology." *Diacritics* 31, no. 1 (2001), pp. 73-90, esp. p.78-79.

[547] Loc. Cit., p.79.

[548] Loc. Cit.

the members, and with immortality of the office, that is of the head alone'.[549] While the medieval monarchy found a solution to the problem of interrex, the permanence of inter regnum in democratic society takes as its source the fact that the throne is empty: a general sense of emptiness is very present in democracy. This is perhaps why Laclau believes that the logic of totalitarianism has the same source as democracy.[550] Here, emptiness and full transparency are interrelated, and I assume that they are similar things. As a major *trompe-l'œuil* or fascinating *tromperie*, the glass city of the *Wizard of Oz* reaffirms the sweet and subtle feeling of both *tromperie* and totalitarism. Dorothy feels safe in the Emerald City that is also a glass city: 'I am sure we are in no danger',[551] she says, as 'The houses of the city were all made of glass, so clear and transparent that one could look through the walls as easily as through a window'.[552] I have a feeling that the new myth built on the contemporary paradigm of transparency aims to suppress everything that is of the neo-classical era, or part of the Gothic revival – such as the temple design– which signified 'be careful when you enter here'; the intention has been to replace it with a post-modern office design that signals 'don't worry'. In conclusion, we could simply apply here what we learnt from the Wizard of Oz: the city may be transparent and may feel safe, but the powerful wizard turns out to be a fraud – an ordinary man hiding behind a curtain

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[549] Kantorowicz, E. H., *The King's Two Bodies, a study in mediaeval political theology.* Princeton: PUP, 1997, p.316.

[550] Laclau, E. and C. Mouffe, *Hegemony and Socialist Strategy: Towards a radical democratic politics.* London: Verso, 2001, p.186.

[551] Baum, F., *Dorothy and the Wizard of Oz.* Boston: MobileReference, 1908 (2008), p.10.

[552] Ibid, p.11.

operating a giant console of buttons and levers, manipulating people and things.[553] Even in the glass city, then, great danger can be revealed. The glass walls, the transparent houses, did not prevent the *trompe-l'œuil* of the fake wizard, and it seems likely that transparency in courthouse design will result in little more than some version of Orwell's vision: Big Brother will watch us here, too.

After writing in that current Chapter, that transparency and spaces of justice are connected, I will now in the following Chapter go back to the use of video in courts, but this time to discuss the specific area of broadcasting images from courts.

[553] See D. Willis on the Wizard in 'The Emerald City' **Invalid source specified.** in D. Willis, *The Emerald City and Other Essays on the Architectureal Imagination*, Princeton architectural press 1999, pp. 87-98, esp. pp.96-97.

V. Chapter Four: The abolition of the judicial walls: cameras in courts and the reshaping of judicial spaces.

> 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'[554]

My intention in this chapter is to show that the use of cameras in courts is not as innocent, or rather neutral, and positive as we may have been told it is; not only by one-sided government officials but also by some of our eminent colleagues such as Professor Stepiak.[555] Indeed, what I will refer to as 'visual technology' creates and redefines limits, pushes borders to the extent that there is, in the case of courts, a specific space of justice, a specific legal space that is created, a space that is centred on the judge and its representation on screen. I would like here to make a short preliminary remark on the fact that both cinema and TV are, by analogy, creating similar spaces. The scene and the actors in a trial, the scene and the actors in a play, and the scene and the actors on a screen, seem to affect the settings of the space therefore created in a very similar fashion. That said,

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[554] *R* v *Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259.

[555] Daniel Stepniak, 'Technology and Public Access to Audio Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions', (2004) 12 William & Mary Bill of Rights Journal, pp. 791- 823.

my brief remark should trigger some additional thoughts, that are connected to recent developments in the virtual (judicial) world, such as the idea of filming and broadcasting courts (and I want to focus on the UK here because of what has been happening recently in that jurisdiction), but also the variation of scale between a theatrical representation and a televised representation. Indeed, filming and broadcasting the administration of justice is not the same as watching any kind of fiction. Yet, at the same time, filming and broadcasting implies the idea of mass media, something that touches many more people than the audience at a trial or even at a play. How the legal space is defined is one question that has been answered by many colleagues such as Professor Linda Mulcahy.[556] But how this space is affected when the walls are erased because of the introduction of cameras in courts? How is that space redefined by images and the self-reflection of fiction and reality of what is seen? Let us just reflect on the fiction and reality for a moment. If what is going on in a court room is not seen, if the audience is very limited, which is often the case as spotted by Katy Mack in her review of Professor Mulcahy's book; 'a lack of effective public engagement with modern legal process',[557] then the only 'idea' we may have of a court room has to come from fictional representation in TV series and movies. That said, according to Professor Moran, the judge occupies the place of a marginal figure in 'legal cinema' and in related scholarship.[558] Occupying a marginal figure is an interesting point.

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[556] Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law,* Routlegde 2011.

[557] Mack, K., 'Legal Architecture: Justice, Due Process and The Place of the Law by Linda Mulcahy; Representing Justice: Invention, Controversy, And Rights in City-States and Democratic Courtrooms by Judith Resnik and Dennis Curtis', *Journal of Law and Society* Volume 39, Issue 2, pages 317–325, June 2012.

[558] Leslie Moran, 'Every Picture Speaks a Thousand Words: Visualizing Judicial Authority in the Press' in *Priska Gisler, Sara Steinert Borella, Caroline Wiedmer (eds), Intersections of Law and Culture,* Palgrave, 2012, pp. 31-49, esp. p.6.

For instance, it does not mean the representation of this figure is marginal but rather that the place of judges on screen is marginal. I believe this highlights one of the interesting elements of the judge: its relation to totem.[559] It is then not surprising to find mechanisms or objects similar to taboos in many countries when it comes to representing judges on screen: everything is done to avoid showing what happens in the court room, or at least to limit opening the courts to the parties and the audience. Indeed, in many jurisdictions, filming and broadcasting in courts has been banned: the judge is truly considered as a totem, as previously mentioned.[560] If we cannot see the 'true' or the 'real' work of justice being done, then we are left only with one way to 'see' it, with the only way to show justice and the judge: via a fictional representation of what may have occurred, 'simply', on screens. But then again, as I touched upon above, the effects of that representation on screen, a representation that is in fact a double representation, a representation of a representation, create a space that defines and redefines where justice is done through the notion that it has to be seen to be done.

As mentioned, this chapter will merely use the case of the UK (or more specifically England and Wales[561]) as example, as it was until recently forbidden to film and broadcast

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[559] David Marrani, Confronting the Symbolic Position of the Judge in Western European Legal Traditions: A Comparative Essay', 3 *European Journal of Legal Studies* 1 (2010), pp. 47-77.

[560] Ibid.

[561] In Northern Ireland, section 29 of the Criminal Justice (Northern Ireland) Act 1945 applies similar limitation to recording images and sounds than England and Wales prior to 2013 while there are no restriction in Scottland. See Ministry of Justice, Proposals to allow the broadcasting, filming, and recording of selected court proceedings, 2012. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf, esp. p.9.

court proceedings, while others, such as the USA, Australia and New Zealand, diverted from that interdiction.[562] Until recently, there were only two solutions to 'see' justice being done: you had go to court or to watch a movie in the cinema or on TV. The only experience of justice for many has been the representation of the judge in 'legal cinema'. What was known about justice was an image, the only image known of the judge 'acting' as a judge. It is therefore only through representation of judges and justice in cinema and TV programs that the perception of the figure of the judge but also of the justice system

[562] In France, article 308 of the criminal procedure code prescribes that '

Dès l'ouverture de l'audience, l'emploi de tout appareil d'enregistrement ou de diffusion sonore, de caméra de télévision ou de cinéma, d'appareils photographiques est interdit sous peine de 18 000 euros d'amende, qui peut être prononcée dans les conditions prévues au titre VIII du livre IV.

Toutefois, les débats de la cour d'assises font l'objet d'un enregistrement sonore sous le contrôle du président lorsque la cour d'assises statue en appel, sauf renonciation expresse de l'ensemble des accusés ; lorsque la cour d'assises statue en premier ressort, le président peut, d'office ou à la demande du ministère public ou des parties, ordonner cet enregistrement. Le président peut également, à la demande de la victime ou de la partie civile, ordonner que l'audition ou la déposition de ces dernières fassent l'objet, dans les mêmes conditions, d'un enregistrement audiovisuel.

Les supports de cet enregistrement sont placés sous scellés et déposés au greffe de la cour d'assises. L'enregistrement peut être placé sous scellé numérique selon des modalités définies par arrêté.

L'enregistrement sonore audiovisuel peut être utilisé devant la cour d'assises, jusqu'au prononcé de l'arrêt ; s'il l'est au cours de la délibération, les formalités prévues au troisième alinéa de l'article 347 sont applicables. L'enregistrement sonore ou audiovisuel peut également être utilisé devant la cour d'assises statuant en appel, devant la cour de révision et de réexamen saisie d'une demande en révision, ou, après cassation ou annulation sur demande en révision, devant la juridiction de renvoi.

Les scellés sont ouverts par le premier président ou par un magistrat délégué par lui, en présence du condamné assisté de son avocat, ou eux dûment appelés, ou en présence de l'une des personnes visées au 4° de l'article 622-2, ou elles dûment appelées.

Les dispositions du présent article ne sont pas prescrites à peine de nullité de la procédure ; toutefois, le défaut d'enregistrement sonore, lorsque celui-ci est obligatoire en application du deuxième alinéa, constitue une cause de cassation de l'arrêt de condamnation s'il est établi qu'il a eu pour effet de porter atteinte aux intérêts de la personne condamnée.

itself is created.[563] A game of images, images of the judge, images of how the whole scene works, although orchestrated by directors, contributes to what is known about justice. As stressed by Feigenson and Spiesel, 'the ostensible credibility of pictures that seem to present reality directly and unmediated, (…) combined with people's growing dependence on those pictures for their knowledge of the real, has multiplied the possibilities for managing people's impressions of the world'.[564] That point summarises the difficulties that face the use of camera in courts.

I will start by presenting the Crime and Courts Act 2013 and the relation between open justice and transparency, before considering how work on voyeurism, simulacra, and third meaning are relevant to the introduction on cameras in courts. [565]

[563] As a comparative lawyer, but also as a legal academic who decided to use contemporary techniques of teaching, I have used cinema and TV to show the differences between civil law and common law, between inquisitorial and adversarial systems through the specific representation made on the screens, between on the one hand the 'active' judges and on the other the 'passive' judges. One may want to remember movies such as *Giovanni Falcone* or *Le Juge Fayard* movies, but also movies with more or less 'absent' judge like *12 Angry Men* or *To Kill a Mockingbird* or even the absent or redefine space created on screen by the movie *Erin Brockovich* …

[564] Neal Feigenson and Christina Spiesel, *Law on Display*, NYU Press 2009, pp.16-17.

[565] http://www.legislation.gov.uk/ukpga/2013/22/introduction/enacted. Last accessed 17 February 2017.

Crime and Courts Act 2013: cameras in courts, open justice and transparency.

The fictional representation of justice has been the only way to massively 'see' justice being done in part of the UK, although things were actually slightly modified in 2012, to give a full transposition to fear that reality would become fiction and fiction would become reality. This was organised through the Crime and Courts Act 2013, which legally transposes the way to tackle, we have been told, the distorted view of reality brought by TV dramas and has apparently increased transparency. The fiction/reality of a court hearing become combined, in self-reflexive ways, and have to be analysed together with the voyeurism; the pleasure of looking. One may want to look at the genealogy of the Crime and Courts Acts 2013 for a start: the 2012's Queen Speech and the 2012 Crime and Courts bill.[566] I particularly would like to focus on the intentions, express and hidden, behind the spirit rather than the letter of the bill. In her speech, the Queen declared:

> My government is committed to reducing and preventing crime. A Bill will be introduced to establish the National Crime Agency to tackle the most serious and organised crime and strengthen border security. The courts and tribunals service will be reformed to increase efficiency, transparency and judicial diversity.

If we may not comment on the idea of increased efficiency or judicial diversity it is certainly interesting to comment on transparency. When the Queen presented the

[566] https://www.gov.uk/government/speeches/the-queen-s-speech-2012. Last accessed 17 march 2017.

programme of her government, she refers to the need of transparency. As we discussed in the previous chapter, transparency appears to have become the new paradigm in justice architecture and it is not surprising to find it also present in the question of filming and broadcasting in courts.[567] But as it was developed in literature, transparency is not a notion that is as simple as it seems. For instance, according to Pingeot, what should be carefully analysed is what side of transparent we are referring to. Are we considering 'transparent' as *invisible* or 'transparent' as *visible*?[568] Indeed, someone 'transparent' is someone quite invisible, while it is, also, an object that lets light through. The meaning of transparency oscillates between appearing and disappearing. That new paradigm in the case of architecture was linked, as discussed, to literal and phenomenal transparency, and the attempt made by architects to push glass as a transparent material to show justice and/or democracy, equating both to transparency. In the case of cameras in courts, we are witnessing the birth of a new equation: transparency equals open justice. Indeed, what is more transparent than the abolition of walls by glass as we have witnessed in many court houses, but even more, the total disappearance of the meaning of walls, via the cameras? That is how the door to filming the process of justice was opened. The point of transparency in the British government programme has been addressed by the Crime and Courts Act 2013, which relaxed the rules on filming and broadcasting court proceedings. Let us first consider what the rules were prior to 2013.

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[567] See the previous chapter on the question of transparency.

[568] Pingeot, Mazarine, *La Dictature de la Transparence,* Nouvelles Mythologies, Laffont Paris 2016, esp.p.182 & pp.13-20.

Prior to 2013, ban on filming in courts.

In 1925, the British legislator decided to ban recording and broadcasting arguing, as the only interest the members of the press had (…) was to take advantage of the sensational nature of the event and to make money.[569] In addition, it also considered that:

> The alarm expressed by authorities at the growing level of public interest in media reports of gruesome or salacious cases – a trend apparently fuelled by the newly introduced publication of courtroom photographs and sketches to accompany press reports of proceedings.[570]

Recording and broadcasting images and sounds in courts were considered as offences. Taking pictures in court and broadcasting them was prohibited by s.41 of the Criminal Justice Act 1925.[571] The 1925 Act made it an offence (while recording sound in courts

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[569] Stephen Mason, Cameras in the courts: why the prohibition occurred in the UK?, *Amicus Curiae Issue 91 Autumn 2012, pp.22-27, esp. p.25.* http://sas-space.sas.ac.uk/5769/1/2095-3056-1-SM.pdf

[570] Daniel Stepniak, British justice: not suitable for public viewing?*,in* Paul Masons eds., *Criminal Visions*, Routledge 2012, Ch. 13.

[571] http://www.legislation.gov.uk/ukpga/Geo5/15-16/86/enacted. Last accessed 17 February 2017. 41 Prohibition on taking photographs, &c, in court

(1) No person shall—

(a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof;

and if any person acts in contravention of this section he shall, on summary conviction, he liable in respect of each offence to a fine not exceeding fifty pounds.

unless permitted by the court was banned by s.9 of the Contempt of Court Act 1981[572]). By extension, filming was also prohibited by case law.[573] The general ban was relaxed by s. 47 of the Constitutional Reform Act 2005 which dis-applied these restrictions to the UK Supreme Court.[574] That said, most courts are open to the public (this is the idea of open court) and journalists have been able to be present inside and to report from courts, subject to reporting restrictions. The legal system of Scotland has long been ahead of England and Wales on this issue; since 1992, some filming in court proceedings has been allowed in Scotland, following a practice note by the Lord President, Lord Hope.[575] In April 2012, the sentencing of David Gilroy for murder was televised. A documentary showing the full murder trial of Nat Fraser in Edinburgh was broadcasted by Channel 4 on July the same year.[576]

What are the changes brought by the 2013 Act?

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(2) For the purposes of this section—

(a) the expression " court" means any court of justice, including the court of a coroner :

(b) the expression "judge" includes recorder, registrar, magistrate, justice and coroner :

(c) a photograph, portrait or sketch shall be deemed to be a photograph, portrait or sketch taken or made in court if it is taken or made in the court-room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the court-room or any such building or precincts as aforesaid.

[572] http://www.legislation.gov.uk/ukpga/1981/49. Last accessed 17 February 2017.

[573] *J Barber & Sons v Lloyd's Underwriters* [1987] 1 QB 103 ; *R v Loveridge, Lee and Loveridge* [2001] 2 Cr App R 29, CA.

[574] http://www.legislation.gov.uk/ukpga/2005/4. Last accessed 17 February 2017. Proceedings of the UK Supreme Court are routinely filmed, recorded and broadcasted, and are streamed live on the Sky News website (http://news.sky.com/home/supreme-court).

[575] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf. Last accessed 17 February 2017.

[576] Available on : https://youtu.be/RVtiu6diut0. Last accessed 17 February 2017.

The 2013 Act.

TV cameras are now allowed in courts. It is therefore possible to have recordings of Court of Appeal hearings, with the BBC, ITN, Sky News and the Press Association cooperating on the project. In-court video-journalists have been hired. They are supposed to recommend the most interesting cases to be recorded and broadcasted. This commenced on the 31 October 2013 on Sky News. The 2013 Act was complemented by the Court of Appeal (Recording and Broadcasting) Order 2013 made under its section 32(1).[577] The Order applies to the recording and broadcasting of hearings in the Court of Appeal, in open court and before a full court. It means that from 2013, the Criminal Justice Act 1925 s. 41 and the Contempt of Court Act 1981 s. 9 remain in force but the Lord Chancellor (with the concurrence of the Lord Chief Justice) has the ability to make an Order dis-applying those sections in specific circumstances. The court retains a right to reapply any dis-applied provision in the interests of justice or in order that a person is not unduly prejudiced.

It is quite interesting to read the precise definition given by the order in Art. 2. For instance, 'broadcast' means the transmission to members of the public of a recording of a hearing of the court, which fits the idea of the right for the public to be present in court (even if that is virtually). Meanwhile, 'recording' means a visual or sound recording on any medium from which a single image, a moving image or any sound may be produced or reproduced, or the making of any such recording, and 'record' and 'recorded' shall be

[577] http://www.legislation.gov.uk/ukdsi/2013/9780111101100/contents. Last accessed 17 February 2017.

construed accordingly. Finally, 'legal representative' means a representative who is an authorised person entitled to exercise a right of audience before the court within the meaning of Part 2 of the Legal Services Act 2007(b) and who is acting on behalf of a party to the proceedings to which a hearing relates. [578] The Order also divides the operation of recording and broadcasting. Some limits have been introduced, such as the one on space of justice and the ones on recording. The only space of justice concerned is the 'court': The Court of Appeal, and only open courts before full courts (Art. 3). Recording is allowed, and therefore the 1925 Act and 1981 Act are dis-applied (Art. 5 to 7 Order), only of the following:

- Appeal or an application for permission to appeal or refer,[579]
- an AG reference on review of sentencing (s. 36 of the Criminal Justice Act 1988)
- an application by a prosecutor concerning retrial for serious offences (Part 10 of the Criminal Justice Act 2003).

But then the Order goes deeper and details several limits for the recording. It distinguishes the presence, or not, of legal representatives for instance. If there are legal

[578] A "right of audience" means the right to appear before and address a court, including the right to call and examine witnesses. See Legal Services Act 2007 Schedule 2. Are authorized to exercise the right of audience, persons who is authorised by a listed body: The Law Society, The General Council of the Bar, The Chartered, Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, The Association of Law Costs Draftsmen, and under certain limitation The Institute of Legal Executives. Legal Services Act 2007 Schedule 5. http://www.legislation.gov.uk/ukpga/2007/29/contents. Last accessed 17 February 2017.

[579] Except against verdict of not guilty by reason of insanity (s. 12), appeal against finding of disability (s.15) and a hospital order, interim hospital order or supervision order (s.16A of the Criminal Appeal Act 1968); or a decision in family proceedings as defined in section 75(3) of the Courts Act 2003.

representatives, the recording is limited to the submissions of a legal representative, their exchanges with the court and the judgment. Without legal representatives, only the judgment will be recorded. It then specifies who can record. It has to be a person who (a) is permitted in writing by the Lord Chancellor to record hearings in court; and (b) assigns any copyright in the recording of a hearing to the Lord Chancellor, for and on behalf of the Crown.

Filming proceedings does not mean broadcasting the footage. Indeed, as mentioned, there is a separation of the two operations. According to articles 8 to 11, broadcasting is allowed if recordings are made according to articles 5 to 7. Articles 8 to 11 set out when the recording of a hearing can be broadcasted and what content is permitted in a broadcast. The permission has to be given, according to article 9, by the court to broadcast a criminal conviction appeal (unless the court does not order a retrial), or for an application for permission to appeal against conviction or an application by a prosecutor under Part 10 of the Criminal Justice Act 2003, otherwise recordings may be broadcasted with no permission.

