

**Confronting the symbolic position of the judge in western European legal traditions: A comparative essay**

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*“Hegel always seems to want to say that things that look different are in reality the same. Whereas what interests me is to show that things that look the same are in reality different”.<sup>1</sup>*

For Legrand, “the two legal traditions represented in Western Europe – known to Anglophones as ‘civil law’ and ‘common law’ – find themselves interacting with one another within a general legal framework, that of the Treaty of Rome”.<sup>2</sup> Because these two legal traditions remain “discursive formations of sufficient homogeneity”, making them “autonomous discursivities”, they permit the definition of “two modes of understanding reality (reflecting the two foundational mythologies)”.<sup>3</sup> On this basis, and knowing that comparative law is, as expressed by Richard, only an anamorphosis of legal theory,<sup>4</sup> while for Legrand it is “a commitment to interdisciplinarity”,<sup>5</sup> I have decided to look closely at the symbolic position of the judge in both legal traditions. I aim to do this through the lens of what Wittgenstein believes to be another “powerful mythology” – psychoanalytic theory.<sup>6</sup> I will mainly, but not exclusively, rely upon Freud and Lacan here. The latter has perhaps more to do with this article than Freud, in a way, with regard to ‘autonomous discursivities’ and the place he gives to language.<sup>7</sup>

In both legal traditions, the figure of the judge evolves in legal institutions that appear to be similar but use different terminology, namely trial and *procès*. This article will explore whether it is possible to understand the legal institutions described by “trial and *process*” through the idea of the legal event. I believe this point to be consistent with Garapon’s

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<sup>1</sup> Conversation between M. O’C. Drury and L. Wittgenstein in 1948 in **J. BOUVRESSE**, *Wittgenstein reads Freud: The myth of the unconscious*, Princeton, Princeton University Press, 1995, p. xviii.

<sup>2</sup> **P. LEGRAND**, “How to Compare Now”, *Legal Studies*, 1996, Vol. 16, pp. 232–242, esp. at p. 232.

<sup>3</sup> *Ibid.*, p. 240.

<sup>4</sup> **P. RICHARD**, “Les Apports de Wittgenstein à la Réflexion Comparatiste”, *RIDC*, 2005, Vol. 4, pp. 899–920, esp. at p. 900.

<sup>5</sup> **P. LEGRAND**, “How to Compare Now”, *o.c.*, p. 238.

<sup>6</sup> **J. BOUVRESSE**, *Wittgenstein reads Freud*, p. 52.

<sup>7</sup> Lacan declared that the unconscious is structured like a language and that language is the condition of the linguistic. We know that Freud considered that language was one “thing” replacing another one. For Lacan, the priority is that second “thing”.

observation that “the event of judging is in fact part of justice to the same degree as the law: it is its foundation”.<sup>8</sup> Then again, the use of different words (trial v. *procès*) may operate as a way of distinguishing among legal events while enforcing the ‘power of words’ in both traditions.<sup>9</sup> I am therefore conscious that what Heidegger explained concerning translation from Greek to Latin may also be valid here: it is a process of closing and alienation.<sup>10</sup> By trying to theorise the two institutions, I may in fact diminish their meaning.

According to the *Oxford Dictionary*, “trial” originates etymologically from the old French word *triage* and is an act of separation of the good from the bad. The dichotomist, perhaps Manichaeist, definition of this legal institution is, surprisingly, slightly different from its equivalent in civil law. The French counterpart (that I will use here as a prototype of “civil law”), the *procès*, does not share this exact idea of selection between good and bad, in part because it revolves around other operators (the legal/illegal binary code described by Teubner<sup>11</sup>), and in part because “justice is the principle of separation between good and bad”.<sup>12</sup> However, trial and *procès* share the notion of being a dynamic event. *Procès* refers to the positioning of the parties before a judge, on a *différend*. To aid the understanding of what is involved in the legal institution of “resolving a *différend* by separating the good and the bad”, I will refer here to Lyotard’s definitions. Primarily, a *différend* is a conflict between two parties that cannot be solved without a ruling. Secondly, it may be an act that cannot be compensated, where the victim cannot get their argument across. Finally, it is a problem of language, a place and a moment where and when something that is suffering from not ‘being’, ‘asks’ to be put in place, to be recognised and heard.<sup>13</sup> The word *procès* carries a dynamic aspect of procedural process. Moreover, according to Badiou, this event is one dimension of another process – the truth-process.<sup>14</sup> The *procès* appears, then, as a progression towards the legal-truth, *la vérité judiciaire*: “the judgement is the expression of a legal-truth, i.e., a truth of whom the source, the elaboration and the outcome are defined by the juridical as expressed in

<sup>8</sup> A. GARAPON, *Bien juger, Essai sur le Rituel Judiciaire*, Paris, Odile Jacob Opus, 1997, p. 19: “[l]’événement de juger fait partie de la justice au même titre que le droit: il en est la fondation”.

<sup>9</sup> S. J. TAMBIAH, “The Magical Power of Words”, *Man*, 1968, Vol. 3, pp. 175–208.

<sup>10</sup> M. HEIDEGGER, *Introduction à la Métaphysique*, Paris, Tel, Gallimard, 1967, p. 26.

<sup>11</sup> G. TEUBNER, “Global Bukowina: Legal Pluralism in the World Society” in G. TEUBNER (ed.), *Global Law Without a State*, Dartmouth, Aldershot, 1997, pp. 3–28.

<sup>12</sup> A. GARAPON, *Bien juger, o.c.*, p. 28. “[l]a justice ... est principe de séparation du bien et du mal”.

<sup>13</sup> J. F. LYOTARD, *Le Différend*, Paris, Minuit, 1983, “quelque chose “demande” à être mis en phrase, et souffre du tort de ne pouvoir l’être à l’instant”.

<sup>14</sup> A. BADIOU, “The Problem of Evil” in *Ethics: An Essay on the Understanding of Evil*, London & New York, Verso, 2001, p. 67.

the trial”.<sup>15</sup> Indeed, the legal “truth”, which differs from social or scientific truth, is allegedly and commonly understood to be established at the end of the legal process in both the English trial and the French *procès*, making the legal institution a place of sacredness that consecrates the judge’s action.<sup>16</sup> The legal-truth operates as a fiction that sacralises the function of judging.

In this article, I aim to analyse the symbolic position of the judge and to show that the legal event, whether in civil or common law traditions,<sup>17</sup> is a process of communication where judges, parties and advocates interact, perhaps in different ways, through a system of dialogue–monologue in a dialectical relationship. I will start by defining how the judge relates to the totem and to the Oedipus complex, and how on this basis we can compare the two legal traditions. I will then look at differences between the number of totems, at the three elements that I believe condition the symbolic position of the judge, and compare each of these under the two legal traditions, before considering the background of oral and written traditions and how the alleged division is growing less marked.

### **Judge, totem and Oedipus**

In this section, I look at how it is possible to apply psychoanalytic theory to the figure of the judge, and particularly the notion of the totem and the Oedipus complex. Specifically, for this comparative work, it will be through the quality and quantities of totemic position/s that differences may best be demonstrated.

The trial (or the *procès*) is an ambivalent legal event. This idea of ambivalence is present in Freud’s writing on the totem in the 1910s.<sup>18</sup> The totem, object or *thing*, with a

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<sup>15</sup> P. PONCELA, “Regard sur la Vérité Judiciaire”, in Dialogue, Dialectique en Philosophie et en Droit, *Archive de Philosophie du Droit*, Paris, Sirey, 1984, tome 29, pp.175–183 at p. 175 : “le jugement est l’expression d’une vérité judiciaire, c’est à dire d’une vérité dont la source, l’élaboration et la finalité sont définies par le juridique en tant qu’il se réalise dans le procès”. See also B. RAVAZ, “Vérité judiciaire et Vérité religieuse”, *Champs libres n° 3*, Paris, L’Harmattan, 2002 and “Le juge judiciaire gardien de la Vérité historique ?”, *Champs libres n° 2*, Paris, L’Harmattan, 2002, pp. 225-245.

<sup>16</sup> This occurs through the magical power of words.

<sup>17</sup> I do not intend to develop in detail the different levels of justice or judges. I wish to describe legal events through their broad outlines. If the type of trial or *procès* has to be related to the type of model I am describing, it is probably the criminal rather than the civil one. In the case of a criminal trial, I will not analyse the differences between jury and non-jury trials. Although I recognise jury trial as an “element” of the “structure” of common law in criminal justice, juries are also widely used in civil law. I also assume that the presence or absence of a jury does not affect the position of the judge considered here.

<sup>18</sup> S. FREUD, *Totem and Taboo*, London, Ark, 1983, pp. 1–17.

symbolic signification for an individual or a group of individuals, serves as a foundation for a system of beliefs, and is the source of a micro (social) organisation.

It is intriguing to think that the totem is linked to the law.<sup>19</sup> But the totem is something that constructs rules, and further, that cannot transgress the rules constructed by it. Indeed, taboos relate to the sacredness of the totem. Freud explained that “the clansmen [members of the totem] are under sacred obligation (subject to automatic sanctions) not to kill or destroy their totem and to avoid eating its flesh (or deriving benefit from it in other ways)”.<sup>20</sup> Totemism carries ‘instinctual renunciations’: the worship of the totem, which included a prohibition against injuring or killing the totem; the desire of the female in the horde and the fraternal alliance; and the restriction of “inclination to violent rivalry among [the members of the fraternal alliance]”.<sup>21</sup> These prohibitions, or taboos, are established in relation to the father’s will: the first two are prohibitions against the father; the latter is against disregarding the father’s will.<sup>22</sup> The totem is marked by taboos that are attached to it and constitute its core: members of the totem cannot *kill* the totem (horror of patricide) while the absolute rule of abstinence exists in relation to every female of the totem (horror of incest). I will consider both rules in turn and analyse how they connect to the figure of the judge.

