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From the Principle of Immediacy To the Principle of Presence:  
A French Example and a Comparative Law Perspective

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Different scenes, similar issues. In the United States, a judge is dealing with detainment through videoconference. Some detainees start appearing on the screen and taking the oath, but the camera does not capture the whole scene, making the detainees' hands as well as the Bible not visible. The prisoners know they have followed a ritual and the judge can well confirm it. Is it nevertheless enough to feel that the ritual has been respected? Moving the stage to a Criminal Court in the South of France, a ballistics expert is heard through videoconference from his Parisian laboratory. He is in control, in his own space; the lawyer who is trying to ask him questions does not insist on the subject. Time and money have been saved, possibly to the detriment of the adversarial proceedings that seem weakened. In France, judicial experts no longer travel much to attend criminal trials. Because they are not physically present in front of the jury, their science seems even more unassailable. The expert's intervention and the questions asked are rather quickly dealt with, as if the judge had felt that the expert had something else to do. Had he travelled from Paris, would he have been listened to for ten minutes only? The situation is not very different in Northern Europe, more precisely in Norway, where a judge shared his experience about witnesses giving remote testimony *via* videoconference. He acknowledged that it was more difficult to exercise his judgment about such witnesses' credibility, as it was nearly impossible to ascertain that there was no one hidden behind the camera trying to put pressure on them. Initially, the judge had taken the view that videoconferencing was a substitute for an in-person hearing, as it 'looked like' a hearing, but he later on wondered whether the conditions were right. Similarly in France, a statute used to authorise videoconferencing when it was required to extend compulsory hospitalisation in case of mental illness. This measure prevented judges from travelling kilometres from one psychiatric hospital to another. This solution, as practical as it was, was ultimately abolished, as it turned out that patients were destabilised by the process, which even led to bouts of paranoia<sup>1</sup>. Examples could be multiplied. The main question is hence whether the principles of immediacy and orality are respected in videoconferencing. In case of any doubt, the new principle of co-presence should be established, with restrictive exceptions.

Although the principle of immediacy does not exist as such in French civil proceedings<sup>2</sup>, there are on-going debates on the principle of presence (presence in person) with respect to videoconferencing. If the French Constitutional Court considers that videoconference cannot be used in criminal proceedings since defendants must be present to defend themselves, this solution seems to be accepted in civil proceedings.

In England and then Great Britain, the King's Courts proceedings were oral and accusatory, while they used to be written in the Chancery Court (the Equity court), under the influence of Romano-canonical laws. After the *Judicature Acts* 1872-1875, both procedures were merged

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<sup>1</sup> Statute n° 2013-869 of 27 September 2013.

<sup>2</sup> J. Leblois-Happe: "The principle of immediacy in French criminal procedural law", in: *Journal for the entire criminal law science*. Volume 126, 2014, pp. 184-192.

into a single one, namely the Common Law type of procedure, based on orality. English scholars are today concerned that the digitalisation of justice may lead to an inquisitorial procedure. The procedure is actually becoming increasingly iterative and online, without being video conferenced. Dame Hazel Genn wrote: “I want to worry a bit about the move away from physical gathering in one space. I am well aware of the practical disadvantages of everyone having to congregate in the same physical space at the same time. But what are the implications of evidence only online and in writing, or presented orally but remotely? I worry about the loss of physical presence for a range of reasons and ultimately I am concerned about the long-term consequences of court merely as a service rather than as a public, physical site of justice. Into this goes the question of identifying the foundational values and principles of the existing public justice system that are necessary to maintain and indeed enhance public trust and confidence in the system – the elements essential for legitimacy; this includes the question of how justice in future would be seen to be done, if not in public? ... In both courts and tribunals, the description of the move to online processes at first sight suggests a significant shift from traditional adversarial procedure. In the online court, we are moving to integrated triage/advice and integrated Online Dispute Resolution. In tribunals, there is an explicit shift to an online, iterative process”<sup>3</sup>.

In France, where civil proceedings used to be rather adversarial (unlike criminal proceedings, which were fairly inquisitorial), hearings are gradually disappearing. French civil procedure has two origins, with Frankish and Romano-canonical sources. The Frankish procedure was oral and accusatory, while the Romano-canonical one, stemming from the exceptional Roman legal approach, was essentially written. As a result, there are still two types of procedure in French first instance courts, and there is still a principle of orality but it is declining (1). As a result, videoconferencing has developed, particularly during the Covid period. However, we will discuss the need for a principle of presence, which is quite close to the principle of immediacy (2). We will then propose a test to determine when videoconferencing can be used as an exception to the principle of presence (3).

## **1 - The decline of orality in French civil proceedings**

For centuries, Small Claim Sections (a division of the *Tribunal Judiciaire*), Commercial Courts, Labour Courts, or Rural Lease Courts have opted for the oral procedure approach. In contrast, the procedure of the *Tribunal Judiciaire* civil section (over €10,000) is written.

