

JUDICIAL SYSTEMS IN THE WORLD
JUDICIAL PORTRAITS: A STUDY THROUGH
TIME AND SPACE

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INTRODUCTION

My conference today is inspired by a « grand cours » I had been asked to teach at Sciences Po, Paris, by the Premier President of the Court of Cassation (then Guy Canivet – he has since been promoted to the Conseil constitutionnel). This class was the first in a serie on the theme of « Justice in a global world ». The Premier President had asked me to present the judicial systems in the world – not the classical « legal » systems in the world, as I was used to. The challenge proved interesting, since it led me to compare the world's legal systems through the « judicial lense », so to speak. So what I would like to do today is share this new outlook with you. I admit that to present the different judicial systems in the world in 45 minutes is quite a challenge, but I managed it at Sciences Po so it should be ok today as well. The way I tackled the time problem was simply to focus on examples inserted in a wider outline rather than pretend (and fail) to be exhaustive. Therefore, I propose to paint a portrait of the judge like an impressionist artist would, thus using different judicial figures, or models, chosen through time and space. I apologize for interpreting a written paper rather than improvising outloud, but once again, I was concerned about the time limit and was afraid to stray!

The judge is to law what the judicial systems are to legal systems: it would be very hard to talk about one without talking about the other. You probably know the traditional classification of the leading legal systems in the world, that the world map designed by the Civil law section of the University of Ottawa

echoes. The common law systems include English law and the national legal systems related to it by way of conquest (Australia, New Zealand, the United States, etc.). The romanist systems (thus called because they are the inheritors of the Roman law spirit) – they are also called in English « civil law systems » - stem from the French and German traditions, respectively embedded in the French civil code and B.G.B., exported by conquest, borrowing of imitation. Besides those two leading systems (common law and civil law), comparatists also identify customary systems (or unwritten systems) and systems inspired by a religion – the so-called « religious systems » (like islamic law, jewish/talmudic law, hindu law) None of these four types of systems is mutually exclusive, and that's what explains the development of « mixed » systems, where the characteristics of two or several of the four systems blend into an often unique cocktail.

As promised, I will thus talk about those legal systems in the world under a very specific angle : the judicial angle, more precisely through the two missions generally given to judges in time and space – say the law and decide cases. Therefore, I will turn first to the relation uniting the judge to the legal rule he utters, interprete or apply (« Judges and the law »), and then to the modes of conflict resolution administered by judges (« Judges and conflicts »).

1 JUDGES AND THE LAW: BETWEEN INTERPRETATION AND CREATION OF THE RULE

What is the nature of the relation between the judge and the legal rule – legal rule which, once applied, should lead to the judicial resolution of the conflict (the case)? There is no simple, plain answer to this complex question; rather, the answer takes the form of a polyphony reflecting the variety of the legal

systems where all these judges interact with legal rules everyday. Between the judges-interpreters who receive the legal norm from outside and the judges-legislators who create it from inside, other judges resemble the Roman god Janus because of the two faces their mixed legal tradition impose on them. I will evoke them in this order in connection with their respective legal tradition.

1.1 Judges-interpretors: *Law from outside*

1.1.1 Romanistes judges

Civil law judges are what I call here « judges-interpretors » because they are not, officially at any rate, considered as lawmakers. In France for instance, the new hierarchy of legal sources imposed after the 1789 revolution implied the subordination of jurisprudence to statutory law. The excesses of the Parliaments d'ancien régime had led to a reaction in the new order, a « legicentrism » where judges should only have been, to quote Montesquieu, « the mouth saying the words of the law, a soulless being that can not temper its force or power ». In practice of course, the « soulless beings » were quick to recover and fight back. It is true that the anathema thrown on « judge-made law » explains the official discourse that the courts use in their formal argumentation – what an American comparatist, Mitchell Lasser, calls their « official portrait ». This official portrait limits the judicial role to the application of the legislative rule and stresses the need for judicial deference towards the legislator – legislator which in no case can be challenged or worse, replaced. But French judges are not mere « slaves of the legislative law » (those are the words of a 1791 circular, this time). Thanks to the obligation they have to avoid any denial or want of justice (they can not « refuse to judge pretexting the opacity of the law »), they were able to renew their interpretive power to the point of creating their own rules in the shadow of the statutory norms they have the duty to apply. This « officious

portrait » of the judges, next to their « official » one, explains the ambivalent status of the jurisprudence as a legal source in the French system and in the systems inspired by it. It also enables us to understand better the relation between the judge and the legislative rule he has to apply: his « power margin », or « power space », can only open if he uses his creativeness through interpreting the statutory norm – it does not flow from the explicit creation of a distinct legal norm he would be allowed to shape.