### **Horror of patricide**

This *thing*, the totem, is present in the cognitive legal field; it is present in the normative rules.<sup>23</sup> If we compare this approach to that of the trial (or the *procès*), and consider it as a dynamic legal event characteristic of the judicial area, we find similar characteristics. The judicial totem is a place where judges, legal advocates and academics exist and belong, and they know that they cannot transgress the rules constructed by it.

In this context, the particular judicial totem must be considered in relation to the Oedipus complex, which evolves around the well-known triangular relationship between a child, the father and the mother.<sup>24</sup> In the Oedipus complex, the boy considers the mother as a

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<sup>19</sup> *Ibid.*, p. 51. Freud commented on the first legal code while exposing the rules of the taboo. We must also bear in mind the formula, “who brings law to its roots destroys it” (“qui ramène le droit à son fondement l’anéantit”).

<sup>20</sup> *Ibid.*, p. 2.

<sup>21</sup> S. FREUD, “Moses and Monotheism: Three Assays”, *SE* 23, 1939, pp. 1–138, esp. p. 118.

<sup>22</sup> *Ibid.*, p. 118.

<sup>23</sup> S. FREUD, *Totem and Taboo, o.c.*, p. 51.

<sup>24</sup> The triangular relation judge–party A –party B.

“sexual object-cathexes” and identifies with the father as his (ideal) role model,<sup>25</sup> who becomes the boy’s ego ideal.<sup>26</sup> Tension arises because “[t]he little boy notices that his father stands in his way with his mother”.<sup>27</sup> The boy wants to be like the father because he loves the mother: he therefore needs to kill the father. The desire for the mother becomes a desire that is forbidden, or “taboo”. The development of the superego, the censor of the ego, which it monitors and judges, is defined as the heir to the Oedipus complex, and is an interiorisation of (parental) authority.<sup>28</sup> This is where the myth of the primal hordes, examined in the anthropological essay *Totem and Taboo*, connects the “politico-legal institution(s)-father”, to the symbolic Father. The different elements of the Oedipus complex described by Lacan in many of his mathematical schemas are a help in mapping this complex.<sup>29</sup> He describes the complex using the position of the subject S (Es), the splitting ego a (ego) and the a’ (the other; the Mother), all of which contribute to the positioning of the Father (or A; the Other) as the place of language, authority, the Law. This symbolic position may also be filled by other paternal figures.

This leads us to Pierre Legendre’s narration of the crime of Corporal Lortie in 1984. This is the story of a young corporal in the Canadian army who entered the Quebec national assembly building with the intention of killing members of the government on 8 May 1984. Lortie ran through the corridors, firing his automatic rifle at the people he encountered; he arrived at the Chamber of the National Assembly of Quebec. Unfortunately for him, it was a holiday and no one was there. He entered nonetheless and sat on the president’s chair, having killed three people and injured eight. Commenting on his crime, Lortie declared: “the government of Quebec had the face of my father”.<sup>30</sup> What is important in this context is that in his ferocious attack, Lortie went into the building that hosts the institutions of Quebec in order to kill those institutions. What is inferred from Lortie’s peculiar declaration is that political institutions may be considered as being involved in the triangular relationship of the Oedipus complex. The father will be/is or has to be killed, but because we are in the political

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<sup>25</sup> According to Klein, the development of the superego differs between boys and girls, although the result is the same. In that schema, the boy relates to the father as an ideal image while the girl turns towards him in the quest for the missing genital apparatus of the mother. Klein does not differentiate between boys and girls. For the girl, closeness to the mother is a long pre-oedipal stage that changes during the phallic phase converging towards the penis that she does not have. **M. KLEIN**, *Le Complexe d’Oedipe*, Paris, Payot, 2001, pp.138–145.

<sup>26</sup> **J. CHASSEGUET-SMIRGEL**, *The Ego Ideal*, London, Free Association Books, 1985, p. 104.

<sup>27</sup> **S. FREUD**, “Identification” in “Group Psychology and the Analysis of the Ego”, *SE 28*, 1921, pp. 105–110.

<sup>28</sup> See also the second topic of Freud: Id, ego, superego.

<sup>29</sup> **J. LACAN**, *Ecrits I*, Paris, Point Seuil, 1999, p. 53. See “Schema L”.

<sup>30</sup> **P. LEGENDRE**, *Le Crime du Caporal Lortie, Traité sur le Père*, Paris, Champs, Flammarion, 1989, p. 74: “Le gouvernement du Québec avait le visage de mon père”.

sphere, where only representation exists, the killing cannot be real; it is (always) symbolic.<sup>31</sup> Two important conclusions may be drawn here: a) the father (or rather, in this case, the Father) represents, and as a consequence takes a symbolic position,<sup>32</sup> of regulation in the triangular relationship described by the Oedipus complex; he is the authority, he is the Law; b) this can be seen also in relation to Freud's observation in *Civilisation and its Discontents*, that "[w]hat began in relation to the father is completed in relation to the group".<sup>33</sup> This exposes the cultural societal dimension of the superego, where the Father represents authority for a larger group than the family – the Law for society.<sup>34</sup>

One explanation of the French Revolution is embedded in these ideas. The French king was himself positioned in the Oedipal triangle. The horde had to kill him. This real murder committed by the (Freudian) horde can be related to the (Lacanian) symbolic murder orchestrated in a democratic society through elections. As Lacan notes, the *non-du-père* (the "no" of the father-Father) relates to the *nom-du-père* (the "name" of the father-Father), the symbolic position of the "father-regulator" as a place of authority. As the judge relates to the king, because the position is part of and originates from the *curia regis*, the king's court, not only the king but also the judge has the paternal function of authority.<sup>35</sup> The traditional legitimacy and the divine right of kings, "passes"/transfers to the judge, as an element of his court.

God



King



Judge

<sup>31</sup> Although it is possible to murder the personnel of the institution, it is of course not possible to kill the institution.

<sup>32</sup> According to Lacanian topography, SIR means Symbolic, Imaginary, Real.

<sup>33</sup> S. FREUD, *Civilisation and Its Discontents*, London, Penguin, 2002, p. 133.

<sup>34</sup> This refers to society, the group, and all the metaphoric aspects of it, like the governing body, and the powers as "separated" through the myth of the separation of powers. It would be perhaps outside the scope of this article to comment on the changes in Canada and the impact on Lortie. In 1982, Canada, lead by Pierre Trudeau, was given a constitution (The Constitution Act, 1982) modifying the organisation of the country and obtaining "freedom" from London, and particularly from Westminster. Furthermore, a strong figure at that time, Trudeau, decided to step down from his role as prime minister early in 1984.

<sup>35</sup> The *curia regis* is an institution that existed in France and England, as mentioned by G. B. ADAMS, in "The Descendants of the Curia Regis", *American Historical Review*, 1907, Vol. 13, No. 1, pp. 11–15. In note 2, he explained, "Reference should also be made to the chart of the descent of French institutions".

Even when the king is replaced by an elected elite (an elected head of state or an elected parliament<sup>36</sup>), the sacral aura of the judge does not relate solely to the person. The judge does not completely “leave” the sacral but remains linked to the king. Let us consider, for instance, the French *Conseil Supérieur de la Magistrature* (CSM). This council is in charge of nominating, appointing and disciplining judges and public prosecutors. According to article 64 of the Fifth Republic Constitution, the French head of state is the guarantor of the independence of the judiciary. Until the constitutional revision of 2008, the CSM was presided over by the head of state (article 65 of the Fifth Republic Constitution).<sup>37</sup> This contributes to both the autonomy of the judge and to the maintenance of the sacred link between God/King (head of state)/Judge. We can find similar examples in common law. The Constitutional Reform Act 2005 (Chapter 4 s.12, Schedule 3) provides for:

- (a) Her Majesty instead of the Lord Chancellor to make appointments to certain offices, and
- (b) the modification of enactments relating to those offices.

As a result of this Act, the monarch is in charge of appointments, because the monarch/head of state is the guarantor of the independence of the judge, similar to the French president/head of state.

The symbolic position is the crucial element here, which creates authority and relates to the sacral, which is closely linked to its origin: religion (God, the Father) and tradition (the monarch sovereign) meet through the vertical link of God/Judge. The position of the judge is dependent upon the horror of patricide. Members of the totem cannot *kill* the totem. The judge totem thus becomes sacred and takes that specific and fundamental position.

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<sup>36</sup> See Dicey’s comments: “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”. **A. V. DICEY**, *Introduction to the Study of the Law of the Constitution*, London, Macmillan and Co., 1927, p. 279.

<sup>37</sup> This is also the case in the Italian republic. The Italian CSM is presided over by the head of the Italian state: **P. RICHARD**, *Introduction au Droit Italien: Institutions Juridictionnelles et Droit procedural*, Paris, L’Harmattan 2004, p. 127.

### Horror of incest

The judge is also, in many ways, in a similar Oedipal position to that of the King because he is either in a totemic position himself or through the legal event (the trial or *procès*). But that may not be sufficient; hence we need to consider the second rule of the taboo: the fear of incest. In primitive societies, the incest rule meant that certain types of relationships, which Freud called customs, were banned. These taboos were respected with religious strictness.<sup>38</sup> The taboo also extended further in some instances, to actual sexual intercourse *stricto sensu*. In fact, in some primitive societies, it is even forbidden for brothers and sisters to shake hands or converse, while in other societies, fathers cannot remain alone in the house with their daughter/s. However, the strictest acts of avoidance involve a particular act of concealment. A girl might avoid her father by hiding when he passes by, or a man may hide himself voluntarily, and refuse to recognise his mother-in-law.<sup>39</sup> The sacred totem cannot be looked at in such contexts. It is so feared that even an “optical”/visual relationship has to be avoided.