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<sup>3</sup> Professor Dame Hazel Genn (Faculty of Laws UCL), “Online Courts and the Future of Justice”, Gray’s Inn 16 October 2017 Birkenhead Lecture 2017, accessible online [https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead\\_lecture\\_2017\\_professor\\_dame\\_hazel\\_genn\\_final\\_version.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf); See as well R. Susskind, *Online Courts and the Future of Justice*, OUP, 2019.

In oral procedures, hearings are what it is all about and there may be no written pleadings. In reality, written pleadings are submitted but they give rise to no procedural consequences, though recent reforms state that parties may rely on some written documents (*e.g.* to prove that they filed a claim). It is usually not mandatory to be assisted by a lawyer as proceedings are instantaneous and spontaneous and parties are generally self-represented, especially in Small Claims proceedings. Since what matters is the hearing, it is possible to raise jurisdictional issues at the very beginning of the hearing, even if arguments on the merits of the case are already submitted in the written pleadings. Proceedings may be long in case of postponements, as parties or their lawyers are required to be present in person. The whole procedure needs to be recorded (the risk being that clerks make mistakes). Claims may sometimes be unclear and it may be difficult to understand what the claimant exactly wants. Additionally, the oral procedure may turn out to be a pitfall for the parties: as an example, if the claimant starts the hearing on the merits, s/he will then be deprived from the possibility to raise jurisdictional issues, as this kind of issues has to be upheld *in limine litis*.

The 2019 Reform<sup>4</sup> fused Small Claims Courts (*Tribunal d'Instance*) and Civil High Courts (*Tribunal de Grande Instance*) into one Judicial Court, the *Tribunal Judiciaire*. There is still however a Section within the Judicial Court dealing with small claims, called the *Tribunal de Proximité*, where proceedings are still oral. There are 164 Judicial Courts. If the financial issue exceeds €10,000, the procedure is written with a hearing, but what remains all-important are the written documents. At the request of the parties, there may be no hearings. During the Covid-19 first lockdown, the consent of the parties was not required and videoconference was sometimes used. Within the Judicial Court, the Small Claims Section faced with financial issues not exceeding €10,000 still follows the oral procedure, unless otherwise agreed by the parties (art. 446-1 CPC). If the financial issue exceeds €10,000, it becomes mandatory to be represented by a lawyer. The advantages of written procedures are numerous: since pleadings are written by lawyers, claims are usually clear. Written procedures are supposed to be quicker (no postponement) with respect to oral proceedings. Written proceedings are recorded through written pleadings *per se*. They are not spontaneous, which gives additional time to reconsider the case. Written proceedings may be easily digitalized. However, there is a risk of ending up with too many written pleadings, which may lead to the necessity of a consolidated written pleadings version (with judges referring exclusively to the last written pleadings). There is also a risk that written documents are ultimately too wordy and it might be recommended to keep the document to a minimum, *e.g.* less than 100 pages. Lastly, there is a risk that written pleadings are submitted outside the permitted time; this is why schedules, sanctions and case management judges are necessary.

Article L. 212-5-1 of the Code of the Judicial Organisation provides that “Before the Judicial Court, the procedure may, at the initiative of the parties where they expressly agree to it, take place without a hearing. In such a case, the proceedings are exclusively in writing. However, the Court may decide to hold a hearing if it considers that it is not possible to reach a decision

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<sup>4</sup> Statute 23 March 2019 and decrees simplifying civil procedure in particular Decree 11 December 2019.

on the basis of written evidence or if one of the parties so requests”. This rule sounds like the old Romano-canonical procedure: no hearing and so, a secret procedure. Proceedings using videoconference is not an oral hearing; it is something else (recorded, no physical presence, lack of ritual, etc.). The International Commercial Section of the Paris Commercial Court and Court of Appeal has a mix of written documents and hearings.

Whether the procedure is written or oral, the hearing does not play an important role as far as investigations are concerned. As it is known, in Germany, Spain and other countries, the principle of immediacy is based on the presence of the parties and witnesses at the hearing, in order to collect evidence; there is consequently no need for a principle of immediacy in French procedure. Witnesses are even allowed to make their testimony in written form. The situation is even reinforced at the appeal level, since the investigation is considered to have already been done at the first instance level.

The second appeal (*pourvoi en cassation*) is totally written without a hearing (*idem* in Belgium, except in criminal proceedings). On appeal, the procedure is written and the presence of a lawyer is made compulsory, except in some judgments held by Rural Lease Courts (not that many) or the Social Security Section of the Judicial Court (many cases). In those situations, the procedure is oral but Article 546-1 of the Code of Civil Procedure is applicable: a party may ask the judge not to show up. The Council of State (the *Conseil d'Etat*), which is competent to hear second appeals in administrative matters, is currently developing orality during the investigation phase, by way of an experiment. Nevertheless, orality is diminishing in France: hearings are disappearing from written procedures at first instance levels and written documents are more and more taken into account in oral procedures. Digital procedure with videoconference is neither oral nor written. Since it is recorded, instantaneous and spatially distanced, it is not an exact equivalent to a hearing. There is a principle of orality in civil procedure in France but it is only recognized by the Court of cassation<sup>5</sup>, not by the Constitutional Court. Thus, it is not a fundamental principle.