The Order laid down some interesting substantive condition. According to article 11, a report or presentation of proceedings that includes a broadcast of a hearing must be fair and accurate having regard to the overall content of the report or presentation and the context in which the broadcast is presented. In addition, no recording may be broadcasted for the following aims: a party-political broadcast; advertisement or promotion, except where such advertisement or promotion relates to a report or presentation of proceedings that includes a broadcast; light entertainment; and satire.

To sum up, there are many conditions and limits attached to the permission to filming and broadcasting in courts. However, we have witnessed quite recently an attempt to decrease those limits, which may trigger a qualitative and quantitative increase. On the 20 March 2016 it was announced by the Justice Minister that Crown Courts will test, for 3 months, filming, but not broadcasting, trials.[580] Eight courts in England and Wales (Central Criminal Court and in the Crown Court at Southwark, Manchester (Crown Square), Birmingham, Bristol, Liverpool, Leeds and Cardiff) were chosen as the locations for the pilot and only judges' sentencing remarks were selected to be filmed. A statutory instrument was introduced on 21 May 2016, determining the timescale for the test. The current Court of Appeal broadcaster has agreed to support the pilot period at no cost to the public purse, which was strangely stated and highlighted even though it was also explained that, very intriguingly, the process would be managed under the existing commercial arrangements in place for the Court of Appeal.

What was said to convince us…

Until 2013, as mentioned above, what has been seen by the public/masses, the audience, of the inside machinery of the justice process, the intimate process, came from movies and TV series. This was considered as negative by government officials. That is, for

[580] https://www.gov.uk/government/news/crown-courts-to-pilot-filming-for-the-first-time . Last accessed 17 February 2017.

instance, stated in many exchanges during the legislative debate the abstract taken from the second reading of the Bill at the House of Lords on the 28 May 2012.[581]

> Lastly, this part also contains an important provision that will help to increase public understanding of the justice system. Most members of the public have no direct personal experience of what goes on inside a courtroom. Their perceptions will be derived from TV dramas that more often than not give a distorted view of reality. Allowing the broadcasting of judicial proceedings will help to demystify the workings of the justice system and increase public confidence. Of course, there is a balance to be struck between increased transparency and the safeguarding of the proper administration of justice. To this end, we want to start by allowing the broadcasting of advocates' arguments and judgments in the Court of Appeal before extending this to sentencing remarks in the Crown Court. However, I can assure the House that there is no question of victims, witnesses, defendants or jurors being filmed.

The assumption is that the public/masses only know courts (and therefore justice) from TV. That is a question that the British government considered an extremely important one to be addressed in order to increase transparency and to safeguard the proper administration of justice. The text was very critical of the dramatisation of what is going on in court. Indeed, the view expressed during the debates was that a reality that derives from the fiction (TV series, cinema) creates ‘a distorted view of reality’.

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[581] http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120528-0001.htm#1205282000384. Last accessed 17 February 2017.

One may understand how the argument unfolded logically. In fact, we were pushed to believe that in order to have a good and undistorted view of the reality of the operation of justice, the public/masses needed to have access to that reality without any mediation. Therefore, we had to consider the introduction of cameras in courts, filming and broadcasting, to help resolve the previous question. Cameras were supposed to abolish mediation, to give the public an unmediated access to courts. In consequence, what was underlying here was something similar to the argument used by architects in post-modern courts, when they were offering to use glass: Unmediated aspect of the mechanism, of any mechanisms, is crucial to the (appearance of) transparency. This time we have a movement that goes further than glass walls to demonstrate transparency. We have cameras in court for transparency. The argument triggers two remarks. The first one concerns the question of mediation and the second one the quite tight, connected question of transparency. Unmediated access to the court appears to be the solution for transparency, as we are told. But does the presence of cameras, lenses and the need of a screen equate 'unmediated' or does it simply replace one type of mediation with another one, a 'technological' one? Indeed, 'the screen has an ambivalence that it shares with transparency, of blurring at the same time as showing. To screen signifies to hide, not to show'.[582] Furthermore, transparency, as we have seen, may also have a reverse effect to the one expected, an effect that brings more opacity than transparency.[583] An image is in fact not transparent at all, but proposes a fantasy of truth, proof. Showing something is

[582] Pingeot, *Dictature de la Transparence*, esp. p.150. 'L'ecran a cette ambivalence qu'il partage avec la transparence, de masquer en meme temps qu'il montre. Faire ecran signifie "cacher", pas "devoiler"

[583] See previous Chapter on transparency.

contrary to hide something. But this hyper transparency, the result of a *sursaturation*, an 'over-saturation', of images, is obscene; an obscenity that sees around it the constitution of rituals of transparency.[584]

Let us consider here the comment made in another official document. **[585]**

> The Government is committed to improving transparency and public understanding of the courts system and allowing broadcasting from court is part of this work. Television has a role in opening up the courts to the public, demystifying the criminal justice process and increasing understanding of sentencing.

Here, the argument goes a little further. Not only is transparency placed at the apex of the argument, but the place of TV is considered crucial. TV is clearly recognised here as the educational medium. This point has been relayed by newspapers and other prestigious commentators such as Kenneth Clarke, the Justice Secretary at the time, who declared that 'The Government and judiciary are determined to improve transparency and public understanding of court through allowing court broadcasting.'[586] It is rather true that in a democracy, education is certainly one of the key elements for the functioning of a complex political system. But one should be concerned with the ambivalent two-sided

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[584] Pingeot, *Dictature de la Transparence*, pp.154-156 Citing Baudrillard.

[585] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98438/fs-cj-films.pdf. Point 7. Last accessed 17 February 2017.

[586] http://www.telegraph.co.uk/news/uknews/law-and-order/9170589/TV-cameras-to-be-allowed-in-court.html. Last accessed 17 February 2017.

view one may have about the TV. This was spotted, for instance, by the Attorney General of the time Dominic Grieve who voiced a slightly different opinion[587]:

> The issue that then arises is, is this going to help public understanding, or might it contribute to the whole thing being turned into a piece of theatre, which might also be undesirable? Clearly filming people actually being sentenced is likely to be undesirable as it would probably encourage theatricals.

In fact, TV channels have been showing fictional representation of reality 'justice' for years and have therefore 'trained' the mind of the public. The perception, rightly, of administration of justice has been linked to what has been on screen. What is on offer now is, we seem to be told, to use TV to show the real justice, not a representation of justice. Therefore, we are told we should be using TV not to re-present, but to educate. This argument is echoed by authors. Indeed, according to Stepniak,

> The lack of public confidence in the judiciary often reflects a low level of public understanding of the role of courts and the judicial process. This has led to calls for courts to take an active role in promoting or facilitating public education and awareness. [588]

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[587] Ibid.

[588] Stepniak, 'Technology and Public Access to Audio Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions', esp. p. 806.

Again, what may collide here is the expectation of the public that will watch what is on screen. That consideration should not be disconnected, in my opinion, from Plato's analysis of reality and appearance (and indeed, I believe, disappearance). But even then, that point is something quite different from things as it appears to be, as a phenomena.[589] Justice is, as we all know, something very complex to grasp, with definitions, such as Derrida's, considering that, in fact, justice is impossible.[590] Justice is one of these Freudian 'things' that need something else, an agent, to represent it. The agent may be a judge, or it may be a building. We need, for the 'signified justice', a 'signifier' to appear to us and show us what it is. When we are told that, through transparency, we are touching the reality of justice, we may be concerned and critically analyse that point rather than accepting or rejecting, *prima facie*, the argument. In fact, it is slightly more complicated than this: we are touching something that we should not really touch, something that may burn us. It may, in fact, be even worse than this. What the entry of cameras in court produces is not as neutral as we may think. It is also a re-representation, one that goes wild because it triggers a sort of double representation of what justice really is. And the point of the 'entry of cameras' in courts introduces another angle and new actors: actors of the cameras, the broadcasters. When we read further into this document, at points 8 and 9, we have that issue explained. [591]

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[589] Harold Pritchard, "Appearances and Reality," *Mind*, 15 (58): 223–9.

[590] See Chapter on transparency.

[591] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98438/fs-cj-films.pdf. Point 7. Last accessed 17 February 2017.

> The technical and operational issues around court broadcasting will be covered in guidelines issued by the judiciary and agreed with the Ministry of Justice, Her Majesty's Courts and Tribunals Service, and the broadcasters. Such issues would include the procedures for operating cameras, the process by which a judge might suspend filming or refuse permission to broadcast footage, and limitations on positioning of cameras and camera angles. Use of the footage will be restricted to news, current affairs and educational purposes only, so that it is not used in light entertainment, satirical programmes, advertising or promotion. Similar agreements are already in place governing broadcasting of the proceedings of the Supreme Court and Parliament.

The issue of 'All costs from broadcasting in courts – including installation of the technical equipment and on-going maintenance – will be funded by the broadcasters' seems to be quite attractive, but it is also quite worrying to have a partnership between HMCS and the major broadcasters.

It is quite easy to realise that fiction and reality are in fact intertwined here. In fact, it is quite obvious for voluntary or involuntary reasons. The Crime and Courts Act is partly the result of a very carefully orchestrated lobbying activity on the part of TV channels. The major broadcasters have operated here as the architects operating in the matter of court architecture. They collapsed the meaning of transparency with other ideas such as democracy and (open) justice and imposed a specific outcome. The initiative of TV broadcasting in court, strongly supported by David Cameron, followed lobbying by the BBC, ITN and Sky News. In a 2012 joint letter the main UK broadcasters argued that:

‘The ability to witness justice in action, in the public gallery, is a fundamental freedom. Television will make the public gallery open to all.’ Broadcasters became human rights legislators. The letter signed by John Ryley, head of Sky News, Helen Boaden, director of BBC News and John Hardie, ITN CEO clearly referred to topical issues that have been part of the legislative debate, such as improving public understanding of the justice system, bringing transparency to courts and the collapse between transparency, democracy and justice.[592]

Here is the letter in full:

> "Last September the Government announced its intention to change the law to allow the limited televising of courtrooms, in order to improve public understanding of the justice system.
>
> "As representatives of the country's main broadcasters, we welcomed this proposal and the Government's commitment to bring greater transparency to our courts. We hope that timely progress can now be made to ensure that the Bill lifting the prohibition on cameras in court is included in the Queen's Speech in May.
>
> "The administration of justice is a key part of a democracy. It shapes and defines a civilised society. The ability to witness justice in action, in the public gallery, is a fundamental freedom. Television will make the public gallery open to all.

[592] http://news.sky.com/story/924682/sky-bbc-and-itn-call-for-cameras-in-court. Last accessed 17 February 2017.

"If legislation is announced to lift the ban within the next few months, it will still be some time before we see the first case on TV. There will have to be detailed discussions about what can be shown, and in which courts.

"A great deal of work needs to be done by the judiciary and court officials, civil servants and the media working together to ensure that the change succeeds in its chief aim of opening up courtrooms to make the judicial process more understandable and accessible.

"Each of our organisations fully accepts that there must be limitations on what can be broadcast, and we agree that the presiding judge should have complete control of what is shown from the courtroom. We recognise that concerns have been raised about the impact television coverage will have, particularly in controversial cases.

"However, we believe that the outcome can only be positive. The experience over the last two years of live streaming from the Supreme Court has shown that the presence of cameras has not affected the course of justice in any way. Instead it enhances public understanding and allows everyone to see justice being done.

"Everyone who believes in transparency should support this proposed change in the law. This is a long-overdue reform. For too long the UK has lagged behind much of the rest of the world on open justice. The time has come for us to catch up.

"We hope that you share our view of this important issue, and that you will welcome the introduction of a Government Bill to change the law. Colleagues from each of our organisations will be in touch with key members of your party to explain our

position in more detail, but in the meantime please do not hesitate to contact any of us personally if you have any questions or would like to arrange a meeting."[593]

It is quite interesting to note that the letter starts with a reference to September 2012, when the Government announced its intention to change the law. One may want to look at the government statement again, point 9 here, and compare what the broadcasters stated in their letter with the guidelines contained in the document, and note the resemblance between the two, and, according to the chronology, the strong probability that broadcasters have, in fact, been involved in the design of the legislation. The discourse of the broadcasters involved has been welcoming and it is quite important to further analyse some of the sentences here. We find, for a start, some reference of course to transparency which seems to be the main argument for everyone: 'As representatives of the country's main broadcasters, we welcomed this proposal and the Government's commitment to bring greater transparency to our courts'. Then we have some rather condescending expressions where the broadcasters become teachers and human rights advocates: 'The administration of justice is a key part of a democracy. It shapes and defines a civilised society. The ability to witness justice in action, in the public gallery, is a fundamental freedom. Television will make the public gallery open to all'. The broadcasters are showing some 'responsible' arguments: 'There will have to be detailed discussions about what can be shown, and in which courts.' But also:

[593] http://news.sky.com/story/924682/sky-bbc-and-itn-call-for-cameras-in-court. Last accessed 17 February 2017.

> ‘A great deal of work needs to be done by the judiciary and court officials, civil servants and the media working together to ensure that the change succeeds in its chief aim of opening up courtrooms to make the judicial process more understandable and accessible’, ‘Each of our organisations fully accepts that there must be limitations on what can be broadcast and we agree that the presiding judge should have complete control of what is shown from the courtroom. We recognise that concerns have been raised about the impact television coverage will have, particularly in controversial cases’.

And finally, they are showing that they are helping us by being both modernist and pushy: ‘This is a long-overdue reform. For too long the UK has lagged behind much of the rest of the world on open justice. The time has come for us to catch up.’

Meanwhile, newspapers reacted quite critically to the move. As cited in a one of the leading British newspapers:

> It is important to preserve the majesty of the law; but this is gradually being diminished. Some courts, though not the criminal circuit, have dispensed with wigs on the grounds that they are old fashioned. Since criminal trials are open to the public it is hard to object in principle to televising judgments and sentencing, with

> appropriate safeguards. But going any further must promote transparency and justice, not prurience.[594]

What is really meant by transparency in the case of cameras in courts?

Transparency and open justice.

Transparency remains the main argument here with cameras and with courts. One term is very important because of its similarity to transparency: open justice. As stated by Stepniak:

> Broadcasting (…) make[s] it possible for a virtually limitless public audience to view proceedings and access court documents. It may be interesting to reflect on whether public access via audio-visual broadcast or Internet posting of civil proceedings and their documents can be justified in terms of the principles of open justice.[595]

What hides behind open justice?

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[594] TV cameras in court must promote transparency, not prurience, The Telegraph, 7.6.2016, http://www.telegraph.co.uk/opinion/2016/04/07/tv-cameras-in-court-must-promote-transparency-not-prurience/. Last accessed 17 February 2017.

[595] Stepniak, 'Technology and Public Access to Audio Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions', esp. p. 819.

Open justice was recognised as essential to ensure public scrutiny of the operation of the court system as well as provide information to the public as argued in *Scott v Scott* [1913] AC 417.[596] It therefore has two sides: public scrutiny, which means opening the courts to allow the public to check what is going on, and public information, and, in a way, education. Lord Diplock mentioned the point of courts opened to the press and the public in *Attorney General v Leveller Magazine Limited*:[597]

> If the way that courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects the court proceedings, it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases, all evidence communicated to the court should be communicated publicly.

In *Guardian v Westminster Magistrates,*[598] Toulson LJ gave his definition of open justice and related it to transparency (although referring to the open justice principle as well later on):

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[596] *Scott v Scott* [1913] AC 417. See also Joseph Jaconelli, *Open Justice: A Critique of the Public Trial,* Oxford University Press, 2002, Chapter 1.

[597] *Attorney General v Leveller Magazine Limited* [1979] AC 440 at 450A to C.

[598] *In R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* (Article 19 invervening) [2012] EWCA Civ 420; [2013] QB 618.

> Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept, but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age-old question. Quis custodiet ipsos custodes—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well-known passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 417, 477: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

In *Kennedy v The Charity Commission,* [599] the link with transparency goes further:

> It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence: *Scott v Scott* [(above)]; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [(above)].

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[599] *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] AC 455

Open justice is more than merely opening the doors of places of justice and the observation of the process; it has to do with publicity (and therefore more with transparency).[600] Indeed, in *Bank Mellat v Her Majesty's Treasury* Lord Neuberger, described the common law principle of open justice as fundamental to the dispensation of justice in a modern, democratic society (para 2) while Lord Reid recognised that 'the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings'.[601] The connection with the 2013 act is quite striking: transparency is linked to media. Ultimately, here, as in court architecture, what is needed is 'to see justice being done'. To render the court process visible, the courts need to be opened, and the media (press in *Attorney General v Leveller Magazine Limited,* media generally in the latest cases, i.e. press and TV) are the instrument of that new interpretation of transparency. That transparency is erected as a moral principle, but because of what transparency does, i.e. opening up something, spaces such as private and public spheres, it also erases the divide between those private and public spheres, contributing ultimately not to opening up and democratising but rather to a totalitarian trend.[602]

> **'Their perceptions will be derived from TV dramas that more often than not give a distorted view of reality' and 'increased transparency'. See Criminal Visions[603]**

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[600] Masons, *Criminal Vis*ions, pp.260-262.

[601] Bank Mellat v Her Majesty's Treasury [2013] UKSC 38; [2013] 3 WLR 179

[602] Pingeot, *Dictature de la Transparence*, p.73

[603] Masons, *Criminal Visions*, Routledge 2012.

Court of Appeal hearings are now more or less systematically filmed and broadcasted. The first one to be seen on TV was 31 October 2013. One court channel on Sky News has also been set up and appears on the Law Society website http://www.lawgazette.co.uk/analysis/court-on-camera/. The first 'use' of the 2013 Act was for a programme called The Murder Trial. The British newspapers around the time of the broadcasting of that programme sensed that:

> The prospect of American-style televised courts has moved a step closer after Channel 4 announced that it is to show a British murder trial in its entirety for the first time. Remotely-operated cameras were installed in an Edinburgh court room to film the trial of Nat Fraser, a Scottish man accused of murdering his wife, Arlene, whose body was never found. After three years of negotiation, the Scottish High Court granted permission for the trial to be filmed. The results will be screened as a 90-minute Channel 4 documentary called The Murder Trial.[604]

It was the first example of 'the reality' shown as in fiction. Or perhaps was it the first example of fiction that looked like reality. In fact, the process was not as transparent as it was supposed to be. What really was presented was a reality TV style of programme using real footage of a trial. Instead of the promised transparency, of the promised unmediated footage, there was mediation, but *technological* mediation. The programme had all the flavour of something fictional but with bits and pieces that were taken from reality.

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[604] http://www.independent.co.uk/news/media/tv-radio/americanstyle-televised-courts-move-a-step-closer-channel-4-to-show-a-british-murder-trial-for-first-time-8541108.html. Last accessed 21 January 2019.

The current results of filming, recording and broadcasting resemble a new legal Janus, with one positive side and one negative side. It appears on the one hand as a continuation of the (real) audience, the public present at a trial, through a 'techno-legal' transparency; while on the other hand it may seem to be drifting towards voyeurism. It also appears as a substitute for fiction, permanently creating and recreating a circular situation: reality, fiction, reality, fiction. This has to be kept in mind as we know that what seemed important from officials was to tackle the distortion created by TV dramas, in order to increase transparency, although they probably never considered the question of voyeurism.

Transparency and voyeurism.

The entire operation of filming and broadcasting, rather than fostering transparency, feels rather like the expression of a neoliberal manipulation than anything else. We may draw a parallel between what the giant media corporations have been doing and my comments about the architects in the previous chapter. Here too, they are using and abusing the public when they voice that transparency of a building (literal transparency) or of the process of filming and broadcasting equates to phenomenal transparency (real one).[605] No care has been given to the 'ambivalence' aspect of a notion that crucially oscillates between transparent *visible* and transparent *invisible*.[606] However, one may want to

[605] See previous chapter

[606] Pingeot, *Dictature de la Transparence*, esp. p.152.

consider the matter as reflective and be less critical against neoliberal aspirations, so easily condemned. If the media is pushing this, perhaps it is because we, the public/masses or what is referred to as 'the public', have a need to fulfil. We may therefore turn towards the literature that makes the connection between cinema/TV and psychoanalysis for help. Watching, looking, gazing, is a source of pleasure, while there is also pleasure in being looked at. As reported by Professor Laura Mulvey,

> The cinema offers a number of possible pleasures. One is scopophilia. There are circumstances in which looking itself is a source of pleasure, just as, in the reverse formation, there is pleasure in being looked at. Originally, in his *Three Essays on Sexuality*, Freud isolated scopophilia as one of the component instincts of sexuality which exist as drives quite independently of the erotogenic zones. At this point he associated scopophilia with taking other people as objects, subjecting them to a controlling and curious gaze.[607]

We will extend these comments to the TV. One of the crucial aspects of voyeurism using people as objects through cameras is, in fact, watching them. What more can be right about watching a trial in one's living room? Scopophilia, literally 'the love of looking' is synonymous with voyeurism. Voyeurism is therefore associated with seeing other people

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[607] Laura Mulvey, 'Visual Pleasure and Narrative Cinema' Screen, Autumn 1975, vol.16, pp.6-18. Reedited as Mulvey, Laura. "Visual Pleasure and Narrative Cinema." Film Theory and Criticism : Introductory Readings. Eds. Leo Braudy and Marshall Cohen. New York: Oxford UP, 1999, pp. 833-44. esp. p.835.

as objects, subjecting them to a controlling and curious gaze. Voyeuristic activities of children for instance, their desire to see, revolve around the private and the forbidden.