It is possible to link this notion to Bentham’s panoptic design. The system described by Bentham is based on an optical relationship to power, which Foucault also explores, and which highlights the effects of panoptical architecture: “the major effect of the Panoptical: creates on the prisoner a conscious and permanent state of visibility that insures the automatic functioning of power”.<sup>40</sup> Furthermore, it became clear for Foucault “that the perfection of power [made] irrelevant its use”.<sup>41</sup> The idea of the automatic functioning of power fits more with the unconscious than with the conscious, with the symbolic position of the Father and his authority. Bentham wanted a power “visible and unverifiable”.<sup>42</sup> It is evident here that the “Panoptical is a machine to separate the pair to see–being seen”,<sup>43</sup> where the individuals inside the perimeter are always watched without ever seeing; the individuals (who have the power) are located in the middle, in a surveillance tower, and can see everything without being seen themselves. What is particularly interesting is that the notion of the appearance of

<sup>38</sup> S. FREUD, *Totem and Taboo, o.c.*, p. 10.

<sup>39</sup> *Ibid.*, p. 12.

<sup>40</sup> M. FOUCAULT, *Surveiller et Punir*, Paris, Gallimard, Tel, 1975, p. 234: “l’effet majeur du Panoptique: induire chez le détenu un état conscient et permanent de visibilité qui assure le fonctionnement automatique du pouvoir”.

<sup>41</sup> *Ibid.*, p. 234: “que la perfection du pouvoir tende à rendre inutile l’actualité de son exercice”.

<sup>42</sup> *Ibid.*, p. 235: “visible et invérifiable”.

<sup>43</sup> *Ibid.*, p. 235: “Panoptique est une machine à dissocier le couple voir-être vu”.



power shows an ideal form of power.<sup>44</sup> In a way, this is similar to what Freud describes in *Totem and Taboo* and what Lacan positions as A, the symbolic Father.

This is power seen at its source, as a magical *thing*, which is the primal element of the core organisation of primitive society. Hiding from it, because of the belief in its magical virtue, contributes to a fear of the totem. The visual link becomes crucial. But this magical thing goes deeper than the conscious idea of its power: what becomes important is its authority. The repressed thoughts imposed by fear, which includes, in the case of primitive societies, the avoidance of any link with the totem, visual or optical, represses the desire for the totem. What remains from the past in our present is the unconscious fear of power – the unconscious fear of the totem – because of the Father and his authority. In the case of a legal event, one may consider the second rule (incest), and particularly the optical connection. If the parties decide to go to trial (or *procès*), this taboo emerges and may take many forms. It particularly may operate as a deterrent, with the consequence of encouraging individuals to ‘stay in line’, to conform to the rules in order to avoid ‘facing’ trial, but it also creates fear of a legal event for the parties involved.

Lord Phillips’ narration of the behaviour of his first client illustrates this point perfectly: “I met my client for the first time in the corridor outside the court on the day that the Action was due to begin. 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 could not ‘face’ the judge and things were settled between counsels outside the courtroom. Ultimately, Lord Phillips concluded that “She was relieved to miss her day in court, but I was very disappointed to miss mine”.<sup>45</sup> The behaviour of Lord Phillips’ client confirms Lacan’s belief that the symbolic order is the one that cures. It initiates the creation of mechanisms that result in avoiding trial. Let us simply consider the story of Lord Phillips’ client and how, in common law, very few disputes end up at trial stage. Indeed, pre-trial actions operate to avoid the occurrence of the legal event.

To return to Oedipus, we know that King Oedipus transgressed the two taboos. He was both the incestuous rival of his father and his assassin. For Lacan, the Oedipal

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<sup>44</sup> *Ibid.*, p. 239.

<sup>45</sup> Speech by Lord Phillips of Worth Matravers, Chief Justice of England and Wales, “Alternative Dispute Resolution: An English Viewpoint”, India 29 Mars 2008. [www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf). Last accessed 30 June 2009.

identification relates to the paternal totem where guilt, aggressive behaviour, the killing of the father and the rivalry between brothers, the other male members of the hordes, structure the subject.<sup>46</sup> The Father, in the symbolic, orders and positions. The father is the place acting as foundation of human actions. The social pact created by the brothers' alliance the moment after the killing, the transcendence of aggression, each relate to the symbol and ultimately to the symbolic order. The apparatus created is consciously revealed, though it has always been present in our unconscious. The Oedipus complex links back to totems and taboos. The judge encompasses all the aspects of the totem, but because of the two "rules", it may be the case that the totem delimits a variety of situations based upon legal traditions.<sup>47</sup> In consequence, we face a variety of quality and quantities of totemic position/s.

### **The quality and quantities of totemic position/s**

A strict division between the two legal traditions can be traced by using Lacano-Freudian ideas. The organisation of the *civil* law trial can be considered as mono-totemic. The organisation of the *common* law trial can be seen as bi-totemic. This is one of the main differences in the legal events of these two legal traditions. Both contain the idea of a totem in their legal events but each operates differently and at different levels in the trial, or in the *procès*. There is a second totem in the common law legal event. In civil law, a second totem exists but is within the judiciary organisation, not within the legal event itself. I wish to analyse this point through what I consider to be two major variables here – which differentiate between the judge in common law and the judge in civil law – the quality and quantity of totems: the formation of the judge and the discourse of the judge.

### **Formation of the judge**

The recruitment and the administrative, sociological and politico-legal aspects of the judiciary show us where the judges are coming from, and how they are positioned within the myth of the separation of powers. In the two legal traditions, the formation of the judge is

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<sup>46</sup> J. LACAN, "L'agressivité en psychanalyse", in *Ecrits I*, Paris, Points, Seuil, 1999, pp. 100–123, esp. p. 116.

<sup>47</sup> It is necessary here to restrict my comments to Western Europe and to consider only the common law and germano-roman traditions, or civil law. I am not using the concept of major legal systems. Indeed, as recently exposed by Legrand and Samuel, we cannot consider common law as a "system", although we can apply the terminology of systems to what is found in the germano-roman context. P. LEGRAND and G. SAMUEL, *Introduction au Common Law*, Paris, La découverte, 2008, esp. p. 8. Here, I will use English law mainly as a prototype of common law, and French law as the prototype of the civil law system. I will use civil law hereinafter as a synonym of romano-germanic law.

significant in the design of the mechanism of rendering justice. For Guarnieri and Pederzoli, there are two basic models of judicial recruitment: the bureaucratic model corresponding to civil law, and the professional model corresponding to what happens in common law.<sup>48</sup> In common law, only experienced practitioners may become judges. It has a system of training based primarily on scholarly knowledge, with universities as the main providers for future judges' education.<sup>49</sup> The graduates then have to qualify as solicitors or barristers, and practice for a reasonable number of years before being allowed to become judges. It is particularly important to note at this stage that the legal team involved in a trial, judges and advocates, are similarly educated and speak the same language. That said, Woodhouse stresses that “the judicial appointment system in England and Wales has frequently been criticised on the grounds that it is secret and discriminatory”.<sup>50</sup> There is no distinction between judges and advocates, except the move from an “active” position of barrister/solicitor to the “passive” position of the judge as a referee. Like a monarch or a head of state in a parliamentary system of government, the judge, in the accusatorial system, does not participate. He acts as “an arbiter” and not as “a captain”. The judge represents and appears positioned as the totem. This position is emphasised by the “circulatory” method of recruiting the judges: judges come from the “horde”.<sup>51</sup> The judge here is the “father of the horde” – the Father. The younger figure wants to take his place and needs to *kill* him. The symbolic killing works as a revolution, in a situation similar to what Pareto describes as “the circulation of the elites”.<sup>52</sup> The younger will take the place of the older. In David's terms, the judge is the “heir of the practitioners”, *héritier des praticiens*; he acquires the symbolic position of “father–regulator”, the Law, the authority of the A, the Father, in the Oedipus complex.

If, in common law tradition, the judges' training academy is the bar,<sup>53</sup> in civil law tradition, judges are trained in special schools after a recruitment conducted amongst university graduates. But the training is strictly separated between the legal actors who will be on the side of the parties, defending or not, and the legal actor who will be on the side of the

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<sup>48</sup> C. GUARNIERI and P. PEDERZOLI, *The Powers of Judges: A comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2003, p. 20.

<sup>49</sup> See the four discourses of Lacan and particularly the “discours universitaire”, where the professor knows and the student does not, where the subject supposes that someone knows as a pre-requisite.

<sup>50</sup> D. WOODHOUSE, “The Law and Politics: More Power to the Judge – and to the People?”, *Parliamentary Affairs*, 2001, Vol. 54, pp. 223–237, esp. at p. 234.

<sup>51</sup> Judges meet and dine with the horde often, through the collegial rite of dinners at Inns. P. LEGRAND and G. SAMUEL, *Common Law*, o.c., p. 47.

<sup>52</sup> V. PARETO, *The Rise and Fall of Elites: An Application of Theoretical Sociology*, New Jersey, Transaction Books, 1991.

<sup>53</sup> P. LEGRAND and G. SAMUEL, *Common Law*, o.c., p. 47.

state – the judge. Furthermore, the judge is effectively a civil servant: they are there to serve the state, and ultimately the social structure, in accordance with their *curia regis* origin. The judge in civil law does not appear to be a totem similar to that found in common law. The only connection between the different actors of the legal team in the case of civil law is that of education. But the way the career of judges is organised (shaped by the civil service structure, itself conditioned by the weight of the authority and symbolism of “public power”) creates a flow through the system, between “lower-level (young) judges” and “higher-level (older) judges”.<sup>54</sup> In a way, the idea of the circulation of elites, and the totem reappears here but through a separate “bubble” within the mechanism. It will therefore have less affect on the condition of the *procès* than it has in the case of the trial.