1.1.2 Islamic judges

Islamic judges – and this is my second example because, I say this again, this conference does not pretend to be exhaustive – can also be considered as « judges-interpreters » in their relation to the legal norm they apply. Islamic law balances, as my colleague Muriel Paradelle aptly puts it, « between a revealed word and a constructed norm ». It is composed of a body of norms of divine origin (the *shari'a* contained in the Coran and the Sunna) and of another body of doctrinal norms (the *fiqh*) mostly framed outside the judge, and whose very nature is not limited to the legal field but also pertains to the religious, social, moral fields. When facing the *shari'a*, judges are like interpreters who remind us of the Roman *jurisprudents* specializing in the study of the sacred texts. But the « pure » islamic systems are rare – meaning systems where the *shari'a* does not coexist with a national, state law of course inspired by the islamic legal culture, but expressed in the forms of occidental law (this is called the *qânûn*, a denomination which dates back to the Ottoman period, under the Turkish kalifat). The occidental law available for exportation will usually be the civil law system, not the common law (which is only exported through conquest as far as private law goes – I am not talking here of the constitutional law of « common law » countries such as the U.S.). Therefore, a judge

working in such a mixed civil law-islamic law system will still end up with a legal norm created outside him. I will go back to this type of mixed system after having said a word of the exact opposite of the judge-interpreter : the judge-legislator.

1.2 Judges-legislators: *Law from inside*

The judge-legislator, or judge-nomothetos by adaptation of the Platonician vocabulary, voices his own law within his court. Such judicial norms may or may not be in competition with legislative norms – in any case, their legal status is not in question: they are a legal source and that's precisely what distinguishes them from civil law « jurisprudence ». As an illustration of the link uniting those judges-legislators to the rules they create, I will tell you briefly about customary law judges and common law judges.

1.2.1 Customary judges

Customary courts were very common in the pre-revolutionary French legal landscape as well as in other European systems in the middle ages, but current « customary » systems are a lot rarer. The map established by the University of Ottawa only mentions a few of them, among which figure Andorre and the British Channel Islands (Jersey and Guernesey – where Victor Hugo stayed for a while). The Channel Islands, for instance, are « attached » personally to the English queen in her quality of duchess of Normandy but Norman custom still prevails there. It is still applied instead of the common law – at least in those matters where no English statute was passed saying specifically that it will apply in Jersey or Guernesey. It can thus be said, with all the precautions warranted by the scarcity of the available documentation, that judges still apply customary law in Jersey and Guernesey. But if this is really the case, do they apply norms created outside themselves (through the repetition

of certain habits over a certain period of time – hence the name « custom », for something which is « customary ») or do they just repeat and refine a judicial rule through a continuing stream of decided cases? This is the very heart of the debate relating to the nature of customary law. I hope that the description that I am about to make of the relation between the English judges and the common law will help clarify it somewhat.

1.2.2 Common law judges

The nature of the common law and, in general, of any so-called « customary » law, can be better understood through its old and intricate history. I don't feel it is an exaggeration to say that it is very difficult to understand the link between the common law and the judges without a historical explanation.

a. The common law as the general custom of the kingdom of England

As soon as 1100, the English kings have sworn to respect the «*leges et consuetudines*» (laws and customs) of the kingdom of England on the occasion of their coronation (Elizabeth II did swear an oath to the same effect at her coronation in 1953: “Will you solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada (...) according to their respective laws and customs?”). But what are those « laws and customs » of England that the king or queen swear to respect? According to Professor Robert Jacob, research director at the National Center for Scientific Research (C.N.R.S.) in Paris, the laws and customs referred to in the coronation oath were originally made of the norms applied before the Norman invasion in 1066, thus essentially Saxon laws and customs. The fact that the first Norman kings (William the 1st and his successors) promised to respect them was supposed to help improve their political legitimacy after the conquest.

But today, those «*leges et consuetudines*» of the kingdom of Great Britain or Canada refer to the common law (here meaning a general custom of the realm) such as it has been uttered and refined by the royal judges whose mission it was to voice it. Therefore, the relation of those judges to the common law depends on the way their mission is understood. The first way to view it is as a mission to say the pre-existing custom (common law) that is waiting outside them to be expressed and put into words – a little bit like the German *volksgeist* put forward by Savigny in 1814. This way to understand the judges' mission regarding the common law is called the declaratory or « oraculary » theory formulated for instance by Blackstone. According to this theory, judges are seen as the « oracles » of the general custom of the realm (like the Pythie was the oracle of Apollo in the Greek mythology). This is a first way to understand the mission of the judges in relation to the common law. But there is another. It could also be argued that the mission of the judges is to create this general custom *ex nihilo*, out of nothing, because they have been granted a normative power of their own, a normative power different from the one enjoyed by the parliament. This is called the institutional theory of the common law. It has more or less replaced the declaratory theory among Canadian and English authors. But which theory is favored by the judges? Actually, they appear to be divided. Some intuitively adhere to the first one, some to the second one. This lack of uniformity is understandable, because those two theories relating to the nature of the common law (the declaratory one and the institutional one) are not at all incompatible. The common law can be seen as nesting in the words of individual judgments as well as (at the same time) in the legal knowledge common to legal professionals: this is the theory called « the two bodies of the (common) law » that was proposed by the legal historian Brian Simpson.