> In this analysis scopophilia is essentially active. (Later, in *Instincts and their Vicissitudes*, Freud developed his theory of scopophilia further, attaching it initially to pre-genital auto-eroticism, after which the pleasure of the look is transferred to others by analogy. There, is a close working here of the relationship between the active instinct and its further development in a narcissistic form.) Although the instinct is modified by other factors, in particular the constitution of the ego, it continues to exist as the erotic basis for pleasure in looking at another person as object. At the extreme, it can become fixated into a perversion, producing obsessive voyeurs and Peeping Toms, whose only sexual satisfaction can come from watching, in an active controlling sense, an objectified other.[608]

What Mulvey spotted is crucial for an analysis of the introduction of cameras in courts, because she clearly highlights the links between cinema and TV dramas and the operation of control through transparency. For Mulvey, cinema, and we may extend her remark to TV here, 'would seem to be remote from the undercover world of the surreptitious observation of a watching unknowing and unwilling victim'.[609] In that sense, what we watch, what we see on TV or on screen, gives us, the audience, the public, pleasure, because we know that the people we are watching cannot know we are watching them. That is how, and again I want to emphasise the link with transparency in court buildings,

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[608] Loc. Cit.

[609] Loc. Cit.

'control trough transparency' actually unfolds. What is seen of the screen is manifestly shown.

> [T]he mass of mainstream film, and the conventions within which it has consciously evolved, portray a hermetically sealed world which unwinds magically, indifferent to the presence of the audience, producing for them a sense of separation and plan on their voyeuristic phantasy. [610]

That is happening to every one of us, the audience, the public. Consider, for a moment, that we are actually not present, but are the (absent) audience of a (remote) court, an (absent) audience, separated, segregated, by screens. We would, at the same time, be peeping, hiding, behind a screen, and yet be, in fact, so very much present through TV screens. It illustrates how cameras and TV screens operate as a mediation device that produces, as written by Mulvey, a sense of separation, making the mainstream transparency argument irrelevant. This isolation, separation, seems to be created by the 'contrast between the darkness in the auditorium (which also isolates the spectators from one another) and the brilliance of the shifting patterns of light and shade on the screen helps to promote the illusion of voyeuristic separation'.[611] We are facing the binary conflict of 'darkness of the auditorium' (or the darkness of the soft ambiance of a living room) v. 'light of the screen', in fact what is projected. The movie is (really) shown. It is there to be seen: the conditions of screening, the way things are organised, but also the specific narrative conventions (and we may, by analogy, include what has been included

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[610] Loc. Cit., pp.835-836.

[611] Loc. Cit., p.836.

in the various documents concerning who operates and how it is operated by video-journalists) give the audience (i.e. the ensemble of spectators or the public/masses) an illusion of 'being', through what is 'seen' of a private world. It is even more exacerbated when we consider the cosy ambience of a home for a TV show, with the TV most of the time nowadays occupying the focal point in a living room, reproducing that effect somehow.[612] Does it make watching a court hearing a pleasant experience? Of course, TV and cinema have something to do with the pleasure of looking too. Watching a court hearing, watching a trial, goes further than simply 'watching'. It has to do with developing the narcissistic aspect of voyeurism based on what the public is used to see of the courts in cinema or TV fictions.

Narcissus looks at himself in the water, as we look at ourselves in a mirror. As he looks at himself, he gets closer and closer to the water. But the water that constitutes the mirror is also a window. Narcissus does not know it but, by going further, by passing 'through'

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[612] I suspect that these considerations must be nuanced according to the cultural identity of the audience and the way the justice process is conducted. What similarities and differences then do we have in the TV fictions. We may offer a safe answer by acknowledging differences in French cinema and TV programmes, where we have either a very slow process, where the French police is involved and/or an investigating magistrate is very active or pro-active. But here, no one never really see what is inside the courts. The British equivalent is a much more active process with verbal exchange in courts. We go back to the crucial difference between legal culture of verbal and written, of openness and secrecy. That said, the influence of Anglo-American TV and cinema in France has created a craving for Anglo-American style of justice. Popular culture creates a distortion of reality. That is a crucial element to be considered in the reality becoming a fiction. Perhaps a fiction is creating not only a new reality and it certainly helps the public to depart from the dominant culture of one jurisdiction. How can I not remember this apprentice *avocat* telling a French judge '*objection votre honneur*!' These examples are simply to illustrate the problem of representation and re-representation. What is what we refer to as 'reality' may not be what is going to be expected, truly expected, by the public.

the ‘water-mirror’, and considering it as the ‘water-window’, he will pass a point of no return, a definitive move that opens onto his destiny, his death. What pushes Narcissus to act is more his loneliness than the search for the origin of his image.[613] There are connections between Narcissus story, the mirror, the water, and the birth or feelings of a society. The screen operates surely as a mirror too. As Mulvey remarks and as I have already mentioned, Lacan describes the mirror stage as the moment a child recognises its own image in the mirror and considers it the crucial operation for the constitution of the ego.[614] The mirror phase occurs when the child wants more than what his body can really achieve. It also is a fundamental moment the child sees an image of himself as a complete body for the first time. This mirror image appears here more complete than the reality of his own body, or perhaps of the expectation he may have of himself. Because this image of himself has been conceived as the reflected body of the self and is a recognition of himself, it is a recognition that is also a misrecognition. That is due to the projection of his body outside itself as an ideal ego (the alienated subject), re-introjected as an ego ideal that will start the identification with others. This image of course has to be considered as a topical element here, an element that is crucial for the imaginary, for the binome recognition/mis-recognition and for identification. As the subject is empty, it will look at others, to identify.[615] The mirror stage is in fact the first experience of the 'I', the one of

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[613] David Marrani, Althusser in Avatar : comparative law as a science and the haunting of the subject, in Laurent de Sutter (ed) *Althusser and Law*, Routledge 2013, esp. p.107.

[614] Laura Mulvey, ‘Visual Pleasure and Narrative Cinema’ Screen, Autumn 1975, vol.16, pp.6-18. Reedited as Mulvey, Laura. “Visual Pleasure and Narrative Cinema.” Film Theory and Criticism : Introductory Readings. Eds. Leo Braudy and Marshall Cohen. New York: Oxford UP, 1999, pp. 833-44. esp. p.836. See also my comments in Marrani, Confronting the Symbolic Postition of the Judge in Western Legal Traditions: 2010.

[615] Maria Aristodemou, *Law, Psychoanalysis, Society*, Routledge 2015, esp. p .77.

subjectivity, which revolves around the experience of the fascination of looking at the mother's face for example, and which collides with the initial consideration of self-awareness. This may be compared to the first step of a journey of 'self-reflecting and self-perpetuating delusions, a 'first wishful misrepresentation of herself [or himself] as a subject'.[616] We, as subjects, will not acknowledge the misrepresentation but will try to find others to ratify and endorse it.[617] We look at others in order to find, to perpetually find something that is not. The complex relationship between image and identification is strongly present in the cinema and TV of course, with the interaction screen-like-mirror/self-like-cinema audience.

Interestingly, for Barthes, 'The spectacle or the tribunal, which are both places where the Other threatens to appear in full view, become mirrors.'[618] We should then rightly consider similarities and differences between screen, that opaque structure that separate spaces, even the most remote ones, and mirror. A screen is at the same time a mirror and not a mirror. Indeed, the cinema does not create a mirror and a self-recognition as such but has the power to fascinate so much that one may lose itself in it for a while, and become inserted in the movie, like Narcissus, falling into the water and drowning. Losing oneself appears then to be the same experience than the one of the mirror stage, the pre-subjective moment of image identification describe above. But the screen is like the mirror. What the public sees as a fiction will be expected in a very similar way as what a child expects in an image of him or herself. The mirror stage here would appear to be the

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[616] Ibid.

[617] Ibid.

[618] Barthes, *Mythologies*, esp. p.151.

public recognising the image or a certain image of (its) judges and of (its) justice on the screen. We should consider it a crucial operation for the constitution of an image, and further for the perception of the judge and justice. Ultimately, that is something that we could consider as crucial for the creation of a specific space. The image presented becomes fundamental. It becomes what is expected by the public, conceived as the reflection of the law itself, of a legal system, of what a legal culture (we should remember that the mirror stage is the entry of the child in culture) of one place is based on. The major issue here is really what the public expects and not what is really happening. On the basis of identification, and of the recognition, like Barthes mentioned, of man's inability to imagine the Other, we end up with us wanting to reduce otherness to sameness: 'one never tries anybody but analogues *who have gone astray*.'[619]

What is on the screen becomes what is 'real'… It is therefore a recognition of what is there but also a misrecognition. Here too, the projection of a cultural reality, the narcissistic imagination of what judge and justice should be, becomes a sort of ideal ego (the alienated subject of the mirror stage), that is re-introjected as an ego ideal starting identification with what is there. This crucial image for the legal imaginary, for the binome recognition/mis-recognition and for identification permits to develop perceptions but also and more importantly here expectation of what a real trial broadcasted not is but should be, of what the actors, judges, lawyer and parties, should be, should do, of the specific scene, of how it should be… But in addition, we should not forget that to show justice being done, being seen rendered, according to a democratic ideal, imaginary or

[619] Ibid pp.151-152

not, something transparent seems adequate. There should therefore be nothing more transparent than filming and broadcasting in places that are said to be opaque. But to show the interior of the process of justice, to show its intimate mechanism, to reach deep inside the process of justice, one has to be able not to see, even though it seems *prima facie* contradictory. These things have to be hidden, as this is through opacity rather than through transparency, as we have seen for palaces of justice, that the most intimate is reached. To complete that brief argument, I suggest that psychoanalytic theory tells us that transparency does not give us access to the inside. A transparent palace of justice and furthermore cameras do not bring a glimpse of the democratic process, for instance, or shows a fair trial.[620]

Transparency renders the opposite effect to the one we are in fact expecting. It does not really open the interior onto the exterior, but it makes the interior permanently available to the exterior, opened. Transparency equates here to openness. Therefore, the use of TV/cinema becomes the seed for revolution. But will it redress the fictional seeds that have been planted in our mind? We may keep in mind that if the domination of US cinema carries on, the expectation of the European audience will be that a trial should be conducted like the public/masses knows, and therefore like a trial in the US (even though we may soften this assumption due to the vast amount of 'real' jurisdictions in the US), because their knowledge is being fuelled by images of what the public/masses have seen on screen. The imaginary, the expectation will simply be one of a US trial and not that of their own jurisdictions.

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[620] See Chapter on architecture.

It can be said, and I have argued in previous chapters, that the rituals of justice taking place in the courtrooms have both an individual and a collective function.[621] They contribute to both the resolution of a private dispute and the re-enactment of the original transgression, the patricide.[622] The real audience, the public/masses, needs to have access to the court rooms, as brothers of the primal hordes needed to witness the re-enactment of the original transgression to interiorise, to repress and then suppress this original transgression that is, as I argued, the moment of the beginning of civilisation.[623] But it has another dimension that has to do with the place, space, identity, and language of a community. It is not surprising that access to courtrooms through the transparency of courthouses and the openness of justice has been topical in the debates following the development of post-modern type of courts. Many architects have used and abused the adage 'justice as to be seen to be done' and made both literal and phenomenal transparency collapse.[624] In the case of the use of cameras in courts, we should therefore analyse how the scope of this statement may be multiplied or divided. However, at the same time, one needs to consider it critically, at a different angle. Screens operate as mirrors as we have seen, and we need to keep in mind how that point impacts on many issues. They help spectators, the audience, to identify as ego, through primary identification with the camera itself. Spectators are in actual fact not active but passive agents in front of what is going on; what is seen, the process of justice, a naked justice,

[621] See Chapter 2.

[622] See Chapter 1.

[623] Ibid.

[624] Chapter on architecture

undressed in front of their eyes. The action that is taking place on the screen fosters identification with the camera that provides the spectator with an illusion of power over what s/he sees (we have to remember the statement of Foucault on control through transparency).

The space of justice constructed by cameras, the onscreen representation of a reality that is supposed to resolve the mistakes of TV fiction, ignores the walls of the palaces of justice and the specific rituals. It also ignores the visual and cultural training that TV and cinema have given to the public. Cameras circumvent walls and bring new dimensions to the ego, through the perversion of (what is) justice, and for the society, with the help of the Althusserian notion of ideology, a political dimension that results from the abolition of the opaque walls of the courtrooms. A dangerous prospect for contemporary democracy, of course, and, to further analyse the question, we may now turn to Baudrillard and his work on media.

Cameras in courts and the implosion of the meaning in the media.

We may want to analyse the question of cameras in courts taking a different but truly relevant angle here. We may reconsider the use of video cameras in courts through the work of Baudrillard Simulacra and Simulations, and specifically Chapter VIII: The Implosion of Meaning in the Media.[625]

[625] Baudrillard, Jean, *Simulacra and Simulation (The Body in Theory: Histories of Cultural Materialism)*, University of Michigan Press, 1994, esp. pp.79-86

For Baudrillard, to 'simulate' is to feign having what one doesn't have.[626] Simulation threatens the difference between the true and the false, the real and the imaginary.[627] Simulation envelops the whole edifice of representation itself as a simulacrum. [628] Baudrillard uses the example of Disneyland[629]: it 'exists in order to hide that it is the 'real' country, all of 'real' America that *is* Disneyland'; it 'is presented to us as imaginary in order to make us believe that the rest is real…' but nothing is real in America, it is simply a simulation. Let us try to apply this concept to the use of cameras in courts. It seems, to a certain extent, adequate to apply *Simulacra and Simulation* in (what I believe to be) the representation or even double representation taking place in the broadcasting of a trial. In the beginning of chapter VIII of Simulacra and Simulations, we find this statement: 'We live in a world where there is more and more information, and less and less meaning'. [630] That is truly why it is relevant to analyse the entire operation of filming and broadcasting in court in the light of this statement. We need to be conscious that as soon as we film and broadcast anything, including a trial, it becomes 'like' any other type of information. Baudrillard considers three hypotheses that we will look at here in turn.

In the first hypotheses, we learn that 'information produces meaning (a negentropic factor), but cannot make up for the brutal loss of signification in every domain'.[631]

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[626] Ibid, esp. p3

[627] Ibid.

[628] Ibid, esp. p.6.

[629] Ibid, esp. pp.12-13.

[630] Ibid, p.79.

[631] Ibid.

Therefore, what is transmitted in our case, when the trial is filmed and broadcasted, the 'message and content', is re-sent, 'reinjected' as Baudrillard puts it, but it loses meaning in the process. In the second hypotheses, Baudrillard mentions that 'information has nothing to do with signification'.[632] If it has nothing to do with signification, then it is not linked to meaning and is positioned 'outside meaning and of the circulation of meaning strictly speaking'.[633] What we have is something 'purely functional, a technical medium that does not imply any finality of meaning'.[634] We end up either with a complete disconnection between 'the inflation of information and the deflation of meaning' or 'a rigorous and necessary correlation between the two, to the extent that information is directly destructive of meaning and signification, or that it neutralises them'.[635] When we film and broadcast a trial, the retransmission of a trial inflates information. There is more information sent to the public/masses, the virtual audience, information that used to be only available in (as in inside) court and is in fact not widely available. But at the same time, it decreases the meaning of what is happening. That is to do with the fact that transparency is indeed deflating the true symbolic meaning here. In the third hypotheses, Baudrillard analyses the measure of socialisation through the exposure to media. There is a point made about correlation between socialisation and media: 'Whoever is underexposed to the media is de-socialised or virtually asocial'.[636] We may just want to consider how for instance, we very quickly forget about the winner of the X-Factor finale every year, even though for weeks and weeks, the judges and all the singers of the show

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[632] Ibid.

[633] Ibid.

[634] Ibid.

[635] Ibid.

[636] Ibid, esp. p.80.

are an integral part of the Saturday or Sunday family routine for millions of viewers. When we are told that we need to see justice being done or being rendered, when we are told that this is good for the administration of justice, we have something similar happening. We need to film and broadcast trials because justice can only exist if it is seen. But as soon as we stop, we may just simply forget about it… This is inverting the meaning of this very statement: If we don't see justice being done, it is not done; it we don't see justice being done, it does not exist. There is also here a correlation between information and acceleration of the circulation of meaning. From information comes communication, with 'an excess of meaning'.[637] A filmed and broadcasted trial does not simply inform us, it communicates something, via a complex mechanism of meaning. We are all complicit in this myth. It is the alpha and omega of our current modernity, without which the credibility of our social organisation would collapse. And yet, the fact is that it *is* collapsing, and for this very reason: because when we think that information produces meaning, the opposite occurs.[638] To sum up, a filmed and broadcasted trial contributes to the circulation of specific information (we need to see justice being done) in order to avoid our social organisation collapsing. In addition, we believe that the meaning produced by that information is needed to avoid the collapse of our society.

We now have many examples of trials that were filmed and then broadcasted. But perhaps, we may want to use here, for an illustration, the experience of the highly mediatised trial of Pistorius, the *State v. Oscar Leonard Pistorius (Pistorius)*. The trial in South Africa of the Paralympian was not televised until the ruling, incidentally a televised

[637] Ibid, esp.p.80.

[638] Ibid, esp.p.80.

ruling, in Pretoria's High Court in February 2014.[639] Judge Dustan Mlambo declared at that time that it was vital that impoverished South Africans who feel ill-treated by the justice system be given a first-hand look at the trial. Judge Mlambo had to balance conflicting constitutional rights (expression v. fair trial), but this is not what initiated the filming and broadcasting process but rather the issues of open justice and social elements:[640]

> I have further considered the extensive interest that the pending criminal trial has evoked in the local and international communities as well as in media circles. My view is that it is in the public interest that, within allowable limits, the goings on during the trial be covered as I have come to decide to ensure that a greater number of persons in the community who have an interest in the matter but who are unable to attend these proceedings due to geographical constrains to name just one, are able to follow the proceedings wherever they may be. Moreover, in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult to access the justice system, that they should have a first-hand account of the proceedings involving a local and international

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[639] http://www.justice.gov.za/docs/other-docs/pistorius-judgment-10193-2014.pdf. Last accessed 17 February 2017.

[640] It is quite interesting here to note that on the contrary Stepniak links right to a fair trial and open justice: 'New technology, in particular the Internet, appears to provide courts with viable means of addressing the long-standing concerns regarding the media's audio-visual coverage of court proceedings, and of securing the balance between the rights to a fair trial and those of the open and public administration of justice.' Stepniak, 'Technology and Public Access to Audio Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions', esp. p.823

> icon. I have taken judicial notice of the fact that part of the perception that I allude to is the fact that the justice system is still perceived as treating the rich and famous with kid cloves whilst being harsh on the poor and vulnerable. Enabling a larger South African society to follow first-hand the criminal proceedings which involve a celebrity, so to speak, will go a long way into dispelling these negative and unfounded perceptions about the justice system, and will inform and educate society regarding the conduct of criminal proceedings.

This statement has, we may all agree, more a flavour of a statement of a politician than the statement of a judge on a point of law. We find very few remote connections with 'law' in this. But we sense an echo of Baudrillard's vision: Allowing Pistorius's trial to be broadcasted super exposes this vision to the media. It increases the socialisation, and Mlambo's argument is quite clever here, a perception. Meanwhile, it is clear that retransmission of the trial does not create meaning in the way Mlambo really desires it. Because of the inversion that occurs in the creation of meaning, we are left with emptiness rather than clear signification. One of the issues is that, as Mlmabo, we believe that information will create a meaning. Therefore, filming and broadcasting the Pistorius trial should not simply be a transmission of information, but a transmission of meaning, the meaning of justice, its administration, etc. Instead, 'Information devours its own content. It devours communication and the social'.[641] In consequence, a televised trial does not convey the expected meaning but simply the misery of the emptiness of signification. There are two reasons for this, and I will base these on ideas developed by Baudrillard.

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[641] Baudrillard, *Simulacra and Simulation***,** p.80.