In the process by which a person becomes a judge, the characteristics of the totem/s in both legal events are highlighted. In the trial, we can consider the trial itself as the first totem, and the judge as the second. In civil law, only the *procès* is a totem. The judge does not hold the second totemic position within the legal event but holds one outside it, within the civil service, and within the executive. This point may be demonstrated by the declaration that, in England, the judiciary is (seen as) independent, while in France, there is a constant wish for an independent judiciary. As stated by Lord Browne-Wilkinson in the famous case *In Re Pinochet*,

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).

In the table below, I have returned to the ideas developed so far:

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<sup>54</sup> Traditionally, young judges will work for lower courts after their initial training; they enter a bureaucratic career, being promoted on the basis of merit and experience. The head of state is supposed to protect the judges. Article 64, para. 1 of the Constitution of the Fifth French Republic states that the president is the “guarantor of the independence of the Judiciary” and that (para. 4) “judges may not be removed from office”.

<i>Common law, dual totem structure</i>	
<b>Trial/totem 1</b>	
<b>Judge /totem 2</b>	<b>Parties</b>
<b>Solicitors/Barristers</b>	

<i>Civil law, uni totem structure</i>	
<b>Procès /totem</b>	
<b>Parties</b>	

<i>Judge/totem</i>
<i>Young judges</i>

There are similar situations in both legal events but they have the particularities that I have developed here, and that are linked to the quantities of the totem/s. In addition, the differences seem to increase when we look at the discourse of the judge.

### **Discourse of the judge**

Derrida wrote that a phenomenological space is opened up in and by language, and particularly that “its legal value, the right of a distinction between fact and intentional law, depends entirely on the language”.<sup>55</sup> Language conditions the distinction between facts and law. But it also articulates the legal event, limiting it and defining it, as it defines, for Wittgenstein, the world.<sup>56</sup> The judge is positioned in relation to his discourse, which puts into action a practice of language constituting a social link between two actors. The first actor (agent) in the link will maintain a “truth” that necessarily determines him whenever he addresses the second actor (other). The second actor will only be able to respond by producing something dependent on the truth that determines the first. But this product cannot return to the ‘truth’; this perception structures the link between the two actors, as shown below:

<sup>55</sup> **J. DERRIDA**, *La Voix et le Phénomène*, 3<sup>rd</sup> ed., Paris, PUF Champs, 2005, p. 21: “sa valeur juridique, le droit à une distinction entre le fait et le droit intentionnel, dépend toute entière du langage.”

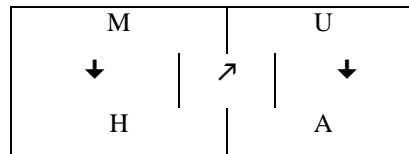
<sup>56</sup> “The limits of my language mean the limits of my world”. Para. 5. 6, **L. WITTGENSTEIN**, *Tractatus Logico-philosophicus*, Paris, Tel Gallimard, 1961, p. 86.

Agent	→		Other
	impossible		
↑	necessary		↓
	possible		
Truth	←		Production

In fact, on the basis of this schema, four discourses can be discerned, which depend upon four factors that create each discourse. In turn, the discourse of the master evolves towards the discourse of the analyst, passing the stage of the discourse of the hysteric and the discourse of the academic. This production can be deduced from the position of the four terms or elements constituting language: the master signifier S1, knowledge S2, \$ the (barred) subject and the “rest” – the object “a”, also found in the Lacanian explanation of the Oedipus complex. These symbols form the discourse of the master, a fundamental structure from which all other discourses derive, and I would like to develop this master discourse further, and that of the analyst, which are significant in the present context.

The discourse of the master follows  $\$ \rightarrow S1 \rightarrow S2 \rightarrow a$ . It is dominated by S1, that is, the master signifier (here the agent). Lacan named it the Law, *la loi*.<sup>57</sup> The Law (*la loi*) is the law (*le droit*). This Law is authorised by justice without ever having been labelled justice. S1 as the master signifier, the theoretical knowledge, imposes knowledge on S2 (here the other), the field of the slave. We could reasonably consider the position of the civil law judge as that situated within the discourse of the master. The judge in this schema *is* the Law. His position is deduced from the “truth” and the understanding that the other knows that he knows. The judge in civil law, in a central powerful position, sitting above the other actors, is the master. He is *la bouche qui dit le droit*, “the mouth” that speaks or voices the Law. When he speaks, his words are final. But he does not speak for himself, he speaks “on behalf of”; he represents society by his authority and what he says is not neutral. After a complete cycle, positioned by the discourse of the hysteric  $a \rightarrow \$ \rightarrow S1 \rightarrow S2$  and of the academic  $S1 \rightarrow S2 \rightarrow a \rightarrow \$$ , after a revolution the discourse of the analyst appears.

<sup>57</sup> J. LACAN, *Séminaire XVII, L’Envers de la Psychanalyse*, Paris, Seuil, Champs Freudien 1991, p. 48.



The discourse of the analyst is formulated as follows:  $S2 \rightarrow a \rightarrow \$ \rightarrow S1$ . Object “a” (the little other) represents here the substantial discourse, that is, the effect of rejection of the discourse. The position of the agent here is one of neutrality. The other is the subject that looks at the neutral agent voicing the “truth” because the agent knows, from the knowledge, S2. We know that the analyst in psychoanalysis is someone who is positioned as neutral. The subject is supposed to believe what the agent says, because the agent, the analyst here, is supposed to know.<sup>58</sup> This position also corresponds to that of the judge in common law. The judge in that context does not interfere. He is the totem and he is not the centre of the dialogic operation of the legal event. The “production”, ultimately, is the knowledge that passes through precedents. This confirms the idea of two opposed ontologies: that of statute law and that of case law. As explained by Legrand, “the typical English decision *is* the law and it is independent from any [statute-law]”; moreover, case law does not aspire to be considered as statute law. In the meantime, in France, “the decision comes from inside the law”, “it wants to be ... the law”.<sup>59</sup> This contributes to a different positioning of the judge in the legal event, depending on “where we are”, in the trial or in the *procès*. After having looked at the differences in the positions of judges, I will now look at what conditions their specific positions.

### Three elements conditioning the symbolic position of the judge

I consider here three crucial elements conditioning the position of the judge: the perception of the function of the judge, the idea of judging “in the name of” and, finally, the important question of appearance.

#### 1- The perception of the function of the judge

What differentiates civil from common law may well be simply the different perceptions of the function of the judge. It is generally understood that in common law,

<sup>58</sup> S. ZIZEK, *How to Read Lacan*, London, Granta books, 2006, p. 29.

<sup>59</sup> P. LEGRAND, *Droit Comparé*, 2<sup>nd</sup>, Paris, PUF, 1999, p. 111: “le jugement anglais typique *est* le droit et il l’est indépendamment de toute loi” au statut de laquelle il n’aspire en rien” and “la décision intervient comme de l’intérieur de la loi”, “elle se veut ... la loi”.

judges are perceived as being the lawmakers, while in civil law they are solely the interpreters of statutes. Indeed, Dicey wrote that “English law is in reality made by the judges”,<sup>60</sup> while Cardozo developed the idea of “the judge as legislator”.<sup>61</sup> That said, Dicey considers judicial legislation as subordinate legislation,<sup>62</sup> while Cardozo was commenting on judge-made law as being “secondary and subordinate to the law that is made by legislators”.<sup>63</sup> Common law is perceived as being made by judges and it seems that an important part of what is considered to be the law originates from the judge. In addition, it is said that judges only proclaim what has always been in *existence* but never revealed before: when something is revealed, it becomes a common law principle. This vision merges well with psychoanalytic theory: a principle was unconsciously there but needed to be re-discovered. It was repressed by the social structure that one day needed it because of a (social) affect – a moment in history when a *différend* was opposing individual members of society. There was no better solution other than that deeply rooted in history.<sup>64</sup> It was for the judge to bring it to light again. The “judge–psychoanalyst”, through the use of transference, extracts from the “built-truth” of the parties what has always unconsciously existed as a legal principle. According to Freud, the unconscious is the social, or what Lacan considers, thanks to Levi-Strauss, to be language, the language of the Other, that is, the Law of the Father.<sup>65</sup> The repressed principle thus revealed may be linked to the definitions provided by the two psychoanalysts. The principle is the social. Law, and particularly case law, has a social dimension that statute law does not share. There is a practical aspect to one that contrasts with the theoretical aspect of the other. Language contributes to the expression of the principle. The judge, through the legal event, expresses what was hidden. Also, a case, if “treated” at the highest level of a Supreme Court,<sup>66</sup> will become so powerful that it will bind future decisions. Judicial precedents represent work at a conscious level. The example of the Law Lords’ speeches which are oral presentations (opinions) may illustrate this point. The judge “tells us”, and thus 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 state it within the limit of judicial precedents. Dicey reiterates this message clearly: “[our judges’] habit of deciding one case in accordance with the principle, or

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<sup>60</sup> A. V. DICEY, *Law of the Constitution, o.c.*, p. 58.

<sup>61</sup> B. N. CARDOZO, *The Nature of the Judicial Process*, New Haven, Yale University Press, 1921, pp. 103–141.

<sup>62</sup> A. V. DICEY, *Law of the Constitution, o.c.*, p. 58.

<sup>63</sup> B. N. CARDOZO, *The Nature of the Judicial Process, o.c.*, p. 14.