In short, criminal and especially civil proceedings are increasingly moving away from hearings, with statutes increasing the possibilities of doing so<sup>6</sup>. Judges and lawyers alike seem to be showing a growing disaffection with this stage, which is sometimes seen as a waste of time and the preservation of rhetoric marked by an old-fashioned accent, and which turn out to be most of the time unable to resolve conflicts, or, even worse, counter-productive, whereas the justice system claims to be more cooperative. Lawyers are shunning hearings, even the so-called interactive ones, and prefer to file their pleadings; many stages of the procedure are now carried out remotely. This latent loss of interest in the courtroom is compounded by the recent pandemic-related distrust of face-to-face meetings. The need to protect individuals - and in particular Commercial Court aging judges - has provided an even stronger justification

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<sup>5</sup> Cass. Ass. Plén., 24 nov. 1989, JCP G 1990, II, 21407 Cadet.

<sup>6</sup> C. Bléry, « Un juge civil toujours plus lointain... ? Réflexions sur la dispense de présentation et la procédure sans audience », *Dalloz Actualités*, 22 décembre 2020.

for holding hearings at a distance<sup>7</sup>. We should not overlook the possible temptation of the parties and judges to escape from the difficulty of a physical meeting, an escape that may prove disappointing, particularly for victims. This may encourage the development of videoconferencing as a way to replace face-to-face hearings.

## 2. - Principle of Presence and Videoconferencing

Videoconferencing has been used for a long time in France, in particular for hearings between metropolitan France and some overseas territories, such as New Caledonia or Saint-Pierre-et-Miquelon, at the Bordeaux Court of Appeal (the appellate jurisdiction for these regions). But it has particularly developed during the Covid-19 period.

A new question has emerged: is a videoconference hearing consistent with the rights of the defence? It seems to have many advantages when travelling is long or dangerous. For example, videoconferencing within a traditional procedure or a digitalised one is used in Brazil (and its Amazonian regions), Norway, Russia, but not so much in Denmark. However, a small country like Estonia is very advanced in the digitalisation of justice<sup>8</sup> and allows dangerous or threatened prisoners to be interrogated without being transferred<sup>9</sup>. The ECtHR specifies that the accused must be able to meaningfully participate in their trial. Does this mean that the accused have the right to be physically present at their trial? Videoconferencing has been admitted by the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 29 May 2000. Mention may be made here of an Italian statute allowing it, in particular for prisoners belonging to the mafia, and deemed constitutional. It is in that context that the ECtHR found it compatible with Article 6 § 3 of the ECHR as it pursued a legitimate aim (the fight against the mafia) and respected the rights of the defence. The accused was able to see and hear those present, make statements to the court and talk to his lawyer. At the end of the day, the videoconference did not place the defence at a substantial disadvantage with the other parties to the case.

It can be said that the principle of orality is respected with videoconferencing since the parties can orally express themselves and this is an exceptional case. However, videoconferencing seems to be developing in France, at least in the texts, without appearing as an exception. Thus, Article L. 111-12 of the Code of Judicial Organization allows the President of the Court, *ex officio* or at the request of a party, to decide on the use of videoconferencing with the consent of all parties. Similarly, the small claims procedure created by the European Regulation of 11 July 2007 does not provide for a hearing (art. 5) unless the Court deems it necessary or a party so requests. A hearing by videoconference is also possible (art. 8) without, it seems, requiring the agreement of the parties. In criminal proceedings where

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<sup>7</sup> D. Iweins, *Les Échos*, Publié le 4 déc. 2020 ; C. Bléry, « Covid-19 et procédure civile : nouveau droit transitoire ou préfiguration du droit de demain ? », *Gaz. Pal.* 1<sup>er</sup> déc. 2020, p. 14.

<sup>8</sup> T. Shelton, “Estonia: from AI judges to robot bartenders, is the post-soviet state the dark horse of digital tech”, *NBC Nexs*, 15 jul. 2019.

<sup>9</sup> ECtHR, 23 Feb. 1994, *Stanford*.

videoconferencing is possible<sup>10</sup> but may be refused by the person concerned, case law provides that s/he may not reverse the decision<sup>11</sup>.