Primarily, information, and I want to note again here that I am focusing on the retransmission of trials via audio-visual technique, does create neither communication nor meaning. Instead, it exhausts itself in the act of staging communication and in the staging of meaning.[642] To sum up and use Baudrillard's terminology, it simply 'simulates'. Assuming the desire of the public/masses, the audience, as I mentioned earlier, becomes an 'antitheater of communication'.[643] That is a heavy machinery of simulation that is put in place to avoid a de-simulation. This simulation masks the 'obvious reality of a radical loss of meaning' and as such participates to the avoidance of that discovery.[644] What becomes quite obvious then is that a televised trial, seen in your living room, is a deception, a simulation of a real trial. It becomes a simulation, but it also becomes hyperreal, an abolition of 'the real': 'More real than the real, that is how the real is abolished'.[645] There is a great and large volume of information but a total loss of communication, and therefore a re-enforcing of the simulacrum. As mentioned earlier about the Pistorius case, not only communication but also social functions are lost. We present the televised trial not as a televised trial but as 'the trial'. In doing so, the 'more real than the real' abolishes 'the real'. It is clear that what is before us is not what is seen or what it seems. It is certainly not the important re-enactment of the original transgression and its punishment.[646] It is something else. However, we are pushed to believe in the information and in its social function (see the declaration of Mlambo or

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[642] Ibid, p.80.

[643] Ibid, p.80.

[644] Ibid, p.80.

[645] Ibid, p.81.

[646] See Chapter 1.

what we have been told during the Crime and Courts bill debates in 2012-13). As Baudrillard puts it, 'Belief, faith in information attach themselves to this tautological proof that the system gives of itself by doubling the signs of an unlocatable reality.'[647] This tautology is interesting because it triggers a reaction from the public or the audience, one of disaffection, but also one of 'enigmatic belief'.[648] At the same time, there is a crucial assumption that the audience or the public, that Baudrillard calls the masses, will not exercise any critical thinking because of the 'naivete and stupidity of the masses'.[649] We may suspect that to address the question of disaffection and enigmatic belief, one may want to turn to statistics. How many of us watch trials on TV? In a recent survey, it was striking to see that 51% would not watch a criminal trial on TV. We may be quasi-certain that this assumption would be correct for UKSC TV programmes as well.[650] Interestingly enough, in the pure demonstration of Baudrillard's thoughts, what is interesting may not be the statistics, or the content of the article, but rather its title: 'Many would watch criminal trials on TV'. While we are told so, we get quite a different feeling from the statistics and their presentation: in effect, we are informed that 'A significant minority (39%) would watch television coverage of UK criminal trials if they could'. The significant majority of 39% is a very interesting postulate. One would believe that a majority of 51% should be in fact the 'significant majority' or that at least the expression a relative majority of 39% should be used to change the title to 'Only a few would watch criminal trials on TV'. Journalists are here again masking the reality: that in fact a

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[647] Baudrillard, *Simulacra and Simulation***,** p.81.

[648] Ibid, p.81.

[649] Ibid, p.81.

[650] Many would watch criminal trials on TV. https://yougov.co.uk/news/2014/03/03/many-would-watch-criminal-trials-tv/. Last accessed 17 February 2017.

majority is/was against watching a trial on TV. In a similar, and in my opinion related, branch of the argument, there is certainly great analysis to be done on 'real court' television. Real court shows involve actual, unscripted disputes between real people. To sum up, in that sort of programme, a judge hears the testimony; after a commercial break, the judge hands down a decision. The judge handles the trial in an inquisitorial manner. There are no lawyers. The judge fires questions at the litigants (or the occasional non-party witness) in an attempt to get at the truth.[651] What do we in fact have there? Do we have real courts or hyperreal courts?

The second reason for Baudrillard is that 'Behind this exacerbated *mise-en-scène* of communication, the mass media, the pressure of information pursues an irresistible destructuration of the social'.[652] The risk, if we move to televised trial, is to see the flux of 'information dissolve[ing] meaning and dissolve[ing] the social'.[653] Contrary therefore to what we are pushed to believe, either in the UK or in other jurisdictions, as illustrated with the account of Judge Mlambo, the result of the mediatisation of a trial is not socialisation but rather the contrary. For Baudrillard, it means that the implosion of the social (at macro level) is also the implosion of meaning (at micro level).[654] In consequence, 'all contents of meaning are absorbed in the only dominant form of the medium. Only the medium can make an event…'[655] The content of the meaning of the

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[651] Real Court Television, *Michael Asimow, UCLA Law School* (September 1998), http://usf.usfca.edu/pj//articles/realcourt.htm

[652] Baudrillard, *Simulacra and Simulation,* p.81.

[653] Ibid, p.81.

[654] Ibid, p.81.

[655] Ibid, pp.81-82.

process of justice is then absorbed in the TV itself. In addition, the implosion of that meaning also marks the implosion of the social. The event of a trial on TV transforms the trial: it makes the trial an event. The trial therefore becomes an event. From the latin -e, out, plus -venire, to come, an event involves a movement from outside to inside, which according to Lamizet, marks a limit.[656] This limit is a wall, including a glass wall or a camera, which frames the place of the happening of time, linking space and time.[657] This is valid primarily in the matter of a 'general' event. For Nietzsche, 'an event is nothing other than the time when being appears in all its neutrality'.[658] That neutrality is present and reaffirmed by Baudrillard too, through the operation of making something neutral, the neutralisation of all content of meanings, where the medium replaces the real form. In a TV trial, the cameras in the court rooms replace the real form.[659] In the legal field, one comes to a trial, the legal event, enters a courtroom that delimits, marks boundaries, and defines. As argued previously, the human subject outside is anonymous. S/he enters the courtroom, and becomes defined, named, identified as judge, or advocate, or accused. The idea of the event merges time and space through theatrical ritualisation. As mentioned, and to go back to the example of the legal event, the courtroom is precisely a theatrical place where a play is performed. Actors are all dressed, and everyone plays a part, their life (and sometimes death), in a representation of the original transgression. Courthouses are similar to temples where what is sacred, magical, operates with ritual(s), in a fusion between space and time. But what takes place in this re-enactment of the

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[656] Lamizet, B., (2006), *Sémiotique de l'Evénement*, Paris: Hermes, Lavoisier.

[657] See Chapter 2.

[658] Zupancic, A., (2003), *The Shortest Shadow: Nietzsche's Philosophy of the Two*, London: MIT Press, esp. p.60.

[659] Baudrillard, *Simulacra and Simulation*, esp. p.82

original transgression is a re-birth, a "new beginning", the end of the (psychoanalytical) cure.[660] Simulation destroys. It does so because of the dissolution of the meaning through the media. The important part that is played by the parties/audience in the tragedy taking place in the courtroom does not transfer in the simulation. The result is a) the implosion of the message in the medium, b) the implosion of the medium itself in reality, and c) the 'implosion of the medium and of the real in a sort of hyperreal nebula, in which even the definition and distinct action of the medium can no longer be determined'.[661] The hyperreal nebula is also a hyperreal confusion of everything. If we once again carefully consider McLuhan's formula, as interpreted and explained by Baudrillard, we clearly see that the medium is the message, is the key formula of the era of simulation: the medium is the message, the sender is the receiver, there is a circularity of all poles, the end of panoptic and perspectival space.[662]

Using cameras in court does therefore bring some confusion. The hyperreal confusion is that the information (justice) and the TV that shows it are the same. The courts and the audience in the living room become the same. Subjectivity plays a crucial part on what is received, because in a similar way to what is taking place when we are looking at a painting, the viewer gives corpus to what is seen. The true meaning of the trial is then given by the receiver; by whoever will watch the trial. That is the true dilemma that faces that alleged exercise of transparency taking place through the entry of cameras in courts.

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[660] Lacan, J., (1999), « Le temps logique et l'assertion de certitude anticipée. Un nouveau sophisme" *Ecrits* 1, Paris: Point, Seuil, esp. pp. 195-211.

[661] Baudrillard, *Simulacra and Simulation*, esp. P.82.

[662] Ibid.

The open justice argument, a continuation of transparency, but also the great understanding of the process of justice argument, (a very condescending pedagogical rhetoric of the elites concerned with the education of the audience argument) do not take into consideration the real inversion taking place: the audience gives the meaning of the televised trial. Is this a perversion or simply a proper interpretation of what happens in the process of trials retransmitted by TV? Here we have a clear example of the issues of transparency. The walls of the courthouses explode during the implosion of meaning and medium. That is confirmed by Baudrillard's concerns that not only the contents and messages have been volatilised in the medium but also the medium itself is volatilised as such.[663] Information still gives credibility to what is seen, to the medium, to the TV, including its status as medium. For us, the TV is 'the intermediary of communication'.[664] It also confirms what I feared about touching the 'real': transparency, including what is brought by and through TV, destroys mediation. Indeed, 'A single model, whose efficacy is immediate, simultaneously generates the message, the medium, and the "real."'[665] And we arrive at the end of everything, TV is the message, and therefore there is no information anymore. It is the end of both TV and information, 'the end of the message, but also the end of the medium'.[666] Both are needed to appear and exist, and both disappear when this is done. Watching a trial on TV is destroying both the TV as medium (because it does not exist anymore as a medium) and the message, the information, what is seen (justice been done), vanishes in what is communicated. Baudrillard demonstrates

[663] Ibid.

[664] Ibid.

[665] Ibid.

[666] Ibid.

that there is no media anymore, 'in the literal sense of the word', no 'mediating power between one reality and another, between one state of the real and another'[667]. The only situation is the one of the hyperreal nebula merging medium and content: the trial televised is a television programme showing a 'real' trial, but it simulates it, even though it is appearing/happening somewhere. When we watch it, we do not have any mediation, we are absorbing what we see as if we were present in court… but we are not there at all, we are absent, and we cannot 'see' the truth, the judicial truth, we are only left with this nebula; 'the medium and the real are now in a single nebula whose truth is indecipherable'.[668]

Of course, and this is highlighted by Baudrillard, we have idealised meaning and communication and this is according to this sort of standard that we apprehend information and as this is not going according to that standard, then we think about it as a 'catastrophe', where and when 'nothing takes place that has meaning for us'. This understanding we have about meaning, is now a limit, a border, a horizon like in the words of Baudrillard, a 'liminary', or a point of no return of the meaning, which collapses social into masses, because it destroys the 'social': 'Beyond the horizon of the social, there are the masses, which result from the neutralisation and the implosion of the social'.[669] The absorption of what is arriving on TV does trigger many questions, starting with the one of posture. The question of the condescending poster of elites for instance, highlights what must be looked at, the sort of dynamic elites/masses and how this

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[667] Ibid.

[668] Ibid, p.83.

[669] Ibid.

dynamic operates, as mass-communication tools that control the masses. On one side, we have the few, the elites, the subjects supposed to know, and on the other side we have the masses, subjects supposed to believe, or at least supposed to follow the leaders without answering. The mass media and the masses interact in an 'inextricable conjunction of the masses and the media', where one tries to decipher whether 'the media neutralize[s] meaning and produce uninformed [informe] or informed [informée] masses, or is it the masses who victoriously resist the media by directing or absorbing all the messages that the media produce[s] without responding to them?' [670]

At that stage, moving from Baudrillard, it may be relevant and helpful to consider another side of the argument with the introduction of an interpretation based on Barthes's writings. One of the merits of this last interpretation is the introduction of a third level of explanation, a third meaning.

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[670] Ibid. Of course, Baudrillard applies some radical Marxist outcome here: This absence of response is not a strategy of power but a counterstrategy of the masses themselves when they encounter power. That brings you up to the dynamic elites/masses, orchestrated by the media, as confirmed with the many arguments voiced around trials on TV, using the power confer by images to 'carry meaning and countermeaning' and therefore to 'manipulate in all directions at once'. Ibid, p.84. It is the strategy of the masses: it is equivalent to returning to the system its own logic by doubling it, to reflecting meaning, like a mirror, without absorbing it. This strategy (if one can still speak of strategy) prevails today, because it was ushered in by that phase of the system which prevails. To choose the wrong strategy is a serious matter. All the movements that only play on liberation, emancipation, on the resurrection of a subject of history, of the group, of the word based on "consciousness raising," indeed a "raising of the unconscious" of subjects and of the masses, do not see that they are going in the direction of the system, whose imperative today is precisely the overproduction and regeneration of meaning and of speech., Ibid, p.86.

A third level, as additional and last issue to be considered for cameras in courts.

If we have noticed with Baudrillard the place of media and the role mediation plays in communication and information, together with the explosion/implosion of meaning, Roland Barthes brings an additional layer with the notion of a third meaning.[671] Barthes refers to Eisenstein's movie *Ivan le Terrible* to analyse not two but three meanings in movies. Let us just assume that the points he made in his analysis are strongly relevant to filming and broadcasting in court. It is quite simple to consider that everything relating to film may have connection to our question. That said, one objection for the use of Barthes ideas here could be that specifically, he is referring also to still. To evacuate that objection, it may be easy to explain that the judicial rituals impose not a permanent dynamic and movement such as the one we have in movies but rather long still scenes. As mentioned above, Barthes considers not two but three meanings of a scene, two that are more, or less, relevant and similar to Baudrillard discussion, communication and signification, and the third meaning.

The first level Barthes calls the 'informational level' (or communication). Here we can learn 'from the setting, the costumes, the characters, their relations, their insertion in an anecdote with which I am (even if vaguely) familiar.' [672] At this level, what is important is communication but not simply as an operation of communication. It has more to do with an operation of education through communication. It is particularly interesting to

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[671] Roland Barthes, *The Third Meaning, Image, Music, Text*, London, Fontana, 1977, esp. pp. 52-68.

[672] Ibid, p.52.

note that this is rather similar to all the explanations we received from officials concerning the education and pedagogical side of filming and broadcasting in court in regards the Crime and Courts Act. The argument is found not only in the official documents cited at the start of this chapter, but also in literature on the topic.[673] We want to see justice being done, being rendered. In all examples seen on the Law Society gazette website of court on cameras,[674] it is obvious that the work of the cameras is around the setting (the court room), the costumes (the gowns/wigs), the characters (judges, lawyers and even parties), their relations, their insertion in an anecdote with which one may be (even if vaguely) familiar (that relates to the point made by Barthes in *Mythologies*: one never tries anybody but analogues *who have gone astray.*[675]) That is the level of the message and, indeed, this is what transpires from the point made by the officials on filming and broadcasting. The informational level is also a level clearly connected to rituals. It is concerned with the decorum, what is presented to us and how clear it makes us 'feel' justice. As such, the operation of communication is truly alike the one found in baroque rococo churches: a rococo building communicates.[676] Then comes the second level.

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[673] See Stepniak, 'Technology and Public Access to Audio Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions', esp. p. 806 & 813, but also more recently Edward L. Carter, Supreme Court Oral Argument Video: A Review of Media Effects Research and Suggestions for Study, 2012 BYU L. Rev. (2012), pp.1719-58.

[674] http://www.lawgazette.co.uk/analysis/court-on-camera/. Last accessed 17 February 2017.

[675] Barthes, *Mythologies*, esp. p.151.

[676] Karsten Harries, *The Ethical Function of Architecture*, MIT Press, 1998, esp. p.92. The first meaning of a rococo church is a church, the second is something else that has more to do with education and communication.

The second level Barthes calls the 'symbolic level' (or signification or the obvious meaning[677]). [678] In *Ivan the Terrible*, the referential symbolism is the imperial ritual of baptism by gold. We may, by analogy, use our specific judicial rituals in courts. Those rituals are extremely important to the correct administration of justice, because of the meaning that they bring, a meaning that is obvious. Then there is the diegetic symbolism as the theme of gold, of wealth. Here all the elements including law and justice itself contribute to the theme of justice such as an elevated position for the judge, or the presence of a crest or a cross behind the judges. Many themes can be found but the most obvious are law and justice. Then again there is the Eisensteinian symbolism in Ivan. That reflects the personal input of the director and that is an important element, which touches the subjectivity of the person filming. That is a crucial point that we touched upon earlier in this chapter: who uses the cameras, how are the cameras used, etc.… The subjective dimension, so well spotted by Barthes, is a dimension removing the argument of absence of mediation. The system 'camera-director' is a system that is not neutral. It does mediate: the camera has technology that is not neutral, particularly when it is used by 'someone'. And there is an historical symbolism, what is brought here 'in a (theatrical) playing, a scenography of exchange, locatable both psycho- analytically and economically, that is to say semiologically.'[679] I have argued in many of my papers the link between the process of justice and psychoanalysis.[680] That is the level of *signification.* The place, or space, of justice has an intimate connection with this. The position of things, the place of

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[677] Barthes, *The Third Meaning*, p.54.

[678] Ibid, pp.52-53.

[679] Ibid, p.52.

[680] See Chapter 2.

the actors, their costumes, are all related to the necessary creation of the good distance, one that psychoanalysts consider fundamental for the symbolic. But as in the communication level, the signification is participating in the education of the public, but as a second stage. First, we need to *see*, so the courts are showing. Then we need to *integrate*. Therefore, the more that is shown (hence strong rituals are crucial), the more that is understood and integrated, again in the same way as what we have in rococo churches. We have finally arrived at Barthes' description of the third meaning.

For Barthes, we have a third meaning (the obtuse meaning[681]). That meaning is unknown but is felt: 'I am not sure if the reading of this third meaning is justified - if it can be generalised - but already it seems to me that its signifier (…) possesses a theoretical individuality.'[682] It goes therefore further than the scene communicating and signifying. It is a meaning that forces interrogation, 'on the signifier not on the signified, on reading not on intellection.'[683] In addition, it is a meaning that leaves us unsatisfied. It is 'significance, a word which has the advantage of referring to the field of the signifier (and not of signification) and of linking up with, via the path opened by Julia Kristeva who proposed the term, a semiotics of the text'.[684] That is a more complex meaning that needs to be considered, particularly because we need to keep in mind that we have an aesthetic dimension in the meaning of justice when we refer to 'justice to be seen to be done'. An image of a courtroom has therefore a signification that is obvious and one that is obtuse.

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[681] Barthes, *The Third Meaning*, p.54.

[682] Ibid, p.53.

[683] Ibid, p.53.

[684] Ibid, p.54.

Inside the court, the process of justice takes place with all the decorum and rituals. It is obvious because it has to be seen to be done. What is seen is obvious, it is symbolic and signifies. But with the third meaning, the obtuse meaning, Barthes tells us about 'something to do with disguise'.[685] We are likely to look at the process of justice when we watch a broadcasting of court operations and apply a similar second signification, the significance. 'The characteristic of this third meaning is indeed …to blur the limit separating expression from disguise, but also to allow that oscillation succinct demonstration'[686] that is 'an elliptic emphasis, …, a complex and extremely artful disposition (for it involves a temporality of signification)'[687] that is '"just short of the cutting edge"'.[688] When one watches a hearing, the cutting edge is indeed present as a phenomenon blurring the reality of the process, the signification, the obvious meaning of the administration of justice, what we are told is the pedagogical aspect of the broadcasting of the 'real' court hearing. The obtuse meaning, the 'spectacular', that is disguised under the uniform of the judges and the specific settings of the rituals. The obtuse meaning opens up an infinity that Barthes says extends further than culture, knowledge and information.[689] This is an emotional meaning.[690] A meaning that is not representing anything. The obtuse meaning is a signifier without a 'signified', hence the difficulty in naming it. My reading remains suspended between the image and its description, between definition and approximation. If the obtuse meaning cannot be

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[685] Ibid, p.58.

[686] Ibid, p.57.

[687] Ibid.

[688] Ibid, p.58.

[689] Ibid, p.55.

[690] Ibid, p.59.

described, that is because, in contrast to the obvious meaning, it does not copy anything - how do you describe something that does not represent anything?[691]

We may want to check again what the Law Society website offers and watch some of the videos to grasp the totality of the meanings in fact. The obtuse meaning has to do with something different than the sole symbolic of the wigs and gown or even of a court ritual. It may relate to the ambience of the court room, the atmosphere of the law, its serenity, its solemnity. But law is not all here. Or maybe law is nothing here. The most important 'part' of it is what the voyeur wants to see in the image, still or slowly moving, of the courts. What exactly are we expecting? Do we want to see the law, or do we want to see the sanctions? It may well be a sort of implied echo to early positivists such as Austin, and to the command sanction theory. As we know, and as stressed by Cotterel, the threat of sanctions, the punishment, is essential to Austin's theory.[692] That point is not without echoing the idea of Marcusse, that 'the history of man is the history of his repression'.[693] Law and justice 'seen to be done' equates them, because of what has to be seen to be done, for the sanction that is attached to the law. The voyeur does not really care about justice or about the law. The voyeur wants the 'spectacular'. Meanwhile, the officials/elites want to educate us. The directors and broadcasters may also want to do so, although they are experts in their field and certainly, we reasonably may expect, well-aware of the voyeur aims. The spectacular dimension needs to be embraced as a crucial dimension here. The filming and broadcasting of the court operations take another level,

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[691] Ibid, p.61.

[692] Roger Cotterrell, The Politics of Jurisprudence, OUP 2011 2nd edition, p.58.