<sup>64</sup> It is not clear whether history here is considered to be social history or the personal history of the judge, although the two may in some ways be linked.

<sup>65</sup> F. CHAUMON, *Lacan, le Sujet et la Jouissance*, Paris, Michalon, 2004, p. 18.

<sup>66</sup> This is likely to happen to have such a capacity and the authority of exposing a (legal) principle.



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”.<sup>67</sup>

In civil law, parliaments and legislative chamber/s have the function of law-making bodies. The judge cannot change or even “touch” the mighty ‘mythical’ law. The French revolution formed the basis of this myth, this *parole dépolitisée*,<sup>68</sup> through article 6 of the Declaration of the Rights of Man and of Citizens of 1789: “law is the expression of the general will” that implements Rousseau’s ideas. Although it may be argued that judges have always been involved in normative creation (particularly where statute is “silent”, or in specialised areas like *droit administratif*<sup>69</sup>), the function of the judges as legal actors is to interpret the law. Judges are working on meta-language, interpreting the double semiotic relation that creates the myth of the law.<sup>70</sup> It is a strong statement of Article 5 of the French civil code, for example, that “Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions”. Judges in civil law are not in a symbolic position that can be considered as strong as that of their colleagues in common law. The rules they apply have been decided prior to their action and they can only respect them. The rules here are conscious, although nothing discourages any individual from feeling that, unconsciously, the lawmaker has to respect various principles in his legislative work. The most authoritative principle is probably article 4 of the civil code that states, “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”. Judges are bound; they have no choice but to interpret. This may serve to emphasise the position of the judge in civil law. Then again, the judge here does not participate to the same extent or to the same level of totemisation as their common law counterpart. Also, the judge relies on another interpretative authority, positioned outside the totem of the civil law trial, namely the doctrine (which Samuel calls a strong corps of professors), constraining judges through a legal science they develop, which is influenced by logic and mathematics.<sup>71</sup> The judge in civil law interprets but never creates. He follows principles fixed by a State “super ego” that a member of the society may accept to live in or leave. The judge has to consider whether a member of this society has followed the rules, or

<sup>67</sup> A. V. DICEY, *Law of the Constitution, o.c.*, p. 58.

<sup>68</sup> R. BARTHES, *Mythologies*, Paris, Seuil, 1957, p. 217.

<sup>69</sup> A. V. DICEY, *Law of the Constitution, o.c.*, pp. 378–380, 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’”.

<sup>70</sup> *Ibid.*, pp. 183–190.

<sup>71</sup> Samuel considers that English judges were never constrained to a legal science, “thanks to the absence” of such a *corps of professors*: G. SAMUEL, “Epistemology and Comparative Law”, in M. VAN HOECKE (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, Hart, 2004, p. 72.

whether they have put themselves in a position of guilt, while the State has institutionalised reparation of wrongdoing/s by outlaw/s.

## 2- Appearance and protection

Appearance concerns the ceremonial aspect of the judiciary: the ‘accessories’ of the judge’s uniform and the place where justice takes place. These factors are crucial to the symbolic positioning of the judge. In addition, appearance creates a distance that is, also, protected.

### 2.1 Appearance and the creation of distance

The parties can see the physical reality of the judicial machinery before them. It operates on at least on two levels: the building’s architecture and the uniform of the actors. According to Garapon, “the first act of justice is to delimit a place, to contain a space adequate to its happening”,<sup>72</sup> while the uniform, costume, *robe* or gown, “hides a double body: the body of the person wearing it and the invisible body of the social”.<sup>73</sup> The decorum and the “dance” of the actors produce an impressive picture. But is the process of justice either good or beautiful? It is worth noting that what was important in establishing the Supreme Court in the UK was in fact the creation of an independent court, physically separate from the House of Lords, a place with its own building.<sup>74</sup> At every level, justice has to be seen to be done. The judge will judge in a place where he is identified as a symbolic figure, as the Father, as the face of the law.<sup>75</sup>

In both traditions, the judge in the space of the legal event has an elevated position designed to show power and demonstrate authority. In civil law the judge is physically the central point of reference. The actors, jury, accused and lawyers organize themselves around the judge in a triangle. In common law, the judge holds a central position but the actors are not organized around him. The judge does not appear as the central point of reference here. The jury is positioned to one side and lawyers directly address the jury. As Garapon notes, two axes of communication exist between the lawyers of both parties and the witnesses, and

<sup>72</sup> A. GARAPON, *Bien juger, o.c.*, p. 23 : “[l]e premier geste de justice est de délimiter un lieu, de circonscrire un espace propice à son accomplissement”.

<sup>73</sup> *Ibid.*, p. 83: “couvre un double corps: le corps propre du personnage qui le porte et le corps invisible du social”.

<sup>74</sup> The Constitutional Reform Act 2005. See also Lord Falconer’s comments: “[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.

<sup>75</sup> J. LACAN, “Fonction et Champ de la Parole et du Langage”, *o.c.*, p. 276.

between the lawyers and the jury.<sup>76</sup> In this respect, very little takes place via the judge, while in France, everything takes place via the judge. If we think about this idea together with the idea of the totem developed earlier, civil law judges (who have more power but “represent” less) do not position themselves as totems, while common law judges (who have less power but “represent” more), appear as totems. Let us remember that the totem is feared. It creates “obsessional prohibitions” that proscribe individuals to do certain things, starting by not touching, or looking at, the totem.<sup>77</sup> From physical contact to eye contact, the physical position of the judge in a courtroom does (or perhaps at least should) emphasise the difference between the totemic positions: the judge in common law is in a position that obliges the other actors of the legal event to avoid looking at him because he is the totem, and as such is taboo.

The symbolic in the building imposes the solemnity of the State, and its power, through authority, which is linked with the symbolic of the uniform of the judges. Coloured robes and wigs are key features of current court dress.<sup>78</sup> Wigs are particularly “viewed as a powerful symbol that represents the long history of the British justice system”.<sup>79</sup> Silk robes with large quantities of ermine, which were traditionally royal furs, worn on the robe of the first president of the French *Cour de cassation*, are also elements of “legal costume” that are similar to theatrical dress: “its function is to be seen”.<sup>80</sup> As stated by Meltzer, “the apprehension of beauty contains in its very nature the apprehension of the possibility of its destruction”.<sup>81</sup> This theatricality of justice contributes to the creation and the “entertainment” of a necessary distance between the legal actors in the legal event. It ultimately contributes to the authority of the judge–Father and emphasises the symbolic position of the judge. Indeed, “the costume of the ritual makes those who wear it representatives”.<sup>82</sup> Representation, because of the distance it creates, accentuates the symbolic as having the capacity to represent. The costume of the judge is therefore a significant matter. The judge is the judge because he wears something that differentiates him from the others. The uniform allows the

<sup>76</sup> A. GARAPON, *Bien juger, o.c.*, p. 153. See also his comment on American judges, pp. 149–174.

<sup>77</sup> S. FREUD, *Totem and Taboo, o.c.*, p. 27.

<sup>78</sup> 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>> (last accessed 9 August 2008).

<sup>79</sup> 4.4.1.p. 14. One comment was that “the wig signifies that justice is being done”. This needs to be compared to what is said in *In Re Pinochet*.

<sup>80</sup> A. GARAPON, *Bien juger, o.c.*, p. 72 : “sa fonction est d’être vu”.

<sup>81</sup> D. MELTZER, “The Apprehension of Beauty” in *The Apprehension of Beauty*, Strath Tay, Clunie Press, 1988, p. 6.

<sup>82</sup> A. GARAPON, *Bien juger, o.c.*, p. 94 : “[l]e costume rituel fait de ceux qui le portent des représentants”.

judge to be identified as a judge and to identify himself as a judge. It functions through the legal event as a temporary show of superiority of the social over the individual.

If we go back to a comparison of traditions, it could be said that in common law, the relationship between the architecture and the dress code and, as a consequence, the symbolic role of the judge, integrates the idea that the judge is the figure that symbolises the existence of the social structure. This can be seen in the light of the notion of ego ideal. In civil law, the judge is not seen as independent. It seems that the switch from the king to the judge as the source of justice after the French Revolution made the judge an element of the super-ego that became the “new” State. In both situations, the parties can, in an unconscious way, know that the judge is there to correct, cure and rectify matters. The judge has an “orthopaedic” function because he symbolises what needs to be.<sup>83</sup>

## 2.2 Protection against the failure of appearance

One may consider aggression committed against judges and whether or not this relates to the presence or absence of a specific apparatus, both ceremonial and uniform. The example of the stabbing of a judge in Metz on 5 June 2007, in the North East of France will illustrate this point. The judge was serving in his office and was wearing a normal suit. A judge not wearing robes does not represent society in the same way as one wearing them does. One could argue that such a judge does not represent at all: there is a lack of distance, no symbolic, no authority. The totem is not protected by the horror of parricide. As mentioned by Lucien, who collected significant statistics on this matter, attacks against judges in courts constitute the negation of the symbolic of the judge.<sup>84</sup> In order to promote the symbolic position of the judge, a special instrument is in place, which affords them a measure of “extra protection”.<sup>85</sup> In the UK, the ‘instrument’ of contempt of court matches the French Criminal Code provisions on offences against the authority of justice (S. III). The type of contempt most relevant to the idea of the totem (through the visual taboo) is that concerning the taking of photographs, or making or attempting to make any portrait or sketch of a justice or a witness in, or a party to, any proceedings before the court, either in the courtroom or its precincts

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<sup>83</sup> In common law, parties in an egoist dialogue create a monolithic dogmatic truth with their council, which they will expose to the judge. The judge will declare the “best truth”, after the confrontation of the monologues in a dialectical fashion. In civil law, the judge is there to create the truth in correlation with the “super ego” state.