However, technology is never neutral as far as procedure is concerned and one may be of the opinion that the physical absence of a defendant at his/her trial is detrimental to the justice system<sup>12</sup>. In particular, videoconferencing does not allow for a real meeting between the parties (even if parties may be represented at hearings or simply not appear) and it does not easily allow for gestures, attitudes and glances that sometimes help the judge get a better idea of the legal situation. Neither the framing of the camera nor the position of the screen in the courtroom is neutral. The solution might be more radical in order to avoid a "virtualisation" of justice and it might be appropriate to establish a principle of presence according to which parties must be put in a position to be physically present at least once in the course of a lawsuit<sup>13</sup>. Exceptions could be made possible in cases of particular remoteness or imminent danger. The principle of presence has its origin in the principle of immediacy which still exists in Germany, Spain or Austria today and which originate in particular in French civil procedure under the 1806 Code (since this procedure was partially oral). Julius Glaser, who is at the origin of the principle of equality of arms, was also at the origin of the principle of orality introduced in the Austrian criminal procedure reform in the middle of the 19<sup>th</sup> century<sup>14</sup>.

Within the conception of procedural relationships, which implies the implementation of an emotional reason, presence is more a necessity than it is in the syllogistic approach to judicial reasoning<sup>15</sup>. A kind of principle of "mediacy" existed in Romano-canonical procedure in order to avoid meetings between judges and parties when they were likely to generate a prejudice. Presence should therefore not be hypostatised. A philosophy of presence is also a philosophy of being rather than becoming<sup>16</sup>. A place must be made for the right to distance

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<sup>10</sup> Art. 706-71 CPP from Statute no. 2016-731 of 3 June 2016 concerning pre-trial detention.

<sup>11</sup> Cass. crim., 29 Nov. 2017, n° 17-85300.

<sup>12</sup> J. SIMON-DELCROS, « Visioconférence : moderniser sans déshumaniser », *Gaz. Pal.* 9-11 mai 2010, 8.

<sup>13</sup> E. Jeuland, « Arbitrage en ligne et procès virtuel : pour le principe de présence », *Dr. et proc.* 2007, p. 262 et s. ; S. Amrani-Mekki, « L'impact des nouvelles technologies sur l'écrit et l'oral en procédure civile », in S. Gaboriau et H. Pauliat (dir.), *La parole, l'écrit et l'image en justice : quelle procédure au XXI<sup>e</sup> siècle ?*, entretien d'Aguesseau, PULIM, 2010, spéc. p. 179 et s.

<sup>14</sup> Neumair, Michael (2001). "Glaser, Julius". In Michael Stolleis (ed.). *Juristen: ein biographisches Lexikon; von der Antike bis zum 20. Jahrhundert* (in German) (2nd ed.). München: Beck.

<sup>15</sup> See E. Jeuland, "Judge and Emotion in Civil Law countries, the French Example", 2020, Archiv website Hal <hal-03003272>.

<sup>16</sup> J. Derrida, *L'écriture et la différence*, Seuil, 1967, p. 409 et s. *Writing and Difference*, 1978, transl. A. Bass, University of Chicago Press.

and absence. We should therefore not only advocate for a principle of presence imposing at least one face-to-face meeting between parties and judges, but also a principle of fair distance in the sense of a shift in time and space. Being absent at a trial is not necessarily negative; the possibility of being represented precisely aims at organising the absence of the parties. For example, the procedure *in absentia*, which was unfavourable to the absent accused, was reorganised, after several condemnations of France by the European Court of Human Rights, to allow them to be defended.

The International Criminal Court has also interpreted Article 63.1 of the Rome Statute, which requires the presence of the accused, in a flexible manner. It can exempt an accused from being continuously present at their trial, particularly when the accused is an acting President of the Republic. Presence would therefore be a principle and a right that can be limited<sup>17</sup>, but not an obligation<sup>18</sup>. The absence of the accused must also be strictly limited to what is necessary (by providing for brief adjournments). The principle of presence (or co-presence) is therefore not positive law in France, but is discussed in doctrine. The Constitutional Council and the Council of State case law recognises its existence in its effects without using the expression.

The French Constitutional Council censured a provision of Ordinance of 25 March 2020 generalising videoconferencing in misdemeanour matters (Decision No. 2020-872 QPC of 15 January 2021). The use of videoconferencing is not a novelty linked to the development of the Covid-19 epidemic, and the Code of Criminal Procedure allows, in certain cases (in relation to distance, the consent of the parties and the risks of undermining public order), the use of this type of telecommunication. By way of derogation from Article 706-71 of the Code of Criminal Procedure, and considering the state of emergency owing to the pandemic, Article 5 of the Act of 25 March 2020 authorised videoconferencing, without the consent of the parties, before all criminal courts other than the *Cour d'Assises* (which has jurisdiction when more than 3 years of imprisonment are at stake). Increasing the use of videoconferencing was justified on the basis of two constitutional principles aiming at protecting health, on the one hand, and ensuring continuity of the functioning of the justice system, on the other hand; such justifications did not however convince the Constitutional Council, which ruled that, "in view of the importance of the guarantee that may be attached to the physical presentation of the person concerned before the criminal court", (...) "and in view of the conditions under which these means of telecommunication are used, these provisions infringe the rights of the defence, which could not be justified by the particular health context. " It therefore ruled that Article 5 was contrary to the Constitution.