[693] Marcusse, *Eros and Civilisation*, p.29.

the third meaning. The atmosphere of what is happening rather than what is seen (communication and obvious meaning), but also what is expected rather than the reality of the law being displayed. These are not representing anything. We want sanctions rather than law. In fact, we do not really care about the law at all: we only want sanctions. That sanction is disguised behind the law, a law that is not really present here, even though it is everywhere. It is not present because the third meaning goes way beyond the law, without giving much consideration to it, only regarding the result. That said, by doing so, it completes the law because it reaffirms the compulsory element, echoing Austin, of the necessary punishment. The judges are in front of us, rendering justice, so when we watch them, we see justice being done. But when we film that process, it has another dimension. Again, according to Cotterell on Austin, 'the judge as delegate of the sovereign entails a straightforward recognition that judges legislate no less than do legislatures.'[694] Let us remember that some authors are strongly arguing that judges make law and do not simply render justice. That may be considered as an obvious and obtuse meaning of course. In other words, the third meaning structures the film differently without subverting the story and for this reason, perhaps, it is at the level of the third meaning, and at that level alone, that the 'filmic' finally emerges. The filmic is what is in the film that cannot be described, the representation which cannot be represented. The filmic begins only where language and metalanguage end.[695] That is another important point of filming and broadcasting in court. Though the filmic of the courts, what is actually supposed to take place is concerned. Can we really describe it? We can certainly describe the actors, what they wear, where they are and what it all signifies. But what is represented by that film, by a

[694] Barthes, *The Third Meaning*, p.71.

[695] Ibid, p.64.

film of an (legal) event where what is expected is to see sanctions? The point made by all the people involved in bringing cameras in court was to educate and offer a better understanding of the process of justice. It was also to give a 20th or 21st c. translation of the 'to be seen to be done' quote and to open justice up to the public. However, what we got is the emergence of the filmic, something that could have been foreseen, but that, in fact, could not have been described. What we should say, with Barthes, is that it is not a representation, it is an obtuse meaning. For Barthes, 'The third meaning -theoretically locatable but not describable - can now be seen as the passage from language to significance and the founding act of the filmic itself.'[696] We know where to locate the meaning of what is filmed in court. We film justice that is seen to be done. We film actors of a legal play, actors of a real play. But we cannot describe what we see altogether, when we move from language that describes what is seen, i.e. justice being done, to the significance, i.e. what is happening in the scene we are watching. We film law as well as justice and retransmit 'things' that have meanings that overspill 'traditional' meanings.

The third or obtuse meaning is 'discontinuous, indifferent to the story and to the obvious meaning (as signification of the story).'[697] The court hearing is like a story. We should consider the question of chain novel, where 'a judge is like a writer trying to continue a story started by earlier writers.'[698] It is easy to understand that there is a signification of that story for an individual and for a group of individuals (a community or a society). Notably because that story, the additions a new judge makes on top of a previous one, is

[696] Ibid, p.65.

[697] Ibid, p.61.

[698] Roger Cotterrell, The Politics of Jurisprudence, OUP 2011 2nd edition, p.167.

'the best interpretation of the meaning of what went before.'[699] The judge must make the best story with the best legal meaning.[700] But when we see what we see, we do not need to link either the (best) story or its signification (the best legal meaning). Let us go back to the notion of voyeur. Does he or she really need to know the story? Is he or is she interested in signification? Or is there something else, more emotional, something even perverted? Is there an emptiness that is filled with what we interpret as voyeurism? The third meaning keeps something empty and yet not empty.[701] Because what we see is not simply a court hearing, it goes further, we see more than we have but we do so because we do not see anything that signifies. We expect emotionally to see something that does not happen. We emotionally see justice being done but we actually see nothing. If we see the application of the law, or more precisely the law becoming the law through the (expected) punishment, we see literally everything: 'the obtuse meaning can be seen as an accent, the very form of an emergence, of a fold (a crease even) marking the heavy layer of information and signification.'[702] Here we have the demonstration that this is something that subverts the meaning. We receive the information of what is going on in the court room. We see the actors of the play of justice. We understand that there is something going on that had to do with justice and perhaps the law. But the entire film of the play is highlighted to become super- or hyperreal here too. The film of the court, we know, is not the court. It is a representation of something that is happening somewhere. We cannot even really say we are watching a trial, although this may well be said. We

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[699] Ibid.

[700] Ibid.

[701] Barthes, *The Third Meaning*, p.62.

[702] Ibid, p.62.

cannot say so because what we see is only a part of what is really happening somewhere else. We are only watching a small portion, subjectivised (by the person filming), of a trial, a tiny part of the process of justice. We may want to name what we see 'justice', and we may, through the film, give full effect to the law, because of the argument that the punishment is seen. Then, not only is our expectation as voyeur fulfilled, but we also have the law 'in full', complete. It marks, in essence, what we see, but also crucially highlights that what we have is not what it is.

Conclusion.

In this Chapter, I analyse another aspect of video-link, which is the broadcasting of what has been done inside the courtroom. This complete the cycle of abolishing the walls in the re-enactment of the transgression. As mentioned by Diane Bernard videoconferencing has modified the specific narrative aspect of the trial,

> Notre rapport à l'image et au récit paraît par ailleurs avoir changé au point de constituer une seconde mutation globale, dans le contexte de laquelle s'inscrivent les changements en matière de ritualisation judiciaire. Il semble en effet que, dans le procès, la parole ne soit parfois plus que seconde : par le passage du récit à la photo, puis à la vidéo, la narration au sein du prétoire a changé de nature – au point

de placer parfois le juge dans une position de témoin, face à l'image ou au son de certains faits. [703]

The second mutation of the trial is accomplished through the merchandisation of trial, via its exposition as series of images that are reproduced in the living room of lay men and women. From fiction to reality, the trial becomes a TV show with real actions. Image becomes the 'real' bringing the 'presence' in homes.

On the use of cameras in courts, I am concerned with images of court hearings and administration of justice being recorded and then retransmitted outside the courts. The issue of merging public and private spaces is at stake here. This Chapter demonstrate the close link between right to a fair trial, courts (spaces of justice) and new technologies but in a different angle that simply the use of video-link or videoconferencing. It is focusing on images getting out rather than images getting in. In the next Chapter I go back to video-link and videoconferencing in the specific case of Spain as the case study jurisdiction.

[703] Bernard, D., 2018. Introduction : Enjeux de la ritualisation judiciaire – une réflexion sur les formes du procès. Oñati Socio-legal Series [online], 8 (3), pp.288-295, esp. p.293.

VI. Case study: the jurisdiction of Spain.

As it transpires from most of what has been written previously, our century is that of new technologies, images and cameras are here present in our everyday lives. They have become an indispensable communication tool. Beyond the private sphere, the public sphere has also seized it in order to facilitate and improve communication between individuals and the administration, and as far as we are concerned, the administration of justice.

In Spain, the introduction of cameras in court was proposed as part of a major reform of the justice. The Government's view of the delay in the courts and the loss of public confidence in its judicial system has launched a major programme of modernization of justice. The aim was to reconcile Spanish with justice, but also to accelerate its administration, to speed up procedures in order to gain time, money and efficiency. From 2003, the legislator introduced a new provision by an organic law (LO 13/2003 of 24 October 2003) which would allow judges to use videoconferencing. Article 229, which enshrines in its first paragraph the principle of orality, in its second the principles of immediacy and publicity, opens up the possibility of exercising certain actions through videoconferencing, "or any other means of communication Bidirectional and simultaneous sound and image "when people are geographically remote.[704] The last

[704] The art. 229 LOPJ "These performances can be performed through videoconferencing or other similar system that allows the bidirectional and simultaneous communication of the image and sound and the visual, auditory and verbal interaction between two people or groups of people Geographically distant, assuring in any case the possibility of contradiction of the parties and the safeguarding of the right of defence, when the judge or the court agrees. »

sentence of the provision states that this procedure must be exercised in accordance with the principle of contradiction and the preservation of the rights of the defense. Under the latter, there are many fundamental principles which are sheltered by the fundamental right of access to the judge enshrined in article 6 of the European Convention on human rights.

In so doing, the legislator introduces the use of new technologies but immediately calls for respect for the fundamental rights of the trial enshrined in all European countries' members of the ECHR. Is it really possible to reconcile new technologies, and mainly the use of cameras at the hearing, with the fundamental right of any citizens to access the judge? How have the Spanish courts been able to adapt their procedural principles in order to integrate new technologies into the courthouses?

Before providing for the use of videoconferencing, we will consider the principle of orality to which the Spanish judicial procedure is particularly attached. This principle is also embodied in the Spanish Constitution in the title on the judiciary.[705] Even before the introduction of new technologies, the Spanish trial was in principle supposed to take place mainly in oral. In practice, over the years there has been a kind of abuse here, for instance with replacing oral testimony with a written statement when the person could not move,

[705] Article 120.2 of the Spanish Constitution: Proceedings shall be predominantly oral, especially in criminal cases.
https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf. Last accessed 21 January 2019.

or by simple practical opportunity.[706] The introduction of the cameras in the courtroom has put a halt on this practice of bureaucratization: partial substitution of orality by written evidence in the procedure (accepted by the judges). Interrogations, testimonies and expert reports can no longer be the subject of written "ad-hoc" acts which would in fact simulate the presence of the parties to the proceedings. All the interventions are now oral, in the same procedure, in a same unity of space and time. The Videoconferencing is therefore apprehended as having strengthened this principle of constitutional value.

On the other hand, the principle of publicity is enshrined in the Constitution.[707] It is conceived both as a processual guarantee and as an instrument of social control of judicial activity. It offers a particular perspective of legitimisation of the person of the judge, more visibility for the society. As a result, the arrival of cameras in courts brought the entire administration of justice closer to the citizens. The consistency of the trial in all its details now appears on tape or on screen, the principle of publicity, with the idea of transparency, regains all its substance. We could almost mention the idea of broadcasting (video of the trial) rather than publicity. Hearings are now recorded and kept as a result of the act. It replaces writing down the debates, which are now only written down in a simple form of a "succinct act". The exact sequence of the hearing is kept on the audiovisual recording.

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[706] One may say that the principle of orality, which we also finds in common law principles of English trial, has limits. The practicality but also the facility given by a written document may provide at the same time a rather interesting alternative and a quite tricky alternative.

[707] Article 120.1 of the Spanish Constitution: Judicial proceedings shall be public, with the exception of those provided for in the laws of procedure.
https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf. Last accessed 21 January 2019.

We should also keep in mind the idea of public hearing here, and how broadcasting may affect or redefine public hearing.[708]

Moreover, Spanish procedure knows a principle which is not found in French law. The principle of immediacy which imposes the presence of the judge in the process particularly for the moment of the evidence.[709] It then is a guaranteed that the judge here is the same one who is dictating the sentence.[710] Videoconferencing brings together the entire procedure, the debates, the testimonies, all before one judge, whatever is the distance.

We will first return to the principle of publicity (I) and the consequences of automatic recording of trial in the Spanish courts, before considering the practical influence of the use of videoconferencing on the principles of presence of the judge and immediacy (II).

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[708] Article 120.3. Judgments shall always contain the grounds therefore, and they shall be delivered in a public hearing. https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf. Last accessed 21 January 2019.

[709] Inmediacon. Contact and intervention Direct and immediate of a judge or a magistrate to resolve some procedural issues. Recognised in the art. 229.1 L.O.P.J. and 137 of the LEC of 2000. It has to do with presence immediate of the judge. Principle of processual law aimed at the direct relationship litigants/judge, regardless of the intervention off other people. It means that the judge knows personally the parties and that it is better for the administration of the proof. Immediacy is closely linked to the orality character of the procedure, because when it is written, including the reception of the various statements (witness testimonies, expert reports) by the judicial secretary or officer of a court.

[710] Carlos Gómez Martínez, La grabación del sonido y de la imagen en los juicios civilesdel juez lector al juez espectador, Jueces para la democracia, Nº 48, 2003, págs. 81-87.

Filming and recording hearings and the principle of publicity.

The principle of publicity is enclosed in articles 120 of the Spanish Constitution.[711] These articles make it necessary for court proceedings and sentencing to be made in public. Therefore, filming and recording hearings have various benefits. First, it gives access to the judgment in very precise and direct way. Then, it also facilitates the quality control of work of judges a posteriory, when they try to analyse how the hearing was conducted.

Influence of audiovisual recording in courts on decision making process.

The filming and recording of the hearings made it possible to have access to the judgement in the form of video. It is possible to view and re-view a trial in a much more precise and direct way than it could be with a written of the debates. However, one should not consider what is filmed and recorded as the itself. The video cannot fully account for everything because as we mentioned in other chapters, we are just facing a re-presentation, that may appear to be a very faithful one of a reality, of what happened, but that remains different because it is a re-presentation of what it was. Some of the reality of what happened will not appear because the space and time of justice filmed and recorded are not the space and time of justice of the reality of the trial. It is simply a re-presentation which has its own merit but is not the trial. Unfortunately, we are so used to 'see' images on TV and cinema that we distort reality and may confuse them.

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[711] https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf. Last accessed 21 January 2019.

One of the problems with the introduction of cameras in the courts was also the possibility of a possible decrease of spontaneity from the various actors of the legal event. The presence of cameras would then force them to play. Actors would become actors in front of the cameras. Therefore, the various actors there may ‘act’ not as themselves but as ‘real’ TV of cinema actors. The result here is too a distortion created by the cameras. In fact, at first, in some judicial bodies there was a certain "repetition" of the trial without registration before proceeding to the hearing in front of the cameras.

One could then be faced with a form of staging of the trial of course, as mentioned in other chapters, with judges becoming a sort of a director instructing the various actors of the trial: their position in front of the cameras, the way they talk, the way the move, how they may appear or not appear… That said, the trial itself is a representation based on rituals. It is a reconstitution of the transgression as mentioned, with the help of various actors of the trial that should bring the judicial light on what has happened. Thus, the possible absence of spontaneity in a trial does not depend so much on whether or not the trial is filmed, or the debates recorded. Judicial ritual (s) is/are an important part of the trial. That should not be too much disrupted by the introduction of the cameras. On the contrary, it can help it, it can modify the formality of the trial without altering its forms or merits. In practice, the current audiovisual filming and recordings, have not shown that trials are conducted much differently than the one not filmed.

On the other hand, recording trials allowed the body language to enter the procedure, it becomes accessible on video and that may be seen as an improvement from only having

recorded written documents. Therefore, it is no longer solely the judge's internal court: it becomes more objective than subjective. Therefore, it can be used by the judge for the assessment of evidence at the time of sentencing and can support motivations.

One of the first findings of the academics following the introduction of the cameras in Spanish courts was that the filming of the debates reversed some processual corruption relating to the judge's attitude at the oral hearing.[712] The judge seems more present during the trial, perhaps even showing that the case is better known. The Spanish judge is obliged to give his verdicts and sentencing right after the hearing and it seems that having an audiovisual record available helps it. It may help, solely because of memory of the trial fixed on tape and available to be seen, more detailed of course that the written transcript. The problem of access to the judge (Article 6 of the ECHR) is really considered here. Indeed, the introduction of the cameras in courts allowed the parties to have access to a judge that has become more 'present' because of the presence of the cameras, a judge better prepared and better aware of all the circumstances of the different discussed.

One of the other benefits of recording hearings is that the principle of uniqueness of the proceeding is achieved in a more robust manner because it avoids dispersions. Similarly, while some authors may have noted a better presence of the judge at the hearing, some also notes that the presence of the cameras compels the strict respect of all stages of the

[712] Nicolás Cabezudo Rodríguez, Las reformas tecnológicas esperadas por la administración de justicia española. Estado de la cuestión, in Derecho, gobernanza y tecnologías de la información en la sociedad del conocimiento / coord. por Fernando Galindo Ayuda, Aires José Rover, 2009, págs. 97-124.

into a uniqueness of space and time. Everything can now be done in a courtroom and not simply in a judge office. The technology available in court offers the possibility for a judge to show digital evidence in court, helping the demonstration. Cameras here recreate as stated earlier a specific space and time of the trial. In addition, the judge can then assess evidence on a single 'document' rather than various documents. The audio-visual recording contribute to the quality of the trial while restructuring its space and time. It also in one provokes an increase of inter-procedural negotiations between the parties.[713] The parties, lawyers and judges are offered a platform that gives them the opportunity to negotiate and find an agreement resulting from the judge's conciliation mission established in articles 415.1[714] and 428.2[715] Civil Procedure Act (LEC, Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil). It then finds a way to consensual conciliation, both from the judge who is more present at the hearing and from the parties who are assembled there. It may become here a true tool for possible removal of tensions. It has been also observed that the parties are demonstrating great honesty in their comments, because of the way the cameras impose a new form of duty on them. Becoming aware that the audiovisual document can be watch and watch again appears there as a way of decreasing possible tensions, and therefore contributes to the functions of resolving different that is the administration of justice.

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[713] Carlos Gómez Martínez, Op. Cit.

[714] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l2t2.html#a415. Last accessed 21 January 2019.

[715] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l2t2.html#a428. Last accessed 21 January 2019.

Spain therefore has welcomed audiovisual filming and recording. The recording of hearings is looked as reinforcing fundamental rights of parties, with better access to the judge, the actors of the trial sensing the impact of the cameras and how it is used to definitely record what has happened in court, and re visit that representation over and over again. Filming and recording debates and hearings does not seem to have been considered like in many jurisdictions, as we have seen, as a risk for fundamental rights of the parties but as a factor of quality improvement of justice.

In addition to the benefits of the introduction of the cameras on the judge's attitude, the recording of the trial made it possible to have a comprehensive and precise view of the proceedings for all those who would have to know later, particularly in the course of an appeal against the judgment at trial. So, a slightly different view than the critical approach taken on the chapter about broadcasting but not too dissimilar. Indeed, it is still clear that the trial trough the lenses of a camera is a re re presentation that need to be carefully analysed. However, it does not mean it is something that should not be considered or rejected but carefully planned.

Filming and Recording of trial as a quality control tool.

Filming and recording give the possibility of watching the trial over and over again. It allows a quality control to take place, as it allows revisiting the trial after its end. Thus, it may bring a strong improvement of the publicity of the trials, and of transparency, since it is more accessible for parties: the administration of justice can now send on request the DVD of the proceedings. Audio visual recording has now replaced written records. It may

be the case that transparency could be extended to the public here too, like in the case of England. Even third parties would then be allowed to watch...

It is obvious that publicity can always be limited, as it always has been, by the rights of the parties, such as the alleged accused, the necessary impartiality of the court, the right of expression of the various victims, etc...

However, the audio-visual recordings that supposed to have replaced taking minutes in court for brings more issues. For instance, what will happen if the technology fails? Meaning what if the recordings is faulty or did not work at all?

Section 147 of the Civil Procedure Act is helping on that question.

Article 147 documentation of the judicial actions by means of recording and reproduction of the image and sound

The oral proceedings in views, hearings and appearances held before the judges or magistrates or, where appropriate, before the judicial secretaries, shall be recorded in support suitable for recording and reproduction of sound and image and may not be transcribed.

Provided that the necessary technological means are counted, the Judicial Secretary shall guarantee the authenticity and integrity of the recorded or reproduced by the use of the recognised electronic signature or other security system which, according to the law, offers Such warranties. In this case, the holding of the Act shall not require the presence in the court clerk's room unless requested by the parties, at least two days prior to the

conclusion of the hearing, or that the judicial secretary is deemed necessary exceptionally. Considering the complexity of the issue, the number and nature of the tests to be practiced, the number of participants, the possibility of incidents that could not be registered, or the attendance of other equally exceptional circumstances that Justify it. In such cases, the court clerk shall extend a concise record in the terms provided for in the preceding article.

The oral proceedings and views recorded and documented in digital media may not be transcribed, except in cases where a law so determines. The court clerk shall guard the electronic document supporting the recording. The Parties may request, at their expense, a copy of the original recordings.[716]

A concise registrar, a simplified document with the short elements such as dates, place, requests and proposals of the parties as well as the resolution and the decision of the court may be requested to transcribe the circumstances and incidents not appearing on the audio-visual recording if necessary. But the audio visual recording is the authoritative document. In some cases, the clerk simply records the sound of the trial. If neither the video nor the sound work, a complete written report from should replace the audio visual recording.

[716] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l1t5.html#a147. Last accessed 21 January 2019.

Article 146.2 does not forbid the writing of a complete written report in addition to the audio visual recording, but in practice a short version plus the audio visual recording should be sufficient. [717]

It could be the case that there are some issues at the hearing, while everything in the technology used is working well. This is mainly why there is a necessity supplementing the audio visual recording with the short report, to give full legal effect. Therefore, in case of non-existence or deterioration of the original audio visual recording, the proceedings will n to be invalidated. If everything is lost, and no way of restoring the documentation exists, the procedure will be declared null. This is at that point that the rights of the parties and to the violation of the rights of the defense are at stake. Indeed, all provisions have been established with the objective that courts and particularly any courts of appeal must be able to see and observe debates, hearings, is the same conditions as the previous judge did at first instance. Judges are supposed to watch what happened before, although it can be argued easily that in fact they are only watching a re representation, a distorted representation of what happened before, presented as 'reality'.

In addition, all evidence are supposed to be available. The judge should have everything in his hands, and relying on the recordings not necessary. There is a violation of the rights of the defense, for example when a party has been deprived of the right to prove its legitimate rights and interests or when it is impossible to access the legal "data" for its defense. Indeed, a violation of the rights of the defense can be analysed as the idea of

[717] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l1t5.html#a146. Last accessed 21 January 2019.

having access to effective judicial guardianship, the fundamental right of accessing a judge.