<sup>84</sup> A. LUCIEN, *Médiation et modernité, Approche communicationnelle de l'institution judiciaire*, USTV, Thesis, 2007, esp. p. 241.

<sup>85</sup> M. K. ADDO, “Are Judges beyond Criticism under Article 10 of the European Convention on Human Rights?”, *ICLQ*, 1998, Vol. 47, No. 2, pp. 425–438, esp. at p. 429.

(Section 41, Criminal Justice Act 1925).<sup>86</sup> The most serious offences are the *outrages à magistrature* as stated in article 434–24 of the code.<sup>87</sup> Here, criticisms of the judiciary are considered to be against the symbolic position of the judge. In addition, article 434–25 highlights the function of this “extra protection”. Everything “liable to undermine the authority of justice or its independence” has to be fought against. These are reminders of what lies behind the figure of the judge – “power”, authority, society.

### 3- Judging “in the name of”

Justice may be seen to be done in the name of (*au nom de*) the sovereign, the people or the monarch.<sup>88</sup> This is a strong reference to the paternal figure of the judge, at the level of the symbolic Father, where the name of the father–Father (*nom-du-père*) becomes the severe father–Father (*père severe*). Indeed, for Lacan, “It is in the *name of the father* that we have to find the help of the symbolic function that, since the beginning of history, identifies his person to the face of the law”.<sup>89</sup> Legendre develops this point by looking at the law of reason and the law of the father, explaining that it is two sides of the same notion, a fundamental reference to the fundamental great narrative “to select, to distinguish, to separate”.<sup>90</sup> *In the name of* therefore refers to the big Other, the place of the signifier, the place of language, where the subject “receives” his own message inverted.<sup>91</sup> This takes place within the symbolic order, location of the big Other.<sup>92</sup> *In the name of* is in fact the operation by which we are asking a third party to be the reference, the authority, the Law. This is something that the child does, when positioned in front of a mirror. The child will look towards the person that

<sup>86</sup> [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1925/cukpga\\_19250086\\_en\\_3#pt3-l1g31](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1925/cukpga_19250086_en_3#pt3-l1g31). Last accessed 7 July 2010.

<sup>87</sup> Article 434–24 considers abuse by means of words, gestures or threats, written documents or pictures of any type not publicly available, or the sending of any article to a judge or prosecutor, a juror or any other member of a court acting in the course of, or on the occasion of, the discharge of his office, and liable to undermine his dignity or the respect owed to the office which he holds. Article 434–25 takes into account the attempt to publicly discredit a court’s act or decision by actions, words, documents or pictures of any type, in circumstances liable to undermine the authority of justice or its independence.

<sup>88</sup> I will not discuss here the legitimacy of one over the other. The issue is that of identification as it is created by the “in the name of”. As noted by Richard, the Italian Constitution refers in article 101, para.1 to justice done in the name of the people, to highlight popular sovereignty; while previously, justice was rendered in the name of the King: **P. RICHARD**, *Introduction au Droit Italien*, o.c., n96, p. 120. In France, justice was considered to be the monopoly of the monarch (sovereign) and was done in his name. When sovereignty “moved” to the (sovereign) people, justice was done in the name of the new sovereign. There is always the need for justice to be done in the name of the sovereign.

<sup>89</sup> **J. LACAN**, “Fonction et Champ de la Parole et du Langage”, o.c., p. 276 : “C’est dans le nom du père qu’il nous faut reconnaître le support de la fonction symbolique qui, depuis l’orée des temps historiques, identifie sa personne à la figure de la loi”.

<sup>90</sup> **P. LEGENDRE**, *Le Crime du Caporal Lortie*, o.c., p. 153 : “faire le trier, distinguer, séparer”.

<sup>91</sup> See also the opinion of **S. ZIZEK**, “The Big Other Doesn’t Exist”, *Journal of European Psychoanalysis*, 1997.

<sup>92</sup> **S. ZIZEK**, *How to Read Lacan*, o.c., p. 9.

carries him, “the move of the child in front of the mirror, turning towards who carries him, looking towards the witness for the recognition of the image”.<sup>93</sup> In fact, “it is enough to understand the mirror stage *as an identification*”, that is, according to Lacan, a transformation within the subject occurs, when he assumes his image after the intervention of the Father.<sup>94</sup> The judge is, for the parties, in a position of identification with the ego ideal, the (ideal) model. In civil law, this identification takes place at a conscious level. In common law, the idea is that judgements of lower courts are implicitly made “in the name of”, while higher courts are “merely” committees of the legislature, and therefore acting “in the name of”.<sup>95</sup> This brings us back to the consideration of language and also to some consideration of how legal traditions relate to a broader level of oral and written traditions.

### *The civilisation of the oral tradition and the civilisation of the written tradition*

Whether a country employs spoken or written words, the way in which judicial matter is expressed refers to that country’s traditions. The northern part of Europe, with its customary laws, deals with oral transmissions of knowledge, “through the accumulation of precedent”, giving birth to “a body of common experience” through memory.<sup>96</sup> In the south, the civil law tradition, rooted in chthonic and talmudic traditions, in Glenn’s terms, goes even further back in terms of its ‘written roots’ than the Roman Empire, which developed a written legal tradition symbolised by the development of the *codex*, or codification.<sup>97</sup> The consequences are multiple and revolve around the idea of secrecy and transparency.

First, let us consider the differences between inquisitorial and accusatorial (or adversarial) systems. According to Guarnieri and Pederzoli, “[w]hile common law adversarial systems are led by lawyers, continental systems are invariably led by the judge”.<sup>98</sup> In common law, accusatorial or adversarial mechanisms are characterised by a logic whereby “each side

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<sup>93</sup> J. LACAN, “Remarque Sur le Rapport de Daniel Lagache” in *Ecrits 2*, Paris, Seuil, 1999, pp. 155–156: “le geste par quoi l’enfant au miroir, se retournant vers celui qui le porte, en appelle du regard au témoin (...) la reconnaissance de l’image”.

<sup>94</sup> J. LACAN, “Le Stade du Miroir Comme Formateur de la Fonction du Je”, in *Ecrit 1*, Paris: Seuil, 1999, pp. 92–100, p. 93: “[i]l ... suffit de comprendre le stade du miroir comme une identification”.

<sup>95</sup> Indeed, the HL as appellate committee is similar to the French or Italian constitutional court. Then again, the creation of the new UK Supreme Court may modify this symbolic.

<sup>96</sup> P. GLENN, *Legal Traditions of the World*, 3<sup>rd</sup> ed., Oxford University Press, 2007, p. 125. According to Glenn, there is a written Torah and an oral Torah that has become written, pp. 238–239.

<sup>97</sup> *Ibid.*, *Legal Traditions of the World*, p. 125.

<sup>98</sup> C. GUARNIERI AND P. PEDERZOLI, *The Power of Judges, o.c.*, p. 129.

is responsible for putting their own case”.<sup>99</sup> In civil law, inquisitorial mechanisms need a special actor to conduct the legal event – the *magistrat instructeur*, the *juge d’instruction*, the investigating judge. As indicated under article 49 of the French criminal procedure code, “The investigating judge is in charge of judicial investigations”. He is therefore the only person who, under article 81 of this code “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”. Moreover, it is down to the investigating judge to decide whether or not an offence occurred, and whether or not there will be a *procès*.<sup>100</sup> In fact, the start of the legal event depends upon the investigating judge. If he accepts the need to initiate the *procès*, he will conduct the investigation. The investigating judge acts as the facilitator of the truth-process mentioned earlier, which Badiou refers to. He appears as a guarantor of independence (it is supposed that there should be no pressure from one party on another because of the presence of the investigating judge in terms of the conduct of investigations) and as a guarantor of the rule of law (as specified in article 81 of the criminal procedure code “in accordance with the law”). Then again, one may comment on the inquisitorial characteristics of the procedure itself. The truth is constructed by an “inquisitor-made-judge” (or a judge-made inquisitor), and the function has been widely criticised.<sup>101</sup> It is well known that in common law, under the accusatorial (or adversarial) system, parties and advocates build and reveal a partisan truth (via an internal dialogue that takes place during the “opinion”) that becomes the judicial truth, or a “justice-reality”. In civil law, parties do not have access to this possibility. The function of the judge may be, as mentioned above, to create or expose the law, to confirm or “tell” the truth, or at least to define what is the truth. In common law, the role of the judge is, from his symbolic position, power and authority, to determine which truth, as exposed by the parties, will become the reality-justice. In civil law, the judge has to

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<sup>99</sup> C. ELIOT and F. QUINN, *English Legal System*, 7<sup>th</sup> ed., London, Pearson, 2006, p. 361.

<sup>100</sup> Article 85: “Any person claiming to have suffered harm from a felony or misdemeanour may petition to become a civil party by filing a complaint with the competent investigating judge”. Article 86, para 1: “The investigating judge orders the complaint to be sent to the district prosecutor in order that this prosecutor may draft his submissions”.