The terms of the censure are very broad: they actually rule out the possibility of an extensive use of videoconferencing in the name of the guarantee attached to the physical presentation of the person before the criminal court. While it is true that a nuance is introduced, since the

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<sup>17</sup> CPI, *Decision on defence request for conditional excusal from continuous presence at trial*, 18 oct. 2013, n° ICC-01/09-02/11-8330 and CPI, *judgement on the appeal of the prosecutor against the decision of the trial chamber, M<sup>r</sup> Ruto*, 25 oct. 2013, n° ICC-01/09-01/11 OA 5, *JCP G* 2013, 1220, obs. R. Nollez-Golbach.

<sup>18</sup>A. Danet, *La présence en droit processuel*, thèse Bordeaux, 2016, Dalloz, 2018.



Constitutional Council specifies that it pronounces its judgement “on the basis of the conditions in which this recourse to videoconferencing is exercised”, this rather vague mention alone does not make it possible to understand according to which criteria the principle of presence could possibly be set aside in favour of a more 'efficient' communication technique. Should transmission and reception processes be improved? Should camera(s) be able to capture emotions? Should the public be able to attend the videoconference? Is it an invitation to improve the material conditions of justice (not all Courts in France are well equipped)? The hypothesis of functional equivalence remains largely fictional for the time being, as it is impossible to define the specific qualities that an alternative means of communication should have in order to justify the abandonment of physical connections between individuals<sup>19</sup>.

Consequently, it is the extension of videoconferencing in these situations and, as the Council wrote, "in all the others", without any legal conditions and without any criteria to frame it, that leads to the rejection of its generalized application in criminal proceedings. In this respect, the fact that videoconferencing is only a possibility open to judges and not an obligation, is not enough for things to change. It would even be likely to aggravate the arbitrary nature of the use of such a solution. The existing case law is rather puzzling as to the criteria that allow the use of videoconferencing or that justify, on the contrary, its exclusion.

The order pronounced on 27 November 2020 by the Council of State<sup>20</sup> also limits the use of videoconferencing in criminal matters by considering that the "seriousness of the penalties incurred and the role devolved to the intimate conviction of the judges and jurors confer a specific place on the orality of the debates". It adds that "during the closing arguments, the physical presence of third parties and the accused is essential, and even more so when the accused speaks last, before the closing of the debates." Because of the particular importance attached to this physical presence in the course of a trial, it concludes that the contested provisions infringe the founding principles of the criminal trial and the rights of the natural persons involved in the trial, whether they are accused or victims (point 14). The highest courts (Council of State and Constitutional Council) thus stand together with respect to the need for a principle of physical presence in criminal proceedings.

Such recognition does not seem to have been achieved in civil matters, the difference in treatment not being clearly justified. In its decision of 19 November 2020<sup>21</sup>, the Constitutional Council did not censure Article 8 of Ordinance of 25 March 2020, which offers judges the possibility to decide that, in the absence of an agreement between the parties, there might be no hearings in civil matters. The Court held that this absence was not contrary to the right of defence and the right to a fair trial. *A fortiori*, one might think that it would not sanction the use of a videoconference hearing, without the agreement of the parties, as authorised by Article 7 of the same Ordinance, without the possibility of an appeal.

The absence of a clear criterion for videoconferencing does, however, pave the way for equal treatment of criminal and civil proceedings, since the specific elements of criminal proceedings, such as the risk of incarceration, do not appear to be decisive, particularly in the

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<sup>19</sup> See as well: decision n° 2019-802 QPC 20 Sept. 2019 and decision n° 2020-836 QPC 30 Apr. 2020.

<sup>20</sup>N° 446712, 446724, 446728, 446736, 446816.

<sup>21</sup>N° 2020-866 QPC.

decision under review. The stakes in civil proceedings can be just as high as in criminal proceedings. One only has to think of educational assistance, civil liability litigation or collective proceedings. In both cases, it is hard to see how the right of defence and the principle of a fair trial might not be affected. So, why should videoconferencing be imposed in civil matters without any specific conditions (adequacy, necessity, balance of interests)?

This recourse should not be a simple convenience for judges but should be retained on an exceptional basis. There is undoubtedly a public interest in criminal hearings taking place in the physical presence of the parties, and the decision to derogate from this should be left to the legislator alone. Unless it is considered that the proper administration of justice or the reduction of costs prevails in civil matters, the choice of videoconferencing should at the very least be based on the agreement of the parties.

The use of technology is never neutral and the mistake is to reason ‘as if’ videoconference hearings were equivalent to hearings in the physical presence of the parties. Indeed, there are deep differences between ‘face-to-face’ and ‘remote’ hearings: the burden of silence (in videoconferencing, nobody can say that silence is significant or due to a technical issue), incongruities (does one greet their opponents?), non-verbal communication, the interactions between emotions and the body (the lawyers’ dress), the impossibility of eye contacts and the elusive nature of the hearing (maybe at home). Our body ‘knows’ that it is not in the physical presence of others, which creates a particular fatigue. The pseudo-presence offered by videoconferencing does not allow people to establish a real link, as they can never be assured of their real existence (as already experienced at the university during lockdown periods). A child psychiatrist, Bernard Golse, considers that distance work has a regressive potential because of such unfulfilled quest for security.