If a violation of the rights of the defense is found, and the action is declared void, the trial must start from scratch. The entire procedure has to be redone, resulting in further delay in the resolution of the different. This is one of the risk of technology failure. But the judge may have to balance the disadvantages of a new trial with the violation of the rights of the defense. It may take into account the motivation of the trial and the appeal, the fact that the matter is only processual or legal, and certainly the value of the evidence.

On the other hand, the judge may declare the procedure void when the omission of the formalities is producing a breach of the rights of the defence. Compliance with the procedural rules of public policy must be respected by both the parties and the court. It must control the standards which make procedural guarantees. Thus, the failure to properly record, possibility audio visual recording or written report, entrains lack of sufficient content and impose the procedure to be voided.

Concerning the question of correction or substitution in case of failure of audio visual recording, it could be possible to ask for the drafting of an extended report. It should be able to be a reminder, a complete reminder of everything that happens during the trial and could replace the audio visual recording if needed. The document will be read, commented and signed by the Parties, as a true alternative to the audio visual recording.

In the event of a declaration of nullity, a new hearing must be made. This must be the repetition as far as possible of the first one. The judicial body before which the new trial is held must therefore not allow new evidence (previously known) to be produced, new witnesses to appear or new questions to be asked. This may be difficult because the judge may not have been present at the first hearing, even though he or she has only a brief report as a report to what happened and may now be used during this new hearing. The extended report could then be a guide the successful repetition of the trial.

In fact, it is not a question of reconstructed a report but rather a question of reconstructing a report which satisfies all the guarantees which could not have been the subject of adequate control at the time. A new report is only a repetition to allow its proper recording. One of the main contributions to the recording of hearings is that it allows the possible future appellate judge to have an overall and accurate view of what happened at the trial. Audio visual recording thus allows a better control of a possible appeal. It is as mentioned previously, a second presentation, a re representation. The appellate judge being here in the same position than a tele spectator watching a recording of a film on TV. Hence my comments on voyeurism. It is now become for the whole procedure a fundamental part of any judicial file. A new aspect of the fundamental principle of access to the judge is at stake here, namely the right to a second degree of jurisdiction. This right to a new view of the facts of the different by a second judge, is here to avoid any risk of arbitrary or more generally of a ‘bad’(qualitatively speaking) outcome. Here the second degree judge is able to verify whether there are errors that have been or may have been committed during the process of trial, both by the parties or by the judge. This facilitates the work of appellate courts as it accurately relates what happened during the debates.

Therefore, this is also the judicial truth that becomes now more accessible here as an audio visual offer of the whole procedure to appellate judge. Yet technology does not succeed in fully substituting the requirements of the principle of presence. Re representation does not replace reality. It just creates a new space-time that mirror the 'real' one but without equating that original space-time.

We will have to differentiate between the criminal trial and the civil trial in the Spanish case, as of course we have in the French and English one. In the civil trial, the appellate court can review the evidence seen at first instance entirely. The double presentation of the evidence is sometimes avoided. In the criminal trial, it is required in certain circumstances such as when prison sentences are pronounced, to repeat the evidence before the appellate judge. That contributes to the fulfillment of the principle of minimum evidentiary activity. In that case, it is impossible to use only what has been recorded during the first trial.

We may add that audio visual recordings registration raises questions of collegiality. Even though decision is collegial, it may be understood that each judge has an obviously various views and may retain separate elements of the recording. In addition, it is technically difficult to review the recording during the debate, so judges cannot use the recordings to support the arguments they raise while judging.

There is in addition the question of how to apprehend an intervention via videoconferencing (by screen in the courtroom) during the viewing on appeal of the audio

visual recording of the first instance. It would seem that the intervention through videoconferencing is available directly on the recording, and integrated with the DVD.

Several authors have found a decrease in the number of appeals including those based on the absence of "Concreción" or the lack of precision of the transcript of the testimony or the expert report.[718] The audio visual seems to be fixing the evidence. Technology thus avoids new conflicts and new procedures and tends to rationalize the behaviour of the parties.

Spanish literature and some interesting cases thus finds mainly positive influence of the introduction of the cameras in the courtroom.

The Spanish Constitutional Court, in the SENTENCIA 24/2018 ,[719] clearly linked videoconferencing with right of defence.

> No es irrelevante destacar, en este sentido, que el recurrente aporta una resolución dictada en el mismo proceso penal del que trae causa la demanda de amparo, referida a otro de los investigados, al parecer residente también en Rusia durante la instrucción, del que se hace constar que se encuentra personado mediante Procurador y Abogado y se le ha recibido declaración a través de videoconferencia,

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[718] Carlos Gomez Martinez 'The recording of sound and image in civil trials. From the judge reader to The Spectator Judge', Op. Cit.

[719] http://hj.tribunalconstitucional.es/en/Resolucion/Show/25592#complete_resolucion&hallazgos. Last accessed 21 January 2019. ***BOE (Official State Gazzete) number 90, of 13 April 2018.***

medio este compatible en sí con el derecho de defensa (SSTEDH caso *Marcello Viola c. Italia*, de 5 de octubre de 2006, § 67, y caso *Gennadiy Medvedev c. Rusia*. de 24 abril 2012, § 98, por todas).

The defendant was living in in Russia and was available to testify via videoconference , given the invoked inability to travel to Spain due to health problems. His lawyers and the courts received a declaration via videoconference , which was compatible with the right of defence (quoted *Marcello Viola v. Italy* , and *Gennadiy Medvedev v. Russia*).

In SENTENCE 174/2011, [720] the Court considered the question of investigation being carried out via videoconferencing.

Thus, through arts. 433, 448, 455, 707, 731 bis, 777.2 and 797.2 LECrim, it is possible, from the investigation stage, to protect the interests of the victim without neglecting the right of defence, agreeing that the exploration of the minors be carried out before experts, in the presence of the Public Prosecutor, agreeing on their recording for later use and ensuring in all cases the possibility of contradiction of the parties; as it is legitimate that the exploration is carried out, in any case, avoiding the visual confrontation with the accused, for which purpose any technical means that make it possible will be used, expressly foreseeing the use of videoconferencing as a procedure for carrying out the interrogation.

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720 http://hj.tribunalconstitucional.es/en/Resolucion/Show/22626#complete_resolucion&hallazgos-fundamentos. Last accessed 21 January 2019. ***(BOE (Official State Gazzete) number 294, of 07 December 2011).***

In SENTENCE 135/2011,[721] the Court considered the question of right of defence and videoconferencing, together with the question of immediacy that will be described later.

> And we added that "[it] is notorious, the insufficiency of the trial record as a means of documenting evidence of a personal nature - even when the use of a stenotype allows one to literally record the words spoken during the course of the trial. act- is given by the impossibility of reflecting the non-verbal communicative aspects of any statement. Certainly such a deficiency cannot be preached without more than those means that with increasing quality transmit or reproduce the statements, as happens with the videoconference and with the audio-visual recording, which leads us to assess whether the traditional concept of immediacy should be modulated before the incessant progress of the techniques of transmission and reproduction of the image and sound.

This follows a previous case of 2010 (JUDGMENT 2/2010) where similar issues were discussed:[722]

> Certainly such a deficiency cannot be preached without more than those means that with increasing quality transmit or reproduce the statements, as happens with the videoconference and with the audio-visual recording, which leads us to assess

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[721] http://hj.tribunalconstitucional.es/en/Resolucion/Show/6917#complete_resolucion&hallazgos. Last accessed 21 January 2019. ***(BOE (Official State Gazzete) number 245, of 11 October 2011).***

[722] http://hj.tribunalconstitucional.es/en/Resolucion/Show/6641#complete_resolucion&hallazgos. Last accessed 21 January 2019. ***(BOE (Official State Gazzete) number 36, of 10 February 2010).***

> whether the traditional concept of immediacy should be modulated before the incessant progress of the techniques of transmission and reproduction of the image and sound.

In 2009 (SENTENCE 120/2009), it was clearly established by the Court, that the question of videoconferencing and right of defense was connected to the ECtHR and the ECHR:[723]

> (…) the use of video conferencing [is] conditioned to legitimate purposes - such as "the defence of public order, the prevention of crime, the protection of the rights to life, freedom and security of the witnesses and of the victims of the crimes, as well as the respect of the demand of reasonable term "-, since their development respects the defendant's right of defence.

It worth finally citing the SENTENCE 82/2006 about the confession received by videoconference, because one of the parties was in Peru.[724]

The use of new technology here means not only allows citizens a better access to the judge, that becomes 'more present', but also streamlines the behaviour of the parties who seems to become more aware of their actions, of the fact they are recorded and therefore

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[723] http://hj.tribunalconstitucional.es/en/Resolucion/Show/5947#complete_resolucion&dictamen. Last accessed 21 January 2019. ***(BOE (Official State Gazzete) number 149, of 20 June 2009).***

[724] http://hj.tribunalconstitucional.es/en/Resolucion/Show/5684#complete_resolucion&hallazgos. Last accessed 21 January 2019. ***(BOE (Official State Gazzete) number 92, of April 18, 2006).***

available as new reality in case of appeal or even only in case of review of the trial. Proceedings accessible ‘on demand’ in what is seen as ‘the most faithful way’ for the parties, for the judge and probably for third parties in the future, may anyhow suffer from what we described in other chapter.

Furthermore, we must note that the filming and recording of the hearings has appeared to also improved the principle of immediacy and through the principle of immediacy, the principle of oneness. The fact that the trial is filmed prevents the judge from departing from it. Because everything is recorded on the same audio visual recording, the presentation of additional evidence without bringing together all the participants physically to the court room, which avoided bringing all the participants back for a morning extra the next day is no longer possible. Another example is the one already mentioned of the presentation of the evidence in the judge's office because the courtroom does not have a computer. Now the whole procedure must be carried out in front of cameras in the courtroom during the time allotted to the proceedings. In addition, the principle of orality of the procedure has regained its full meaning. It is no longer possible to substitute oral parts by written parts as everything is carried out in the presence of a judge. The courtroom as regain the natural place in which judicial activity takes place. Audio visual recording help with the details that would have been forgotten otherwise.

Videoconferencing in the service of the principle of immediacy.

The principle of immediacy arises from the constitutional principle of orality of the trial. The principle of orality cannot be understood without immediacy, i.e. the presence of the judge in all stages of the trial. In fact, only the one who witnessed the entire proceedings, the whole debates, everything the parties and witnesses have to say, the evidence, is legitimated to pronounce the sentence.

The basis of this principle is to be sought in the Spanish Constitution, more specifically in its article 120.2,[725] which imposes a predominantly oral procedure before Spanish courts. The LEC requires the physical presence of the judge in every steps of the demonstration of the evidence. If this is not the case, it would be considered a breach of rights, according to articles 137 and 194 of the LEC.[726] Article 289.2 imposes an inexcusable duty on the judge who needs to be present at the presentation of all the evidence (except for the provision of written documents).[727] Articles 302.1 and 368.1 states that the examination of the parties and witnesses must be conducted orally.[728] This requirement already existed before the introduction of videoconferencing. The minimum requirement of the principle of immediacy was reduced by LEC. In some cases the

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[725] See above note 705.

[726] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l1t5.html#a137 and http://noticias.juridicas.com/base_datos/Privado/l1-2000.l1t5.html#a194. Last accessed 21 January 2019.

[727] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l2t1.html#a289. Last accessed 21 January 2019.

[728] http://noticias.juridicas.com/base_datos/Privado/l1-2000.l2t1.html#a302 and http://noticias.juridicas.com/base_datos/Privado/l1-2000.l2t1.html#a368. Last accessed 21 January 2019.

demonstration of the evidence no longer takes place before the judge but in front of other court officials. In other cases the oral demonstration was replaced by written ones submitted by the parties. The change of attitude after LEC is partially due to the strengthening of controls on its application.

The principle remains the physical presence at the trial of all the parties and witnesses. The use of videoconferencing falls within the discretion of the judge and must be motivated. However, the principle of proportionality should guide the judge in his choice. In fact the judge always has the discretion to authorise the use of videoconferencing in the proceedings according to article 230-1 LEC. The principle of proportionality must dictates how the judge balance fundamental rights of the defense and the reasons why new technology (i.e. video cameras) may be used.

In criminal matters, articles 325 and 731 bis of the LECrim (Ley de Enjuiciamiento Criminal) lay down the guiding principle that videoconferencing should only be used for only reasons of utility, security or public order, as well as in situations where appearing physically in court would be serious issue or prejudicial.[729] Therefore, the use of

[729] **Artículo 325.** El juez, de oficio o a instancia de parte, por razones de utilidad, seguridad o de orden público, así como en aquellos supuestos en que la comparecencia de quien haya de intervenir en cualquier tipo de procedimiento penal como investigado o encausado, testigo, perito, o en otra condición resulte particularmente gravosa o perjudicial, podrá acordar que la comparecencia se realice a través de videoconferencia u otro sistema similar que permita la comunicación bidireccional y simultánea de la imagen y el sonido, de acuerdo con lo dispuesto en el apartado 3 del artículo 229 de la Ley Orgánica del Poder Judicial. https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&tn=0&p=20151006#a335. Las accessed 21 January 2019. **Artículo 731 bis.**
El Tribunal, de oficio o a instancia de parte, por razones de utilidad, seguridad o de orden público, así como en aquellos supuestos en que la comparecencia de quien haya de intervenir en cualquier tipo de

videoconferencing has absolutely no bearing on the way evidence (testimony or expertise) are produced unless the accused is asked to intervene in the trial through videoconferencing (during the investigation period (article 325) or during the debates and proceedings (article731 bis)). The accused is the 'real' subject of the trial. Therefore he or she needs to be present. It is necessary at all stages of the procedure and not simply a simple requirement at a minor part of the trial. It is the fundamental rights of the accused, defending himself or herself to attend the entire trial.

While the use of videoconferencing is increasingly accepted and even demanded by judges in civil cases, it is not as simple as this in criminal cases. The principle of immediacy is there interpreted in a more strict manner. In criminal matters, although videoconferencing allows virtual meetings, it cannot replace the physical presence of the various actors of the trial. The physical presence is required.[730] Thus, when used for testimonials, if the means of proof is made through videoconferencing, it will be appropriate to take into account the medium, the technology, and assess how this may

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procedimiento penal como imputado, testigo, perito, o en otra condición resulte gravosa o perjudicial, y, especialmente, cuando se trate de un menor, podrá acordar que su actuación se realice a través de videoconferencia u otro sistema similar que permita la comunicación bidireccional y simultánea de la imagen y el sonido, de acuerdo con lo dispuesto en el apartado 3 del artículo 229 de la Ley Orgánica del Poder Judicial. https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&tn=0&p=20151006#a731bis. Last accessed 21 January 2019.

[730] An very good example is when the Supreme Court did not allow the past President of Council Mariano Raroy to make a declaration by video conference and demanded his physical presence in a trial by corruption of the Popular Party. The tribunal said that if Mr, Rajoy was in Madrid on a certain date and if his security was guaranteed he had no reason to be excuse to appear at the trial. See http://www.rtve.es/noticias/20170530/rajoy-debera-comparecer-persona-para-testificar-juicio-del-caso-gurtel/1556045.shtml.

affect the quality of the evidence. It is possible to list in criminal matters three types of use of videoconferencing: For reason of speed and expediency, if it could be complicated or difficult for someone to appears, for reason of utility, when it is a matter of protection of weak or endangered parties, and finally for reason of security or of public order. Witness protection is particularly important in cases of sexual crimes or related offences, drug trafficking in human beings or organized gang offences.

The fundamental principle of the right of defense has to balance the use of new technologies in the trial. For a start, the principle of confidentiality between an accused and his lawyer should be achieved. Indeed, if the accused is in a place separated or segregated from that of his or her counsel, it is certain that they will not be able to exchange in a confidentially same manner as it should be when the lawyer is present at his or her client's side in the courtroom. It is the human rights of the accused that he or she can communicate with his or her lawyer. However this difficulty is not insurmountable, the technological means themselves could allow a confidential communication between the lawyer's remote client (through proper adapted system). Another proposed solution would be the appointment of a second lawyer who would be placed next to the accused during his statement and could then assist him. The right of the defense would then be adequately complied with, as long as the accused will have access to everything that should be guaranteed to him or her. Thus, by making available technical medium for the accused to actually have access to private communication with his or her lawyer, the right of defense should at least appeared to be respected. In the context of the assises (with the presence of a civilian jury), the statute details (Article 42.2) where the accused is supposed to be positioned in the courtroom. Therefore, it may

be imagined that this spatial obligation might prevent from time to time the use of videoconferencing. That said, it may be also imagined that the law only applies to the physical place without considering the virtual aspect of videoconferencing, and that as a consequence, it may be possible to use it in specific cases.

Thus, with regard to the physical presence of the accused at the criminal trial, it is to the judges to decide. The law has provided for specific cases in which the use of videoconferencing is offered. For example, videoconferencing could be used when the accused may disrupt the court (Article 63.2 of the Spanish criminal code) or for matters of witness protection (Article 68.2 of the Spanish criminal code). On the other hand, in the case of a co-accused wishing to collaborate as a repentant, the law also authorizes him or her to participate via video conferencing (Organic Law 19/1994 of 23 December, on the protection of witnesses and experts in criminal cases).

Therefore, in each case, it is the court that must assess, according to the principles of proportionality and rationality, whether or not videoconferencing should be used. The circumstances will define how and why the substitution of the physical presence by virtual presence of the accused will be justified and legitimated. And in any case, the use of the audio visual medium must be motivated. This allows a better control and the possibility of raising issues if necessary.

It is be important to bear in mind that this legal decision converts physical absence into legal presence, as a virtual immediacy. An accused who is physically absent, even if he or she has access to the procedure through a virtual way, is still physically absent. The

judge's decision must therefore remain an exception to the principle and rely solely on the considerations of speed, expediency, utility, security or public order.

It is truly crucial here too, not to avoid the question of justice, its place and time, its symbolic aspect/s, its ritual/s that are the protection of its specific meaning. As noted previously, it is possible to lose the solemnity of the operation of justice by the using videoconferencing rather than physical presence in the courthouse.

The question is not of the same nature of course, regrading whether we are dealing with civil or criminal cases. Article 169.4 of LEC for example authorizes the accursed not to appear before the judicial office, if he or she is not resident of the jurisdiction. The variation of the use of virtual presence is based therefore of the gravity of the offense considered. Judges have more discretion if they are in civil cases than if they are in criminal cases.

Judges may use videoconferencing to gather the testimony of a witnesses or experts. It is simply a question of common sense that applies here. If the witnesses or experts are far from the courthouse, or when their physical presence may be proven to be particularly difficult or serious, the use of new technologies will offer an alternative. Virtual space will easily replace the physical real one. In other words, in all cases where distance is an issue, it is now possible to use videoconferencing for witnesses or experts. Videoconferencing then reinforces the principle of immediacy. The practice of the evidence takes place directly before the body which must know of the case rather than before the court. So the technology makes it possible to realize a virtual immediacy,

despite the distance. It also facilitates access to the court without delay, therefore cutting time.

In the same way, we should mention the statements made by videoconferencing in the trial for Rebelion of the past members of the government of Catalonia.[731]

Video-conferencing was particularly developed and then used for minors in the context of criminal trial. Articles 448 and 707 LECrim constitute a reasoned resolution and solid basis for the judge if it finds it necessary for the minor to testify through videoconferencing. [732] Fundamental rights are not particularly affected in these cases as

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[731] For Example, see the video at 5h:58m:35s onwards. https://okdiario.com/noticias/streaming-del-juicio-del-proces-hoy-lunes-29-abril-directo-4049392

[732] **Artículo 448.** Si el testigo manifestare, al hacerle la prevención referida en el artículo 446, la imposibilidad de concurrir por haber de ausentarse del territorio nacional, y también en el caso en que hubiere motivo racionalmente bastante para temer su muerte o incapacidad física o intelectual antes de la apertura del juicio oral, el Juez instructor mandará practicar inmediatamente la declaración, asegurando en todo caso la posibilidad de contradicción de las partes. Para ello, el Secretario judicial hará saber al reo que nombre abogado en el término de veinticuatro horas, si aún no lo tuviere, o de lo contrario, que se le nombrará de oficio, para que le aconseje en el acto de recibir la declaración del testigo. Transcurrido dicho término, el Juez recibirá juramento y volverá a examinar a éste, a presencia del procesado y de su abogado defensor y a presencia, asimismo, del Fiscal y del querellante, si quisieren asistir al acto, permitiendo a éstos hacerle cuantas repreguntas tengan por conveniente, excepto las que el Juez desestime como manifiestamente impertinentes.

Por el Secretario judicial se consignarán las contestaciones a estas preguntas, y esta diligencia será firmada por todos los asistentes.