<sup>101</sup> The institution of *juge d’instruction* is currently under threat. President Sarkozy has announced that he is considering changing it to a *juge de l’instruction*, a function that could be non-independent: M. Sarkozy Envisage de Supprimer le Juge d’Instruction, *Le Monde*, 6 February 2009. [http://www.lemonde.fr/politique/article/2009/01/06/m-sarkozy-envisage-de-supprimer-le-juge-d-instruction\\_1138259\\_823448.html](http://www.lemonde.fr/politique/article/2009/01/06/m-sarkozy-envisage-de-supprimer-le-juge-d-instruction_1138259_823448.html). Last accessed 25 Feb. 2009. See also the report on the malfunctioning of the investigation in the d’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 Eviter leur Renouveau” <[http://www.assemblee-nationale.fr/12/rap-enq/r3125-t1.asp#P871\\_183359](http://www.assemblee-nationale.fr/12/rap-enq/r3125-t1.asp#P871_183359)>, 6 June 2006. Last accessed 9 August 2008. Germany and Italy have, for instance, transferred the powers granted to their investigating magistrate to the public prosecutor in order to avoid potential conflict between the functions of investigator and judge.

create the truth and expose it to the parties in accordance with the mono-totemic structure. In addition, the trial is, in common law, a verbal (or at least part-verbal) exchange between parties, while the *procès*, in civil law, is a written (or at least part-written) exercise. The role of the judge is therefore very different:

The role of the judges in the adversarial system is in several ways more passive than that of the judge in the inquisitorial systems, where in the former the judge acts as an important observer and final arbiter, and in the latter the judge acts as a more active seeker of truth and elicitor of information.<sup>102</sup>

Fundamentally, what separates the two legal traditions are supposedly the mechanisms of resolution, as they relate to oral and written traditions. The trial differs from the *procès* primarily because of the process itself of conducting the legal mechanics of exchange. The point of reference, here, is the social structure. The accusatorial or inquisitorial system is defined by how society wants the operation to be conducted. In common law, society seems concerned the mechanism providing the actions and the ‘freedom’ given to the parties. In civil law, society conducts the operation with something akin to inquisition, by restricting the freedom of the parties. It is interesting to note that in most European countries, France included, “the entire criminal procedure, up to sentencing, remain[s] secret”.<sup>103</sup> That said, there is one major exception in the case of England, which highlights two major points. Firstly, in civil law, where the organisation of the legal event is inquisitorial, the procedure is carried out in secret. It will condition and be conditioned through the use of writing, because “the form of the procedure, [is] written and secret”.<sup>104</sup> Indeed, article 11 of the French criminal procedure code states, “Except where the law provides otherwise and subject to the defendant’s rights, the enquiry and investigation proceedings are secret”. That is to say, it is secretive towards and from the public, to avoid disorder in and from the masses or the people, and secretive towards and from the accused, who has no information about what is happening until sentencing.<sup>105</sup> Prior to the French Revolution, establishing the truth was a royal prerogative and the King of France was the exclusive source of justice. After the Revolution, only judges had the exclusive right to establish the truth. The judge, during the “inquisition”, the questioning, is assigned all power to “discover” (the truth). The truth dresses in the

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<sup>102</sup> P. J. VAN KOPPEN and S. PENROD, *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*, Berlin, Springer, 2003, p. 184.

<sup>103</sup> M. FOUCAULT, *Surveiller et Punir, o.c.*, p. 44: “En France, comme dans la plus part des pays européens [in civil law major system] (my emphasis) – à l’exception de l’Angleterre - toute la procédure criminelle, jusqu’à la sentence, demeurait secrète”.

<sup>104</sup> *Ibid.*, p. 45: “La forme secrète et écrite de la procédure”.

<sup>105</sup> *Ibid.*, p. 44.



clothing of the King (and somehow of the State): it is sacred. According to Foucault's accounts of the process in France, "the investigation [is] an authoritarian research of a recorded and attested truth", whereby "the sovereign power assume[es] the right to establish the truth via a number of precise techniques",<sup>106</sup> which were imposed by the King. The process "was imposed on the old accusatory justice, but by a process coming from the top".<sup>107</sup> In civil law, the judge makes all the decisions from beginning to end. It is never a dialogue but rather an intense monologue built on questioning the parties. In common law, the judge does not interrogate or question the parties but leaves this to the advocates: he must appear as a neutral operator, a *referee*,<sup>108</sup> or an analyst.<sup>109</sup> The parties are in fact opposed in a dialectic relationship. They expose their ideas in a confrontational relationship. One party will expose its own truth, then the other will do the same. Because the parties do not share the same language,<sup>110</sup> they can only access a level of dialogue with their lawyers. They are in a stage of what Derrida terms 'negotiation',<sup>111</sup> which results in a dialogue among the parties that is transformed into a partisan monologue, dialectically opposed, leaving a symbolic place for a Father–judge who, in psychoanalytic terms, represents. The judge is clearly in a symbolic position; he is the Law, showing the solemnity of the power of justice by his authority. Secondly, in common law tradition, where the organization of the legal event is accusatorial, the procedure is open and verbal. Here, we are in a dialectic relationship between two parties, in the middle of a confrontational, or oppositional, relationship. Parties expose their views. The (monologue) truth A is exposed by a legal team and so is the (monologue) truth B. From these monologues, and because the aim is to find which one is going to win, the relationship becomes dialectical. The judge appears here as an arbiter. He is in a position of neutrality and

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<sup>106</sup> *Ibid.*, p. 262: "[l]'enquête comme recherche autoritaire d'une vérité constatée ou attestée", "le pouvoir souverain s'arrogeant le droit d'établir le vrai par un certain nombre de techniques réglées".

<sup>107</sup> *Ibid.*, p. 263: "s'est imposée à la vieille justice accusatoire, mais par un processus venu d'en haut".

<sup>108</sup> C. J. SPINOSI, "Comment Juge le Juge Anglais?" in *Droits, la fonction de juger*, Paris, PUF, 1989, p. 57.

<sup>109</sup> Or retiring, disappearing, like the narrator of the stolen letter, *la lettre volée* (l'exclusion neutralisante du narrateur) : R. MAJOR, *Lacan avec Derrida*, Paris, Flammarion, 2001, p. 54.

<sup>110</sup> This does apply to lawyers because they speak the same legal language.

<sup>111</sup> J. DERRIDA and P. J. LABOUSSIERE, *Alterités*, Paris, Osiris, 1986, p. 85. Negotiation may be transferred in legal terms to an "a-trial" situation that does not exist in civil law. ADR, for example, or pre-trial action, contemplates a resolution of the *différend* before entering the trial totem. See also the comments of Lord Phillips on his first case: "That was my first lesson in the merits of alternative dispute resolution. It avoids the trauma of court proceedings. If, like my client, you are not prepared to undergo that trauma at any price, then there is no alternative to alternative dispute resolution, and in the first thirty years of my life in the law, the only form of ADR was negotiation. Any sensible person who finds himself party to a dispute will wish to resolve it, if possible, by negotiation. Over 90% of actions that are commenced in England end in a negotiated settlement before trial": speech by Lord Phillips of Worth Matravers, Chief Justice of England and Wales, "Alternative Dispute Resolution: An English Viewpoint", India 29 Mars 2008. [www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf). Last accessed 30 June 2009.

does not interfere. He observes and watches. He is simultaneously present and absent.<sup>112</sup> The judge “represents” and as a symbolic actor will show, within a specific ceremonial ritual, how solemn is the force of justice, in the name of the Monarch (Her Majesty’s Court Service).<sup>113</sup>

After demonstrating here the many differences between judges in common and civil law, I would like to analyse some of developments that tend to soften these differences, which may be perceived as diminishing them.

### *A dichotomy softening?*

For Levinas, “[the philosophy of Hitlerism] questions the very principles of civilization”.<sup>114</sup> After the Second World War, the idea was to build bridges between the countries that fought not only between 1939 and 1945, but also during the preceding centuries. Many developments arose from this and throughout Europe the transnationalisation of principles took place through the European Convention of Human Rights and Fundamental Freedoms (therefore, as Levinas put it, there was a “folding back” towards civilisation).<sup>115</sup> It could be said that the ECHR is linked to what Levinas describes as “the spirit of freedom” or “a conception of human destiny”,<sup>116</sup> and what Badiou considers to be an “immense ‘return to Kant’”,<sup>117</sup> with a presupposition that “‘Human rights’ are rights to non-evil”.<sup>118</sup> The preamble of the ECHR presents us with the idea that governments in Europe are like minded, sharing both a common heritage and the Rights of the Universal Declaration. These can be considered as an illustration of the move towards “non-evil”:

the Governments of European countries which are like-minded and *have a common heritage* (my emphasis) of political traditions, ideals, freedom and the rule of law [are] to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.

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<sup>112</sup> Perhaps this can be put into perspective with the essay of **S. FREUD**, “Beyond the Pleasure Principle” *SE 18*, pp. 14–15, as explained by Lacan in J. Lacan, “Fonction et Champ de la Parole et du Langage”, *o.c.*, p. 317. The little boy, a nephew of Freud, plays with a ball while his mother is away. The presence and absence of the object develops into another level, through language. It moves to the symbolic. See also **J. DERRIDA**, *La voix et le Phénomène*, *o.c.*, p. 9 : “le langage est bien le médium de ce jeu de la présence et de l’absence”.

<sup>113</sup> Indeed, The Crown has been responsible for the judiciary apparatus for 900 years.

<sup>114</sup> **E. LEVINAS**, “Reflections on the Philosophy of Hitlerism”, *Critical Enquiry*, 1990, Vol. 17, at p. 64.

<sup>115</sup> Herein after referred to as ECHR.

<sup>116</sup> **E. LEVINAS**, “Reflections on the Philosophy of Hitlerism”, *o.c.*

<sup>117</sup> **A. BADIOU**, “The Problem of Evil”, *o.c.*, p. 8. The return to Kant while Lacan proclaims the return to Freud (Lakant?).

<sup>118</sup> *Ibid.*, p. 9.