It is important to establish clear criteria that justify derogating from the principle of physical presence and seriously consider the consequences of the choice of videoconferencing, which must remain exceptional. It should be noted *inter alia* that the Constitutional Council and the Council of State met in person in the above-mentioned cases. Such a requirement would avoid the creation of an arbitrary hierarchy between the various trials and in the end impede the establishment of a privilege in relation to physical presence.

However, and based on these decisions, it remains unclear why judges consider the ‘physical’ presence of both third parties and the accused as being essential. No reference is made to the taking of evidence, which is the basis of the principle of immediacy. This is why it can be difficult to speak about a principle of digital immediacy in France, such as in Spain. But at least, the above French decisions bring an end to the presumption of functional equivalence that videoconferencing seemed to enjoy in the Ministry of Justice. In doing so, the order provides an opportunity for highlighting the importance of the body and its affects during a trial and questions the rules that should govern, in an exceptional manner, the implementation of any substitute technology.

The first merit of these French decisions is that they move away from the obvious idea that trials should, in principle, be satisfied with the false presence offered by communication technologies. In this case, it was held that the deprivation of physical presence constituted a serious and manifest infringement of fundamental freedoms. It recognises that there is something irreducible in the physical presence and that videoconferencing is only a similar reconstruction of the audience that compensates for the approximate real encounter of the

bodies. Facing the other in the same space, in particular the courtroom, without technical mediation, is therefore a fundamental freedom.

In the above-mentioned decisions, judges, who do not want to jeopardise the future, have nevertheless added a reservation to their assertion concerning videoconference hearings, according to which they were ruling “in the state of technical development”, leaving open the possibility of going back on their decision in the event of any improvement in the means of communication. The very wording of this hypothesis, which puts the principle of physical presence into perspective, is unfortunate. This amounts to enshrining a precarious fundamental right to be subject to re-examination in the light of the state of technology. Similarly, will the freedom of movement still be guaranteed when the day comes that the advancement of ‘augmented’ reality allows to come and go without leaving home, simply by using a helmet reconstituting a totally virtualised world?

This projection into a world where technology would be a substitute for physical presence is also based on a representation of technological ‘neutrality’ and functional equivalence that should be deconstructed. It has taken a long time to elaborate the paradigm of ‘technological neutrality’, initially activated to prevent law from discriminating against according to the technique used. Thus, for example, a digital book cannot be treated in the same way as a ‘paper’ book, particularly when it comes to reselling it second hand. Several scholars, including Jacques Ellul, have long demonstrated that any medium profoundly transforms a given situation and the position of the protagonists<sup>22</sup>. Functional equivalence, which consists in aligning the legal regimes of two processes that fulfil the same role, is above all a principle of interpretation<sup>23</sup>. It assumes that two different situations are to be considered ‘as if’ they were similar in order to make them produce the same effects; it cannot be concluded from this point that they are indeed identical. In this respect, videoconferencing might be considered as the technical equivalent of physical presence, insofar as this tool is able to perform the same functions, but it does not allow for physical co-presence and any future technology, however sophisticated, will never achieve this physical co-presence.

The substitutability of presence by another technique cannot be assumed. If we admit that physical presence is irreducible and primary, we must therefore define, by means of a method of interpretation, the conditions under which we depart, by exception, from this principle of physical presence or co-presence. In fact, this conclusion is debated, since recent research has shown that if precautions were observed, parties might not suffer from videoconferencing<sup>24</sup>. R. Moorhead commented on this research: “Material and symbolic court rituals can be translated into virtual contexts in ways more egalitarian and inclusive than the austere grandeur of higher courts and the dilapidated functionalism of everyday courts. The piece challenges physical essentialism such as the idea that significant aspects of courtroom rituals are diminished when moved to a virtual space. Physical co-presence is not a necessary feature of successful communication. The online hearings studied, well designed and managed, were not inherently “dehumanizing, hard to follow, and plagued by disruptive technology”. Nor

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<sup>22</sup> *The Technological Society*. Trans. John Wilkinson. New York: Knopf, 1964. London: Jonathan Cape, 1965. Rev. ed.: New York: Knopf/Vintage, 1967. with introduction by Robert K. Merton.

<sup>23</sup> V. Gautrais, *Neutralité technologique : rédaction et interprétation des lois face aux technologies*, Thémis, Montréal, mai 2012.