La declaración de los testigos menores de edad y de las personas con capacidad judicialmente modificada podrá llevarse a cabo evitando la confrontación visual de los mismos con el inculpado, utilizando para ello cualquier medio técnico que haga posible la práctica de esta prueba. https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&tn=0&p=20151006#a448. Last accessed 21 January 2019.

the primarily issue here would be the protection of a party who should be considered as fragile party.

Another benefit for the victims is that videoconferencing can avoid additional delays, such as suspensions of the trial. By bringing together the trial actors from separate locations, in a mix physical presence, virtual presence, the administration of justice becomes fast and more effective. The deadlines are shortened and the resolution of the different are expedited.

One of the strengths of the technological medium is that in practice the principle of orality is actually pretty much respected. Through videoconferencing, everything of what is 'oral' such as the testimonies of the parties do not need to be written anymore. They may only be video recorded. It seems that audio visual recording offers the disappearance of

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Artículo 707. Todos los testigos están obligados a declarar lo que supieren sobre lo que les fuere preguntado, con excepción de las personas expresadas en los artículos 416, 417 y 418, en sus respectivos casos.

La declaración de los testigos menores de edad o con discapacidad necesitados de especial protección, se llevará a cabo, cuando resulte necesario para impedir o reducir los perjuicios que para ellos puedan derivar del desarrollo del proceso o de la práctica de la diligencia, evitando la confrontación visual de los mismos con el inculpado. Con este fin podrá ser utilizado cualquier medio técnico que haga posible la práctica de esta prueba, incluyéndose la posibilidad de que los testigos puedan ser oídos sin estar presentes en la sala mediante la utilización de tecnologías de la comunicación.

Estas medidas serán igualmente aplicables a las declaraciones de las víctimas cuando de su evaluación inicial o posterior derive la necesidad de estas medidas de protección. https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036&tn=0&p=20151006#a707. Last accessed 21 Janaury 2019.

the forms of processual "corruption" that may happen from time to time and the return to full orality and a full uniqueness. The judge can then directly participate in the witness's testimony and ask him or her the questions he or she wishes to ask. That is a progress in comparison to a written testimony. Audio visual technology also allows all the debates at hearing to take place at the same place and at the same time.

It is also possible to use the technology in every trials. In any case, in an abstract way, when the judge decides that this is how it should be, the use of audio visual technology should take place, notwithstanding the issue of availability of medium and the proper training and qualification of judicial personnel for operating the medium, hence comments on cameras in courts.

Now article 306 LECrim provides for the possibility for the public prosecutor to be able to intervene through videoconferencing in any criminal case. [733] This possibility includes

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[733] **Artículo 306 Facultades del tribunal e intervención de abogados. Interrogatorio cruzado**

1. Una vez respondidas las preguntas formuladas por el abogado de quien solicitó la prueba, los abogados de las demás partes y el de aquella que declarare podrán, por este orden, formular al declarante nuevas preguntas que reputen conducentes para determinar los hechos. El tribunal deberá repeler las preguntas que sean impertinentes o inútiles.

Con la finalidad de obtener aclaraciones y adiciones, también podrá el tribunal interrogar a la parte llamada a declarar.

2. Cuando no sea preceptiva la intervención de abogado, las partes, con la venia del tribunal, que cuidará de que no se atraviesen la palabra ni se interrumpan, podrán hacerse recíprocamente las preguntas y observaciones que sean convenientes para la determinación de los hechos relevantes en el proceso. El tribunal deberá repeler las intervenciones que sean impertinentes o inútiles, y podrá interrogar a la parte llamada a declarar.

hearings in connection with pre-trial detention. While prosecutors were initially not really in favor of the introduction of these new technologies, there is a gradual increase in their participation via videoconferencing in practice, allowing them to gain time and efficiency. Nevertheless, the Public Prosecutor's Office has an obligation to ensure respect for fundamental rights and civil liberties, including the right to a trial with all the guarantees in particular the rights of the defense.

In term of practicality of the use of videoconferencing, the officer in charge of the good functioning of the new technologies is key to the mechanism. In terms of security, the officer remains responsible for the procedural aspect of the use of the medium. It is up to him to ascertain the identity of the person testifying through videoconferencing for instance. To sum up, what appears on the video is now considered not only as real but also as authentic. Viewing a person's image implies somehow direct identification of that person. However, the usual identification mechanisms are admitted before or during the videoconference. The most usual is the presentation of the national identity card, even if other ways have been and still are accepted. The question of the identification of the parties is distinct by means of the electronic Identification card since 2003.[734] In reality, all the identity cards have an embedded electronic chip, so that they allow identification

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3. El declarante y su abogado podrán impugnar en el acto las preguntas a que se refieren los anteriores apartados de este precepto. Podrán, asimismo, formular las observaciones previstas en el artículo 303. El tribunal resolverá lo que proceda antes de otorgar la palabra para responder.
http://noticias.juridicas.com/base_datos/Privado/l1-2000.l2t1.html#a306. Last accessed 21 January 2019.

[734] Eduardo Gomez de la Cruz, The electronic signature in Spain. https://sas-space.sas.ac.uk/5387/1/1754-2373-1-SM.pdf. Last accessed 21 January 2019.

before the administration, including the justice one. In the majority of cases, clerks and users seem to prefer the traditional use of national identity cards than the electronic ones. The witness then simply presents his card, either before directly to the court or in front of the camera, by transmitting a copy to the registry. Videoconferencing is intended to guarantee the forms of testimony in the same evidentiary requirements as testimony in the courtroom.

The officer shall ensure that the questions and answers are forwarded and of course that the questions are well understood by the intervener. In certain jurisdictions, such as France, the judge is responsible for the use of videoconferencing. As such the judge must manage the camera at the same time as leading the trial. This extra responsibility goes into the office of the judge. It is possible that it is less available as he or she must lead the proper conduct of the trial, be attentive to all the data raised as well as to the behaviour of the parties and then the management of the technological medium which can offer a certain dose of difficulties.

In Spain the officer clerk has a key role as an officer of the crown. The integrity of the exchange requires the participation of two clerks, one present in the courtroom where the judgment takes place, the second is present of where the persons testifies. In this way, it is possible for the clerk who is with the witness or the expert to be able to guarantee his identity and the understanding of the questions being asked. These two officers will guarantee the confidence that one can have in the information that passes through videoconferencing. Each of them must record what happened during the expose of the evidence through the camera, emphasizing the correct reception of both the image and

the sound. Thus, they are not merely responsible for ensuring what is authentic in the minutes of the trial – but also become the guarantors of the legal certainty of the evidence. Their role is to the authenticity and the integrity of what is going on through videoconferencing. The guarantee of fundamental rights through this technique must be extended in a special way in order to ensure the realization of all the requirements relating to "public faith", so that it is extensible to all points of transmittal (and reception) which have been interconnected for the realization of the operation. The opinions differ on this point, as to the presence of a clerk both in the room and instead of the issuance of the testimony, but it appears that in the event of an incident (sound or image) the presence of a clerk assisting the witness, is a necessity dictated by the obligation of right of defense.

The appreciation of non-verbal language remains difficult when only one camera is used. One has then only a fixed plan, but this disadvantage could easily be compensated by the use of more efficient technical systems, more cameras, or arranged otherwise, more sophisticated... It seems that in the simplest cases which are the subject of a someone testifying via videoconference, the system now proposed is satisfactory, on the other hand it will probably be inadequate to deal with more complex cases. We note here, that the point of non-verbal and verbal communication we raised in the introduction is mirrored here in that Chapter on Spain.

In the same vein, in a more or less near future, let us imagine the intervention of the judge himself by videoconference. This solution remains difficult to envisage, it is probably a limit to be posed in order to preserve the judicial ritual, the solemnity of the hearing. It is obvious that the report to a screen is not the same as the presentation process before a

judge in a court of law. Yet tomorrow or today these issues will be raised. It is a matter of gradually introducing new technologies while preserving the fundamental values of the fair trial, without considering the two concepts as contradictory. The example of Spain shows us that the principle of "virtual immediacy" is realized and consecrated.

Conclusion.

As in other jurisdictions, Spain has been a place were right for a fair trial and use of new technologies has clashed. If we compare rapidly Spain with France and maybe also common law countries like the UK, we have strong similarities disclosed. The Courts have had to take care of, analyse and interpret quite a substantial numbers of cases, as we have seen in the case of other jurisdictions, sign that the issue is not geographically contained in a specific place, but is of concerned in numerous places.

Here too, the question of physical and virtual presence operates has the starting point of the interpretation given of right to a fair trial, space of justice and use of new technologies. Certainly, there are some differences with other places, but most of the developments seen resembles what has happened somewhere else.

VII. General Conclusion.

In the various chapters of this thesis, I have tried to analyse with relevant tools and information in my hands a very topical question linking right to a fair trial, new technologies and contemporary places of justice. This work is mainly an inter-disciplinary approach of the question of justice. I looked at intersections between philosophy, psychoanalysis and law, and sometimes art and architecture theory, film theory, structuralism writings to present thoughts and reflection on the spaces of justice. I had in mind a very simple idea: using the spaces of justice as the central point of the argument. Indeed, one may well have in mind that the trial takes place in a certain place at a certain time. The palaces of justice represent that place or at least as been representing that place. For hundreds of years, it was there that trials were taking place, in spaces that look like temples or churches. Then we had some more 'transparent' buildings, to the extend we started to imagine the spaces not in physical terms, but in virtual terms. The use of cameras, to get image in or image out of the inside of the buildings, became the additional level of the space of justice. Then again, because of our contemporary world, the central point of the argument is mixed up with another post-modern issue, the one of transnational human rights. The right for a fair trial was certainly designed, at least in its post second world war form, during time where only the physical aspect of the spaces of justice was relevant. It is not the case anymore. Virtual space, mixed physical/virtual, those are coexisting, while the right to a fair trial remains the same. Its interpretation though has now taken into account new technologies.

But one may consider after reading these chapters that my ideas are solely gently looking at law and justice as objects of studies and never really dissecting either. Perhaps that was the point of this thesis, because if justice is supposed to be seen to be done, what we can only consider is what can be seen, and as a side but critical issue, how it is perceived, how we perceived those very complex and abstract concepts. Then, unfold another connected issue: How systems of values using archaic connections through rituals, conveyed the idea of power and authority through time.

In chapter 1, I attempted to describe, through a brief but relevant literature review, what right to a fair trial is or means. However, I found development of the right that connected physical aspects of justice, not only traditional but also more contemporary, with new technologies. I also considered the (original) transgression and the fundamental law ‘you shall not kill’. Using psychoanalysis and specifically the killing of the fathers by the brothers and its repression, I analysed how it is re-enacted during the legal event, highlighting how fundamental that moment is for the law. In turn, the spaces of justice where this re-enactment is taking place become also fundamental, because it is a place of the re-creation of the original transgression, the first step of social organisation. I then look, in chapter 2, at the relationship between time and space in the legal event and try to decipher how we may connect the judge, 'totem' and the Oedipus complex, particularly necessary to define the symbolic position of the judge. That chapter offers a connection between time and space through ritual(s). In Chapter 3, I focus on architecture of spaces of justice and the link between those spaces and the law (at individual and community/society levels). I specifically introduce an in-depth examination of the use (and abuse) of transparency, the new opacity, even though one may believe that

transparent walls are 'OK', before moving to the complete absence of walls in Chapter 4. Here, the question is how the psycho-social perspective on the legal event may be challenged by the use of technology, such as cameras in courts. I consider then how filming, recording and broadcasting trials, through a 'techno-legal' transparency, affects the spaces of justice. In the last Chapter, I decided to give a more detail account of the use of new technology, videoconferencing, specifically in Spain, as a case study on civil law tradition country.

To sum up briefly what has been written in these chapters, what has been connecting my ideas here is that there is an old aesthetic side of the law, and ultimately the appearance of justice is as important as justice itself. Maybe we should remember that, as I mentioned a few times, applying the law is exercising a power, the power to decide the meaning of words. We seem to have forgotten that in order for the words to be spoken, a specific space, something like a scene, should be carefully crafted. The words then take their full, solemn meaning, because of the *where* and *when* they are spoken. Therefore, one must critically be aware of the importance of buildings, time, ritual or rituals and ceremony. The question, deeply connected to aesthetic of justice, ultimately relates also to art. In the essay the 'Age of Technological Reproducibility', Benjamin defined art in terms of its cult value: 'originally, the embeddedness of an artwork in the context of tradition found expression in a cult. This fits well here with the idea of the space of justice being a temple illuminated by the light of the truth. As we know, the earliest artworks originated in the service of rituals – first magical, then religious.'[735]Art was created for the purpose of

[735] Benjamin, W., 'The work of Art in the Age of its Technological Reproducibility' in *Selected Writings* Vol.3, 1935-1938, (USA: Harvard University Press 1996-2003), pp. 101-133, esp. p.105.

ritual but then a shift happened in artwork's value. It moved from cult to exhibition that allowed for 'the emancipation of specific artistic practices from the service of ritual'.[736] The increase in investment in exhibition value has also affected how art is conceived by the artist himself and in his mode of representation. [737] The aesthetic side of justice relates to this art value and exhibition value defined by Benjamin. There are some connections between a vision of justice rendered that may come from 'magical-cult' and emerge in 'exhibition-rational'. The point made by and about architects; the exhibition-rational value of images of a trial for a broadcaster… In addition, we have seen, with Latour, that the divide of religious/secular seems to vanish or to have vanished, while spaces where the ritual or rituals of justice used to develop, are evidence of the vanishing of this divide: 'post-modern' courthouses have become transparent and the ritual/s absent; meaning of the process has imploded and exploded with the use of cameras in courts.

The balance, the very important equilibrium between forces, is the only security to a proper orderly functioning of a complex society. But it is a balance that maybe forced upon us, as the symbol shows that justice brings not peace but the sword.[738] Maybe what we really should remember about spaces of justice is that:

> Courts of law are useful tools for achieving certain kind of compensation and social equilibrium. But sometimes it seems that what is sought in the courts is actually not

[736] Ibid, p.106.

[737] It may also give rise to a wish for a return of investment through profit.

[738] Ibid, p.153.

on trial there. At times, perhaps, we mistakenly turn to a human court in search of answers which can only be found in a heavenly one.[739]

[739] Ibid, p162.

Bibliography

Abraham, G., 'The Sense and the Concept of Time in Psychoanalysis', *The International Review of Psycho-Analysis* 3, (1976).

Stepniak, D., 'Technology and Public Access to Audio Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions', (2004) 12 *William & Mary Bill of Rights Journal*.

Adams, G.B., in 'the Descendants of the Curia Regis', *American Historical Review* 13 (1) (Oct. 1907).

Addo, M.K., 'Are Judges beyond Criticism under Article 10 of the European Convention on Human Rights?', *ICLQ* 47 (2) (Apr., 1998).

Agamben, G., *State of Exception*, Chicago, University of Chicago Press, 2005.

Aristodemou, M., *Law, Psychoanalysis, Society*, Routledge 2015.

Ascher Barntones, D., *The Transparent State: architecture and politics in postwar germany.* London, Routledge, 2005.

Asimow, M., 'Real Court Television', *UCLA Law School* (September 1998) , http://usf.usfca.edu/pj//articles/realcourt.htm.

Assier-Andrieu, L., *L'Autorité du Passé, Essai anthropologique sur la common law*, Paris : Dalloz Les sens du droit Essai, 2011.

Austin, J., Campbell, R., *Lectures on Jurisprudence, Or, The Philosophy of Positive Law, Volume 1,* Clarck, The Lawbook Exchange Ltd, 2005.

Bachmaier Winter, L., 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law', *Utrecht Law Review*, Volume 9, Issue 4 (September) 2013.

Badiou, A., ‘The Problem of Evil’ in Badiou, A., *Ethics: An essay on the understanding of evi*l, London & New York, Verso, 2001.

Balibar, E., ‘The Invention of The Super-Ego, Freud and Kelsen 1922’, in *Citizen Subject; Foundations for Philosophical Anthropology*, translated by Steven Miller with a Foreword by Emily Apter, New York, Fordham University Press, 2017.

Barthes, R., *Mythologies*, Paris, Seuil, Point Essais, 1957.

Barthes, R., *The Third Meaning, Image, Music, Text*, London, Fontana, 1977.

Baudrillard, J., *Simulacra and Simulation (The Body in Theory: Histories of Cultural Materialism)*, University of Michigan Press, 1994.

Baum, F., *Dorothy and the Wizard of Oz,* Boston, Mobile Reference, 1908 (2008).

Benjamin, W., ‘The work of Art in the Age of its Technological Reproducibility’ in *Selected Writings* Vol.3, 1935-1938, USA, Harvard University Press 1996-2003.

Bernard, D., 2018, ‘Introduction : Enjeux de la ritualisation judiciaire – une réflexion sur les formes du procès’, *Oñati Socio-legal Series* [online], 8 (3).

Bessire, D., ‘Transparency: a two-way mirror?’ In *30 years of IJSE: Festschrift in honour of Professor John O’Brien*, edited by D. (ed.) Pettman, pp. 424-438. Bradford, Emerald Group Publishing, 2005.

Bettelheim, B., *Psychanalyse des Contes de Fées*, Paris, Pocket Lafont, 1976

Bourdieu, P., ‘The Cult of Unity and Cultivated Differences’ *in* Bourdieu, P., *Photography: A Middle-brow Art*, Cambridge, Polity Press, 1990.

Bouvier, A.-M., *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR,* Intersentia 2005.

Bouvresse, J., *Wittgenstein reads Freud: the myth of the unconscious*, Princeton, New French Thought, 1995.

Bowie, F., *The Anthropology of Religion*, London, Blackwell Publishing 2000.

Breger, C., 'The Leader's Two Bodies, Slavoj Zizek's postmodern political theology'. *Diacritics* 31, no. 1 (2001).

Bronx County Hall of Justice. 2011. http://architypesource.com/projects/61-bronx-county-hall-of-justice/description.

Bruner, J.S., *Law, Culture and Ritual: Disputing systems in cross-cultural context.* NY, NYU Press, 2005.

Brunet, P., 'Humpty Dumpty a Babel? Les juges et le vocabulaire juridique', *Chronique de Droit Européen et Comparé* (Les Petites Affiches) 17 (2008).

Brunet, P., 'Approche Critique du Vocabulaire Juridique Européen: Le Pouvoir des Juges', *Chronique de droit européen & comparé* N° 17, Centre d'études juridiques européennes et comparées (CEJEC – Université Paris Ouest – Nanterre La Défense), Les Petites Affiches, août 2008.

Bud, R., *On the Social Production of Visual Difference, the myth and the machine: seing science through museum eyes.* Vol. 35, in *Picturing Power: Visual Depiction and Social Relations*, edited by Fyfe, G. and Law, J., London, Routledge, 1988.

Bullen, P.A., 'Assessing Sustainable Adaptation of Existing Buildings to Climate Change', *Cobra 2004.* Leeds, Royal Institution of Chartered Surveyors, 2004.

Cabezudo Rodríguez, N., *Las reformas tecnológicas esperadas por la administración de justicia española. Estado de la cuestión, in Derecho, gobernanza y tecnologías de la información en la sociedad del conocimiento* / coord. por Fernando Galindo Ayuda, Aires José Rover, 2009.

Cardozo, B.N., *The Nature of the Judicial Process*, New Haven, Yale UP 1921.

Carnwath, R. (Sir), 'ECHR Remedies from a Common Law Perspective', *ICLQ* 49 (3) (2000).

Chase, O., & Bruner, J., *Law, Culture and Ritual: Disputing systems in cross-cultural context*, New York, NYU Press, 2005.

Chasseguet-Smirgel, J., *The Ego Ideal*, London, Free Association Books, 1985.

Chaumon, F., *Lacan, le Sujet et la Jouissance*, Paris, Michalon, Le Bien Commun, 2004.

Commaille, J., *L'Esprit Sociologique des Lois,* Paris, PUF, 1994.

Cotterrell, R., The Politics of Jurisprudence, OUP 2011 2nd edition.

Davidson, J., *Bronx Clear, How a courthouse polices us through the glass.* 4 February 2008. http://nymag.com/news/intelligencer/43599/.

Derrida, J. & Laboussiere, P.J., *Alterit*és, Paris, Osiris, 1986.

Derrida, J., *De la Grammatologie*, Paris, Les Éditions de Minuits, 1967.

Derrida, J., *Force de Loi, Le fondement mystique de l'autorité*, Paris, Galilée, 1994.

Derrida, J., *La Voix et le Phénomène*, Paris, PUF, Champs 3e éd., 2005.

Dews, P., *Logics of Disintegration, Post-Structuralist Thought and the Claims of Critical Theory*, London, Verso, 2007.

Dialogue, Dialectique en Philosophie et en Droit, Archive de Philosophie du Droit, tome 29, Paris, Sirey, 1984.

Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, London, Macmillan and Co., 1927.

Discours de Lord Phillips of Worth Matravers, Chief Justice of England and Wales, 'Alternative Dispute Resolution: An English Viewpoint', India 29 Mars 2008. http://www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-29032008. www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf.