This move has been widely acknowledged. The two countries I have used in this article, the UK and France, were the founders of the Council of Europe and instrumental in the formation of the ECHR. Hope for a community created by both legal traditions was therefore voiced in the 1950s. Although the notion of “non-evil” is present throughout the convention, rights like those protected by article 6 are of importance for the legal event. It specifies that “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 developed a transnational implementation, which has the effect of abolishing the distance between the legal traditions described in this article. This transnational “tool” has been reacted against – almost resisted – by individual nations: there were, for instance, 24 years between signature and ratification in France, and while the UK ratified it 3 years after the signature, it was necessary to wait the end of the twentieth century to have it fully operational.<sup>119</sup> Even recently, concerning the incorporation of the ECHR in the UK through the Human Rights Act 1998,<sup>120</sup> Sir Carnwath, as Chairman of the Law Commission, expressed his regret as a public lawyer not to have been able to use the terms of the ECHR. He stated that the HRA should have been passed when the right of individual petition was accepted in 1965–1966. He commented that if not only the right to individual petition but the entire Convention had been passed earlier, “English judges and lawyers would have been able to influence much more directly the development of Convention law in Strasbourg”.<sup>121</sup> This statement implied that while initiating the ECHR, the UK had departed from it, somehow, until 1998/2000. Despite the shared values of the two legal traditions, then, the systems were characterised by many differences. What was meant in the preamble was a prescriptive will. There was either an equilibrium point between the two traditions to be found, or a more “violent” idea or belief that one tradition would give way to elements of the other.

For example, the creation of a *jus commune* associated with general principles of law pushed French scholars to recognise, while writing about the ECHR, that “with such interpretation methods, we are far from the traditional French legal reasoning; that is a

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<sup>119</sup> <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG>. Last accessed 15 July 2010.

<sup>120</sup> [http://www.opsi.gov.uk/acts/acts1998/ukpga\\_19980042\\_en\\_1](http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1). Last accessed 15 July 2010. Hereinafter referred to as HRA 1998.

<sup>121</sup> R. CARNWATH, (Sir), “ECHR Remedies from a Common Law Perspective”, *JCLQ*, 2000, Vol. 49, No. 3, at p.527.

pragmatic Anglo-Saxon demarche that we need to become familiarised with”.<sup>122</sup> Scholars and practitioners in both traditions seem to recognise the ECHR as something valuable and important but, at the same time, as something that changes their way of thinking and operating, to the extent that in each tradition there is fear of a loss of influence. In Garapon and Allard’s terms, in Europe, the two legal traditions were mixed in the “laboratories” constituted by the ECHR. They see this as a direct result of the general globalisation process. Their conclusion is that it appears to favour common law rather than civil law.<sup>123</sup> In that respect, at the level of the legal event, trial and *procès*, it seems to be civil law that “gives way”. Some changes need to be highlighted. For instance, during a *procès* the hearing (*audience*) has to be public in order to comply with the ECHR. This departs from the tradition of the inquisitorial mechanism, and the importance of secrecy in the civil tradition, and appears to be a move towards organising a legal event that resembles a trial. Indeed, the hearing is (and this is perhaps a truism) oral: *audi alteram partem*. That said, in a civil law legal event there are still no dialogues between parties and no freedom of expression within the place of justice. The investigating judge is still, for the moment, the actor in charge of organising the necessary elements, not the parties.

The change of strategy in the protection of rights brought by the ECHR may well be connected to what Meltzer described: “[war] atrocities were committed not by the rebels but by the representatives of law and order”.<sup>124</sup> There is here an element of social (re-)evolution to be considered. The judges, in their symbolic place of power, enforce respect for the law, bearing in mind the concept of the rule of law.<sup>125</sup> What, then, if the law is wrong? To return to the idea of “non-evil”, Meltzer also commented on tyranny, explaining that “[it] is a social perversion in defence against depressive anxieties”.<sup>126</sup> Anxiety results from unbearable situations, as Freud describes in relation to Rat Man. In one of Freud’s first analyses, Rat Man demonstrated a certain “love/hate” attitude towards his father, which was developing into aggressiveness. Freud explained that it was the result of fear, which arose from repressed

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<sup>122</sup> S. GUINCHARD, M. BRANDAC, X. LAGARDE, and M. DOUCHY, *Droit Processuel, Droit Commun du Procès*, Paris: Dalloz, 2001, p. 95 : “[a]vec de telles méthodes d’interprétation on est loin du raisonnement juridique traditionnel français”, because “[c]’est une démarche pragmatique, anglo-saxonne ... a laquelle nous devons nous habituer”.

<sup>123</sup> A. GARAPON and J. ALLARD, “Luttes d’influence” in *Les Juges dans la Mondialisation, la nouvelle révolution du droit*, Paris, Seuil, 2005, pp. 35–56.

<sup>124</sup> D. MELTZER, “Tyranny”, in *Sexual States of Mind*, London, Karnac, 1973, p. 144.

<sup>125</sup> In its narrow meaning, the rule of law organises a set of inferior norms that carefully respects a set of superior norms, which should suffice to acknowledge the respect of the law by judges.

<sup>126</sup> D. MELTZER, “Tyranny”, *o.c.*

hope. His anxiety, Freud claimed, was a consequence of this unbearable situation of conscious love of the father and unconscious hatred. Rat Man had to make amends, to repair the situation. If we apply this to the ECHR, we can analyse it as part of the process of reparation, as something designed to overcome anxiety after tyranny. It was an ethical ambition.<sup>127</sup> European society in the 1920s to 1930s consciously ‘loved’ (in terms of legal positivism – respect of the ‘rule of law’ by Nazi Germany, for example) but unconsciously ‘hated’. Europe hated perhaps because of fear (repressed hope may be a simplistic but relevant explanation here for the ruined post-First World War Germany and Italy, which could be a last link in the economic chain, according to Poulantzas<sup>128</sup>). In the 1950s, it was time to repair, through a reparation process that had two aspects. First, this transformation affected the judiciary through the myth of the separation of powers. It reinforced the judiciary, enforcing and imposing its independence, and conforming to the belief expressed above in a totemisation of the legal event. This is exactly what happened in the UK, for instance. According to Woodhouse, the HRA (and behind it the ECHR), “require[d] a more formal separation between the judiciary and other branches of government”.<sup>129</sup> Indeed, it was said that “[i]n the long run, to protect their independence, the Law Lords may need to remove themselves from the House of Lords when that sits as a legislature”.<sup>130</sup> The result was the creation of the new UK Supreme Court, which was to be “physically” separated from the Houses of Parliament. The cultural societal dimension of the judge after the process of reparation, through the ECHR, was moving towards a certain idea of democracy. It brought together, to a certain extent, the two legal traditions: firstly, the judge represents society through the legal event. Secondly, reparation as an ethical ambition contributes to a cosmopolite development. This cosmopolite operation reminds us of the fifth thesis of Kant’s *Idea for a Universal History from a Cosmopolitan Point of View*: “the greatest problem for the human race, to the solution of which Nature drives man, is the achievement of a universal civic society which administers law among men”.<sup>131</sup> This idealistic view may well be the link between the two legal traditions under the ECHR. But at the same time, it questions particularism, pluralism, identity and further culture. We cannot be certain that what lies beneath universalism is the best solution. And this goes even further than Europe. One may, for instance, look at a case like *Lawrence*

<sup>127</sup> A. GARAPON, *Les Juges dans la Mondialisation, o.c.*, p. 6 : “A la vertu opératoire du droit, s’est ajoutée une ambition éthique à travers la propagation des droits de l’homme”.

<sup>128</sup> N. POULANTZAS, *Fascisme et Dictature*, Paris, Seuil, 1974, p. 24.

<sup>129</sup> D. WOODHOUSE, “More Power to the Judge”, *o.c.*, p. 235.

<sup>130</sup> *Ibid.*

<sup>131</sup> E. KANT, *Idées d’une Histoire Universelle au Point de Vue Cosmopolitique*, Paris, Bordas, 2006, pp. 15–16.

*v. Texas*,<sup>132</sup> where Justice Kennedy cited a 1981 European Court of Human Rights case, *Dudgeon v. United Kingdom*. This expansion reinforces the work of reparation and, again, the softening of the dichotomy that is happening through the position of the judge and its symbolic. That said, I do not believe that it advocates a convergence of traditions, but rather it is an ideal aim prescribed by the ECHR and enforced by different movements.

### Conclusion

My intention in this article was to show how the symbolic position of the judge is characterised and constructed and how it fits into a specific context. Using a variety of conditions and factors, I have looked at these factors in the main western European legal traditions. The legal event, as a process of communication, relates to the totem and to the Oedipus complex in both legal traditions, and as such, it may be pertinent to use psychoanalytic theory to compare these traditions. Because of this symbolic position, the judge becomes an important element of social coherence. He contributes to the diminishing of aggression that is instrumental in civilisation, as stressed by Freud.<sup>133</sup> He is simultaneously the individual and the society.

Some differences in the figure of the judge in the two legal traditions illustrate how “classical” it is to oppose civil law and common law. This is probably unconsciously rooted in our minds. The two largest world empires, one led by France, the other by Great Britain, were opposed. When they broke up, blocks of countries rearranged in legal families that were following the leading legal prototype. But it also contributes to the development of a great narrative, based on information and dis-information, where the opposition between the two ways of understanding and presenting law is emphasised. In Europe, in the context of the post-Second World War era, which has been dominated by transnational human rights issues, an exchange between the two traditions operates. The ECHR functions as an instrument that favours permeability. How does this fit with the legal event, the figure of the judge and its position? We have seen in the case of civil law the way the legal event has been modified. It has moved closer to the common law trial. So, with Hegel, we may consider that things that

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<sup>132</sup> *Lawrence v. Texas*, 539 U. S. 558 (2003), as cited in A. GARAPON, *Les Juges dans la Mondialisation*, o.c., p. 12.

<sup>133</sup> S. FREUD, *Civilisation and its Discontents*, o.c.

look different are, in reality, the same and, with Wittgenstein, we may consider that things that look the same are, in reality, different.