<sup>24</sup> M. Rossner, “Remote Rituals in Virtual Courts”, 48 *J. Law & Society* 334 (2021).

were interpersonal dynamics necessarily diminished in the remote context”<sup>25</sup>. R. Moorhead gave an account of the result: “In both studies, the process of translating physical hearings into virtual counterparts was apparently not profoundly transformative ... An aspect of the pilot program’s design was that litigants were brought considerately and carefully into the virtual courtroom through a combination of a managed pathway and court staff support. The piece takes us beyond a critique of fetishizing physical court appearances whilst showing how the quality of the virtual experience relies on the physical (and technical) environment in which virtual participation actually takes place... Interestingly, a defendant isolated in a dock in a physical courtroom was most likely to be convicted. In other words, the design of a traditional physical environment seemed as or even more problematic than a shift into the virtual. Rossner argues that a sense of judicial formality was satisfactorily created through the use of logos, judges appearing from courtrooms, and the behaviour of the judge herself ... Both lay and professional participants felt virtual court were appropriately formal, although judges were less sure... There is a strong sense, on my reading, that the success of virtual hearings depends on their orchestration by judges... We do not know if what the researchers observed was judges behaving well for a pilot program or an inherent feature of technology”. He then concluded: “Rossner persuasively casts doubt on the idea that physicality is essentially or necessarily superior and that virtual courts are necessarily “Spartan, and technocratic” if well designed and operated”.

Indeed, there may even be advantages in terms of access to justice. It is less impressive to attend a videoconference hearing than come to a feared court. However, we are of the opinion that videoconferencing should remain an exception. Beyond its timid recognition by the Council of State's order, the principle of physical presence must be affirmed in civil matters, contrary to what the Constitutional Council seems to have decided, even though it was invited to do so by the applicants (19 November 2020, No. 2020-866 QPC). The ECtHR defends the principle of the parties’ personal and physical appearance, while admitting the hearing by videoconference in some specific cases and if the proportionality test is satisfied (*Marcelo Viola c. Italy*, 5 Oct. 2006, n° 45106/04): « 53. Nor is it in dispute that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general, this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings (see *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A). 54. The personal appearance of the defendant does not take the same crucial significance for an appeal hearing as it does for the trial hearing (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner of application of Article 6 to proceedings before courts of appeal does, however, depend on the special features of the

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<sup>25</sup> Richard Moorhead, *Designing Rituals in the World of Virtual Courts*, JOTWELL (February 22, 2022) (reviewing Meredith Rossner, *Remote Rituals In Virtual Courts*, 48 J. L. & Soc’y 334 (2021)), <https://legalpro.jotwell.com/designing-rituals-in-the-world-of-virtual-courts/> : “Rossner’s article is based on two empirical studies of virtual courts. One was an evaluation of a real online pilot in tax, civil, and family hearings in England and Wales. The second study involved a large simulated criminal trial before 445 mock jurors in Australia”. See as well: David Tait, *et al.*, *Towards a Distributed Courtroom* (2017) [https://courtofthefuture.org/wp-content/uploads/2017/07/170710\\_TowardsADistributedCourtroom\\_Compressed.pdf](https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compressed.pdf) ; Emma Rowden, *Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?*, 14 Law, Culture & the Humanities 263 (2018); Jenni Ward, *Transforming “Summary Justice” through Police-Led Prosecution and “Virtual Courts”: Is “Procedural Due Process” Being Undermined?*, 55 Brit. J. Crim. 341 (2015).

proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein”.

Relationships between parties are not hypothetical in judicial matters; they involve the bodies and emotions of those being involved. Hearings are one of those moments where individuals may see themselves as legal subjects when faced with others. The constitutional principle of confrontation with others is one of the arguments against videoconferencing in the United States (*Maryland v. Craig*, 497 U.S. 836, 857 (1990)). It offers trial participants the opportunity to become aware of the scope of their respective actions and functions - defending, accusing, testifying, and repairing. It is also necessary when decisions are to be made that have direct consequences on individuals' bodies (prison sentences, placement of children...).

Without making it explicit, the Council of State considers physical presence at the hearing to be particularly important in criminal trials, in that it is likely to provoke various emotional reactions - confession, repentance, forgiveness, compassion, etc. - that will facilitate the conclusion of the trial. Even beyond the criminal trial, the Council of State is giving increasing importance to the hearing, not only in summary proceedings but also in the investigation<sup>26</sup>.

Convenience and fear are not sufficient to justify departures from the principle of presence in the trial and oral hearing<sup>27</sup>. Since physical presence is in principle necessary at least for the main hearing, it should only be possible to rule it out after a test that reveals the impossibility of a physical hearing, the availability and suitability of an alternative technique and finally the balance of interests between the use of a 'remote' solution and the postponement of the hearing.

### **3. - A test to authorise the use of videoconferencing**

First condition: impossibility of the hearing in presence. A *prima facie* case must be made that there is a duly established material impossibility, such as a deteriorated state of health or a very important physical distance<sup>28</sup>. There may also be a particular need to protect a party or a third party (*e.g.* a minor witness to a crime).