Dumoulin, L. & Licoppe, C. (2016), 'Videoconferencing, New Public Management, and Organizational Reform in the Judiciary: Videoconferencing and Judicial Organization'. *Policy & Internet.* 8.

Duncan, C., 'The Art Museum as Ritual', in *Civilising Rituals, inside public art museum*, by C. Duncan, London, Routledge, 1995.

Duncan, C., 'Art Museums and the Ritual of Citizenship' in Karp, I., and Lavine, S.D., (eds) *Exhibiting Cultures: The poetics and politics of museum display*, Washington and London, The Smithsonian Institute, 1991.

Dworkin, R., *Law's Empire*, Cambridge, Harvard University Press, 1986.

Eastlake, C. L., *A History of the Gothic Revival.* London, Longmans, Green and Co, 1872.

ELIADE, Eliade, M., *Aspects du Mythe*, Paris, Gallimard, Idées, 1963.

Eliade, M., *Rites and Symbols of Initiation: The mysteries of birth and rebirth,* Putnam, Spring Publication, 2009.

Eliot C. & Quinn, F., *English Legal System*, London, Pearson, 7e ed,. 2006,

Feigenson, N. and Spiesel, C., *Law on Display*, NYU Press 2009.

Fish, M., 'An Eye for an Eye: Proportionality as a moral principle of punishment ', *Oxford Journal of Legal Studies* 28 (1) (2008).

Foucault, M., "The Eye of Power." In *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, edited by C. Gordon, NY, Pantheon books, 1980.

Foucault, M., *Surveiller et Punir*, Paris, Gallimard, Tel, 1975.

Freud, S., 'The Group and The Primal Horde', in *Group Psychology and the Analysis of the Ego*, *SE* 18, London, Vintage Hogarth Press, 2001.

Freud, S., 'Identification' in *Group Psychology and the Analysis of the Ego*, London, Standard Edition 28 (1921).

Freud, S., ‘Moses and Monotheism: Three essays’, London, Standard Edition *23* (1939).

Freud, S., ‘Screen memories’, London, Standard Edition *3* (1899).

Freud, S., ‘The Unconscious’, London, Standard Edition *14* (1905).

Freud, S., *Civilisation and Its Discontents*, London, Penguin, 2002 (1930).

Freud, S., *Totem and taboo*, London, Ark 1950.

Friedel, W., ‘Chapter 3. Sigmund Freud: the loss of transparency’, In *Copernicus, Darwin and Freud: Revolutions in the History and Philosophy of Science*, Wiley-Blackwell, 2008.

Furneaux Jordan, R., *Western architecture : a concise history,* London, Thames & Hudson, 1993.

Fuss, D., and J. Sanders, ‘Bergasse 19: Inside Freud’s Office’, in *Stud: architectures of masculinity*, edited by J. Sanders, Princeton, Princeton Architectural Press, 1998.

Garapon, A. et Allard, J., *Les Juges dans la Mondialisation, la nouvelle révolution du droit*, Paris, Seuil, La République des Idées, 2005.

Garapon, A., ‘Le Droit mis à l’Epreuve’, *Esprit* Août-Septembre 2007.

Garapon, A., ‘What Should one Think of Judicial Ritual in Law?’ in Ralph Lindgren, J. et Knaak, J., *Ritual and Semiotics*, New York, Lang, Critic of Institutions 14, 1997.

Garapon, A., *Bien Juger*, Paris, Odile Jacob, 2001 (1997).

Gibbs, Penelope, *Defendants on video – conveyor belt justice or a revolution in access?* Transform Justice, October 2017.

Glenn, P., *Legal Traditions of the World*, Oxford, OUP 3e ed., 2007.

Gomez de la Cruz, E., The electronic signature in Spain. https://sas-space.sas.ac.uk/5387/1/1754-2373-1-SM.pdf.

Gómez Martínez, C., La grabación del sonido y de la imagen en los juicios civiles del juez lector al juez espectador, Jueces para la democracia, Nº 48, 2003.

Goodrich, P., 'Europe in America: Grammatology, Legal Studies and the Politics of Transmission', *Columbia Law Review*, 2001 101.8.

Guarnieri, C. & Pederzoli, P., *The Powers of Judges: A comparative study of courts and democracy*, Oxford, OUP, 2003.

Guinchard, S., Brandac, M., Lagarde, X. et Douchy, M., *Droit Processuel, Droit commun du procès*, Paris, Dalloz Précis, 1e ed., 2001.

Halmos, C., *L'autorité Expliquée aux Parents*, Paris, Nil, 2008.

Harries, K., *The Ethical Function of Architecture*, MIT Press, 1998.

Hart, H.L.A., 'Positivism and The Separation of Law and Morals', in *The Philosophy of Law*, Dworkin, R.M., (ed.), Oxford, OUP, 1977.

Heidegger, M., *Being and Time*, Oxford, Blackwell, 2007 (1927).

Heidegger, M., *Introduction à la Métaphysique*, Paris, Gallimard, Tel, 1967 (1935).

Heidegger, M., *Qu'appele t'On Penser?* 3rd. Paris, PUF, 1959.

Heidegger, M., *The Basic Problems of Phenomenology*, Bloomington, Indiana University Press, 1988 (1927).

Heidegger, M., *The Metaphysical Foundations of Logic*, Bloomington, Indiana University Press, 1984 (1928),

Hilferty, R., *Jury Beauty.* 26 February 2008. http://www.nysun.com/arts/jury-beauty/71877/.

Hoebel, E.A., *The Law of the Primitive Man*, New York, Atheneum 1976.

Holm, L., 'The New Yorkers', *Architectural Theory Review* 12, no. 2 (2007).

Holm, L., 'What Lacan said re: architecture', *Critical Quarterly* 42 (2000).

http://www.echr.coe.int/NR/rdonlyres/086519A8-B57A-40F4-9E22- 3E27564DBE86/0/FRA_Conven.pdf.

http://www.legislation.gov.uk/ukpga/Geo5/15-16/86/contents.

Jabloner, C., 'Kelsen and his Circle: The Viennese Years', *European Journal of International Law,* 9 (1998),

Jauffret Spinosi, C., 'Comment Juge le Juge Anglais?' in *Droits, la fonction de juger*, Paris, PUF, 1989.

Jencks, C., *The New Paradigm in Architecture: The Language of Postmodernism,* Yale University Press, 2008.

Kant, E., *Idées d'une Histoire Universelle au Point de Vue Cosmopolitique*, Paris, Bordas, 2006 (1784).

Kantorowicz, E. H., *The King's Two Bodies, a study in mediaeval political theology.* Princeton, PUP, 1997.

Kelsen, H. (1924), 'The Conception of the State and Social Psychology—With Special Reference to Freud's Group Theory', *Int. J. Psycho-Anal*., 5.

Kelsen, H., *General Theory of Law And State*., Clarck, The Lawbook Exchange Ltd, 2009.

Klein, M., *L'Amour et la Haine*, Paris, Payot 2001 (1937).

Klein, M., *Le Complexe d'Oedipe*, Paris, Payot, 2001 (1945).

Krier, L., *Architecture: Choice or Fate.* Winterbourne, Papadakis Publisher, 2007.

Krips, H., 'The Politics of the Gaze : Foucault, Lacan and Zizek', *Culture Unbound* 2 (2010).

La Fontaine, J., 'Le Juge arbitre, l'Hospitalier et le Solitaire', Livre XII fable 25, *in Fables*, Paris, Hachette, 1929.

Lacan, J., *The Four Fundamental Concepts of Psycho-analysis.* Edited by J.A. Miller, London, Vintage, 1998.

Lacan, J., 'Les Fondements de la Psychanalyse', in Lacan, J., *Les Quatre Concepts Fondamentaux de la Psychanalyse,* Livre XI, Paris, Seuil, 1973 (1964).

Lacan, J., 'The Insistence of the Letter', *Yale French Studies, Structuralism*, 36/37 (1996).

Lacan, J., *Ecrits 2*, Paris, Seuil, Points Essais, 1999 (1966).

Lacan, J., *Écrits: A Selection*, (Alan Sheridan trans.), London, Norton, 2004.

Lacan, J., *Ecrits: A Selection.* Translated by A. Sheridan. London, Routledge, 2005.

Lacan, J., *Le Séminaire* I : Les écrits techniques de Freud, Paris, Seuil, 1975.

Lacan, J., *Le Séminaire II : Le moi dans la théorie de Freud et dans la technique de la psychanalyse*, Paris, Seuil, 1978.

Lacan, J., *Le Séminaire XVII : L'Envers de la psychanalyse*, Paris, Seuil, Champs Freudien, 1991.

Lacan, J., *My Teaching*, London, Verso, 2008.

Lacan,J., *Ecrit 1*, Paris, Point Seuil, 1999.

Laclau, E. and C. Mouffe, *Hegemony and Socialist Strategy: Towards a radical democratic politics,* London,Verso, 2001.

Lambert, J., 'Courtroom Video Conferencing in a Small Jurisdiction: a Case Study', LVI 2016 conference paper.

Lamizet, B., 'Sémiotique de l'Evénement dans l'Espace Euro-méditerranéen', Actes du Colloque International 'l'Evénement dans l'Espace Euro-méditerranéen, Mémoire, Identité et Communication', Toulon, USTV, 2006.

Lamizet, B., *Sémiotique de l'Evénement*, Paris, Hermes, Lavoisier, 2006./

Latour, B., 'Visualisation and Social Reproduction : opening one eye while closing the other...a note on some religious paintings', in *Picturing Power: Visual Depiction and Social Relations*, edited by G Fyfe and J Law, 15-38. London, Routledge, Sociological Review Monograph 35, 1988.

Lecourtois, C., ‘Espace de la conception d'architectures judiciaires: les nouveaux palais de justice (Caen, Melun, Nantes, Grenoble et Pontoise)’, *Diagonale Phi. n°4, Université Lyon 3*, 2010.

Lecourtois, C., ‘Perception Architecturale et Image’, *Colloque International Images et citadinité,* Alger, 2005.

Legendre, P., *Le Crime du Caporal Lortie, Traité sur le Père*, Paris, Champs Flammarion, 1989.

Legrand, P., ‘How to Compare Now’, 16 *Legal Studies* (1996).

Legrand, P., *Droit Comparé*, Paris, PUF, Que Sais Je 2e ed., 1999.

Levi-Strauss, C., *Totemism*, London, Merlin, 1964.

Levinas, E., ‘Reflections on the Philosophy of Hitlerism’ , 17 Critical Enquiry (autumn 1990).

Levinas, E., *Le Temps et l’Autre*, Paris, PUF, 1983.

Lucien, A., *Médiation et modernité, Approche communicationnelle de l’institution judiciaire*, Toulon, USTV, Thèse, 2007.

Lyotard, J.F., *Le Différend*, Paris, Éditions de Minuit, Critiques, 1983.

Macdonald, CF, 2003, ‘The Palaces of Minos at Knossos’, *Athena Review*, Vol.3, no.3: Minoan Crete. http://www.athenapub.com/11knoss.htm.

Mack, K., ‘Legal Architecture: Justice, Due Process and The Place of the Law by Linda Mulcahy; Representing Justice: Invention, Controversy, And Rights in City-States and Democratic Courtrooms by Judith Resnik and Dennis Curtis’, *Journal of Law and Society* Volume 39, Issue 2, June 2012**.**

Major, R., *Lacan avec Derrida*, Paris, Flammarion, Champs, 2001.

Marcuse, H., *Eros & Civilisation*, London, Abacus, 1972

Markus, T., *Buildings and Power, freedom and control in the origin of modern building types.* London, Routledge, 1993

Marr, K., ‘The Right to "Skype": The Due Process Concerns of Videoconferencing at Parole Revocation Hearings’, 81 *U. Cin. L. Rev*. (2013)

Marrani, D & Farah, Y, ‘ADR in the Administrative Law: A Perspective from the United Kingdom’, in *Alternative Dispute Resolution in European Administrative Law*, (Heidelberg: Springer 2014).

Marrani, D., ‘Althusser in Avatar : comparative law as a science and the haunting of the subject’, in Laurent de Sutter (ed) *Althusser and Law*, Routledge 2013.

Marrani, D., ‘Confronting the symbolic position of the judge in western European legal traditions: A comparative essay’, *European Journal of Legal Studies,* Vol. 3 Issue 1 (2010).

Mason, S., ‘Cameras in the courts: why the prohibition occurred in the UK?’, *Amicus Curiae Issue 91 Autumn 2012*.

McQuire, S., ‘From Glass architecture to Big Brother: Scenes from a cultural history of transparency’, *Cultural Studies Review* 9, no. 2 (2003).

Mehrabian, A., *Nonverbal Communication*, Transaction Publishers, 1972.

Meltzer, D., ‘The Apprehension of Beauty’, in Meltzer, D., *The Apprehension of Beauty*, Strath Tay, Clunie Press, 1988.

Meltzer, D., ‘Tyranny’, in Meltzer, D., *Sexual States of Mind*, London, Karnac, 1973.

Merleau-Ponty, M., *Le Visible et l’Invisible*, Paris, Gallimard, Tel, 1964.

Milano, L., in ‘Visioconférence et droit à un procès équitable’, *RDLF* 2011, chron. n°8.

Miller, J.A., ‘extrémité’, In *Lacanian Theory of Discourse: Subject, structure, and society*, edited by M. Bracher, F. Massardier-Kennedy, M.W. Alcorn and R.J. Corthell, NY. NYU press, 1997.

Miller, J.A., *Theorie de Turin*, http://www.causefreudienne.net/index.php/ecole/textes-fondateurs/theorie-de-turin.

Mole, N. & Harby, C., *The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights, Human rights handbooks*, No. 3, Directorate General of Human Rights Council of Europe, 1st edition 2001; 2nd edition, August 2006,

Moran, L., 'Every Picture Speaks a Thousand Words: Visualizing Judicial Authority in the Press' in *Priska Gisler, Sara Steinert Borella, Caroline Wiedmer (eds), Intersections of Law and Culture,* Palgrave, 2012.

Mulcahy, L., 'Architects of Justice: the Politics of Courtroom Design', *Social Legal Studies*, 16, 3, (2007).

Mulcahy, L., *Legal Architecture: Justice, Due Process and the Place of Law,* Routlegde 2011.

Mulvey, L., 'Visual Pleasure and Narrative Cinema'. *Screen*, Autumn 1975, vol.16. Reedited as Mulvey, Laura, 'Visual Pleasure and Narrative Cinema', *Film Theory and Criticism : Introductory Readings.* Eds. Leo Braudy and Marshall Cohen. New York, Oxford UP, 1999.

Nader, L. & Sursock, A., 'Anthropology and Justice', in Cohen, R. (eds.*), Justice: views from the social sciences*, New York, Springer, 2006.

Nicolls, S., *Jung and Tarot: an archetypal journey*, Red Wheel/Weiser; New edition edition 1985.

Open curtain wall gives transparency to the judicial process. 2011. http://archrecord.construction.com/projects/bts/archives/civic/07_bronxhall/default.asp

Ost, F., 'L'invention du tiers, Eschyle et Kafka', *Esprit* Aout-Septembre 2000.

Overgaard, S., *Husserl and Heidegger on Being in the World*, Dordrecht, Kluwer Academic Publishers, 2004.

Pareto, V., *The Rise and Fall of Elites: An application of theoretical sociology*, New Jersey, Transaction Books, 1991.

Pingeot, M., *La Dictature de la Transparence,* Nouvelles Mythologies, Laffont Paris 2016.

Poulantzas, N., *Fascisme et Dictature*, Paris, Seuil, Point Essais, 1974.

Pritchard, H., 'Appearances and Reality', *Mind*, 15 (58).

Public Perceptions of Working Court Dress in England and Wales, October 2002, 1/3 p. 4 http://www.dca.gov.uk/consult/courtdress/orcreport.pdf..

Quattrocolo, S. & Ruggeri, S., (eds), *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe,* Springer 2019.

Ravaz, B., 'Le Juge Judiciaire Gardien de la Vérité Historique ?', *Champs libres* n° 2, Paris, L'Harmattan 2002.

Ravaz, B., 'Vérité Judiciaire et Vérité Religieuse', *Champs libres* n° 3, Paris, L'Harmattan 2002.

Reik, T., *Ritual, Four Psychoanalytic Studies*, New York, Evergreen, 1962 (1946).

Renucci, F., 'L Les Voix pour le Dire', Actes du Colloque International 'l'Evénement dans l'Espace Euro-méditerranéen, Mémoire, Identité et Communication'.

Resnik, J. & Curtis, D., *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms,* Yale, Yale Law Library Series in Legal History and Reference, 2011.

Richard, P., *Le Jeu de la Différence : Réflexions sur l'épistémologie du droit comparé*, Laval, PUL Dikè , 2007.

Richard, P., 'Les Apports de Wittgenstein à la Réflexion Comparatiste', *RIDC* 4 (2005).

Richard, P., *Introduction au Droit Italien: Institutions juridictionnelles et droit procédural*, Paris, L'Harmattan, 2004.

Ricoeur, P., *Amour et Justice*, Paris, Seuil, Point Essais, 2008.

Rossner, M., ‘Does The Placement Of The Accused At Court Undermine The Right To A Fair Trial?’, *Policy Briefing* 18, 2016.

Rowe, C., Slutzky, R., ‘Transparency: Literal and phenomenal’, *Perspecta* 8 (1963).

Sacco, R., *Anthropologie Juridique, Apport à une micro histoire du droit*, Paris, Dalloz, 2008.

Samuel, G., ‘Epistemology and Comparative Law’, in Van Hoecke, M., (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, Hart, 2004.

Schoenfeld, C.G., *Psychoanalysis and the Law*, Springfield, Charles Thomas, 1973.

Sherover, C., (ed.), *The Human Experience of Time, The development of its philosophic meaning,* Evanston, Northwestern University Press, 2001.

Stepniak, D., ‘British justice: not suitable for public viewing?’*,* in Paul Masons eds., *Criminal Visions*, Routledge 2012.

Strydom, P., *Risk, Environment and Society*, Buckingham, Open University Press, 1st ed. 2002.

Sueur, J.-J., Richard, P. (eds.), *La Transgression*, Bruxelles, Bruylant, 2013.

Sutcliffe, A., *Architectural History of London,* New Haven, Yale University Press, 2006.

Tambiah, S.J., ‘The Magical Power of Words’, *Man* 3 (2) New Series (Jun., 1968).

Teubner, G., ‘Global Bukowina: Legal Pluralism in the World Society’, in Teubner, G., (ed.), *Global Law Without a State*, Dartmouth, Aldershot, 1997.

Tusseau, G., *Jeremy Bentham, la guerre des mots*, Paris, Dalloz Les sens du droit, 2011.

Van Koppen, P.J., et Penrod, S., *Adversarial Versus Inquisitorial Justice: Psychological perspectives on criminal justice systems*, Berlin, Springer, 2003.

Waldron, J., ‘Lex Talionis’, *Ariz. L. Rev*. 34 (25) (1992).

Weiner, Friedel. ‘Chapter 3. Sigmund Freud: the loss of transparency’, In *Copernicus, Darwin and Freud: Revolutions in the History and Philosophy of* no. 3 (fall 2006).

Wigley, M., *The Architecture of Deconstruction: Derrida's haunt,* Cambridge, MIT Press, 1995.

Willis, D., *The Emerald City and Other Essays on the Architectureal Imagination*, Princeton architectural press 1999.

Wirth, O., *La Franc-Maconnerie Rendue Intelligible à Ses Adeptes*, *Volume II Le Compagnon*, Paris, Dervy, 1994.

Wirth, O., *La Franc-Maconnerie Rendue Intelligible à Ses Adeptes*, *Volume III Le Maitre.*

Wittgenstein, L., *Tractatus Logico-philosophicus*, Paris, Gallimard, Tel, 1961.

Womack-Weidner, A., 'New York Opens Second Mega-Courthouse', *Benchmark, Journal of the New York State Unified Court System* 2, no. 3 (fall 2006).

Woodhouse, D., 'The Law and Politics: More power to the judge – and to the people?' *Parliamentary Affairs* 54 (2001).

Yankelevitch, H., 'Qu'est ce qu'un Concept en Psychanalyse', *Futur Antérieur* 10, Fev. 1992, http://multitudes.samizdat.net/Qu-est-ce-qu-un-concept-en.html.

Zizek, S., 'The Big Other Doesn't Exist', *Journal of European Psychoanalysis*, Spring/Fall 1997.

Zizek, S., (2007), ' Knight of the Living Dead', *The New York Times* OP-ED Saturday, March 24, 2007.

Zizek, S., *How to Read Lacan,* London, Grant Books, 2006.

Zizek, S., *The Fragile Absolute: Or, why is the christian legacy worth fighting for?* London, Verso, 2000.

Zupancic, A., (2003), *The Shortest Shadow: Nietzsche's Philosophy of the Two*, London: MIT Press.