Second condition: availability and suitability of techniques. It is then necessary to ensure the availability of techniques with a claim to substitute the hearing, the quality of the means employed, and its adequacy to fulfil the function assigned to it, including the certification of the identity of the persons and the confidentiality of the exchanges, in particular between lawyers and clients.

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<sup>26</sup> <https://www.conseil-etat.fr/actualites/actualites/le-conseil-d-etat-experimente-les-echanges-oraux-avant-les-audiences>.

<sup>27</sup> A. Danet, *La présence en droit processuel* : Dalloz, *Bibl. de la justice*, 2018., L. Dumoulin et Ch. Licoppe, *Justice et visioconférence : les audiences à distance*, rapport du GIP justice v. <http://www.gip-recherche-justice.fr/wp-content/uploads/2018/07/R.F.-Dumoulin-visioconf%C3%A9rence-1.pdf>

<sup>28</sup> *E.g.*, videoconference in the Saint-Pierre et Miquelon court See report of L. Dumoulin et Ch. Licoppe, already quoted.

Video-conferencing is both a benefit and a detriment; it distorts time and space, where traditional hearings postulate a unity of time, place and action. It therefore entails a loss of immediacy since, whatever the speed of the medium, it creates a temporal shift, which makes it possible, if necessary, to ‘cut off’ the transmission. Moreover, this process presupposes the presence of a third-party technician who influences the quality and integrity of the transmission. Videoconferencing also reduces the perception of the courtroom; images do not reflect the complex architecture of the spatial relations between the protagonists, which trivialises the judicial ritual and the solemnity that accompanies it. Finally, this mediation leads to a loss of perception of the other: smells, unconscious transfers, the complexity of the interplay of bodies, and infra-verbal languages constitute the essential part of what is communicated between individuals. The reactions of the audience are also absent.

It seems to us that what characterises law is not so much to define what it should be by means of rules (there are non-legal norms in technical, managerial, nutritional matters, etc.) as to symbolise, by means of legal devices, human relationships. These symbolic arrangements have been accompanied for thousands of years by rituals. According to A. Garapon and J. Lassègue<sup>29</sup>, rituals allow bodies to be linked to the social group in order to enable the acceptance of norms. They lead to the renewal of conflicting or offending events in a judicial setting through a moment of non-significance (in the sense that rituals do not imply verbal exchanges concerning the case), like at the theatre (implying catharsis). Another approach to ritual is to see it as creating and changing human relationships through initiations (such as a wedding ceremony or even a trial)<sup>30</sup>. In this view, judicial rituals do not merely accompany the trial but are an integral part of it. By taking citizens away from the courthouse, digital technologies cut them off from the judicial symbolism that is expressed in the buildings, the robes of the court officials, the layout of the courtroom and the procedure followed. However, it does not seem impossible to reconstruct symbolic forms with the help of digital technology. It can be noted that the duration of a click of acceptance has been extended for online contracts beyond what is technically necessary to give the impression of a real commitment. It is a form of ritual. It is a safe bet that online disputes will have colours and layouts recreating a form of judicial symbolism.

Third condition: the concrete balance of interests. If, at the end of a detailed analysis of the effects of the technique used, it is judged adequate to replace a physical hearing that is deemed impossible, a balance of interests must be established between its use and the possible postponement of the physical hearing. This research must take into account the intensity of the conflict, the protagonists’ rights and freedoms, the issues at stake and the nature of the relations between parties, judges, witnesses, journalists and the public, etc. It must also be ensured that the proper administration of justice is taken into consideration, provided that budgetary shortfalls are not imposed on the litigant or that there is a risk of inequality of access to justice depending on the alternative means made available.

The order of the reasoning is essential: skipping the first stage means that physical presence is not required whenever a means of communication is available. There is also a risk that the

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<sup>29</sup> *Justice digitale. Révolution graphique et rupture anthropologique*, Paris, PUF, 2018,

<sup>30</sup> M. Houseman et C. Severi, *Naven ou Le donner à voir. Essai d'interprétation de l'action rituelle*, éd. CNRS, 1994 and M. Houseman, *Le rouge est le noir*, Presses Universitaires du Mirail, 2012.

balance of interests will always fall on the side of the proper administration of justice and thus on the side of saving time.

Conclusion. On the basis of such a reading grid increased by the emotional and physical dimension, we can already reconsider several infringements of the principle of presence. For example, the French practice of using videoconferencing for certain expert opinions in criminal courts, which does not allow the expert to be questioned with the same acuity as if he were present, could be reviewed.

Finally, the place of the consent of the parties should be reassessed, as this cannot be the basis for systematically justifying the use of videoconferencing. Parties are not always aware of what they are giving up and, even if they are, the choice of presence cannot be theirs alone. 'To consent is etymologically' to 'feel with': it is a paradox that we may forego a hearing which precisely allows us to relive emotions. Moreover, if physical presence plays the role of a collective, socially useful catharsis, its removal cannot be left to the will of a single individual.