b. The common law as a legal norm competing with Parliament-made legislation

In any case, the coronation oath sets up a triangular relationship where the judge enjoys a privileged tie with the customary norm (the common law), but where the king himself (and its legislative successor, the parliament) is placed in a submissive position. So it is no wonder that the development of the common law went hand in hand with a strong judicial « protectionism » towards it. It was to be expected, just as it was only to be expected that judges would view the common law as a « benefit » of the people, who can not be deprived of it despite all the explicit legislative will to the contrary. And it is understandable also that judges always feel free to interpret statutes restrictively when they limit or amend the common law. English judges, as well as Canadian, Australian or American courts, are the creators of their own set of rules : the common law, which in turn compete with the legislative norm. We find ourselves far away, here, from the civil law model where jurisprudence is not formally a legal source, and where judicial creativity can only make itself felt under the guise of interpretation.

1.3 Judges-Janus: *The double face of mixity*

So what happens when those different systems mix? When common law and civil law mingle in a « mixed » system, or when civil law and islamic law are brought together? As an illustration, and before moving to the second part of my presentation, I will tell you about the Quebec judge (as an example of the mixity involving common law and civil law) and about the Egyptian judge (for the mixity civil law/islamic law).

1.3.1 Civil law and common law: The Québec example (precedent *v.* jurisprudence)

The Québec judge, in the first place, belongs to a mixed system where private law flows from the romanistic tradition. The new Québec Civil Code (which came into force in 1994) renewed the older Civil code of Lower Canada – the latter, adopted in 1866, received the French civil tradition through an open « borrowing » operation. But if the private law is indebted to French and Roman law, Québec public law is mostly common law by its content and methodology. This public law is more or less uniform everywhere in Canada, thanks to the uniformizing influence of the Supreme Court (the Supreme Court occupies the higher place in the federal judicial hierarchy). In this context, Québec judges have to use two distinct legal methodologies on a daily basis: the civil law methodology in the private sphere, and the common law methodology in the public sphere. The problem connected to this mixity comes from the fact that the relation judges entertain with the judicial norm is not the same in civil law and common law systems. In the civil law methodology jurisprudence is not formally considered as a legal source, but the common law *is* law and must be applied if possible to new similar cases according to a subtil mechanism called the *stare decisis doctrine* (or doctrine of the « precedent »). This mechanism explains how to extract the legal reason (*ratio decidendi*) from decided cases (the so-called « precedents ») in order to apply it to the case to be decided today. In short, what we have here are two distinct methodologies and two opposite judicial attitudes concerning past decisions. Ideally, Québec judges should respect one or the other according to the legal sphere he has to decide in. If they have to adjudicate a civil action, they should refer to the codes and statues only rather than to the jurisprudence. But if they have to decide a public law question, they should apply both the common law and

statutory law. This is « in theory ». In practice, the *stare decisis* doctrine (the precedent seen as a legal source, a legal norm) tends to increase its hold on Quebec courts, even in civil law cases. The reasons behind this methodological shift are many, ranging from the influence exerted by the Supreme Court of Canada (where judges apply the *stare decisis* in civil law actions originating from Quebec) to the understandable temptation for the judges to increase their law-making powers – and through it, their influence and power. At the end of the day though, the result of the mixity of Quebec law implies a mutation in the relation between Quebec judges and the judicial norm (the jurisprudence), as well as in the relation between those judges and the legislative norm. They move away from the romanist, civil law tradition and get closer to the common law tradition – from judges-interpretes, they become more « judges-legislators ».

1.3.2 Civil law and islamic law: The Egyptian example (the principle of legality of offenses and sentences v. uncodified islamic law)

I come now to the example taken from the Egyptian mixity. In the Egyptian system, islamic law is mixed with a statutory law (called *qûrûn*) inspired by the civil law tradition and organised around codes – a civil code, a criminal code, etc. The romanist appearance of this codified system, even though it is inspired by the islamic legal culture, might lead the foreign, western-trained jurist to think that he moves into a familiar territory. He might also expect Egyptian judges to abide by state law as any civil law judge would. In fact, such an appearance would be very misleading. To illustrate this, I will draw an example from a famous criminal affair, the affair Abu Zayd (example which was provided very helpfully by my colleague Muriel Paradelle, because I am not a specialist of islamic law myself). In this notorious affair which took place in the early 90's, a philosophy professor had been accused of apostasy because of his writings (he had

advocated more rights for women, among other things). Apostasy is, for those who do not know (and I confess I was among them) a major crime, springing from the « denial » or rejection of a religion deemed perfect : Islam. Anyone can then kill the apostat – the criminal – on sight. This is also what happened, if you remember, to the English writer Salman Rushdie after his book « The Satanic verses ». The interesting point there, from a comparative legal standpoint, was that if apostasy is one of the major crimes in islamic law, it is not an offense in the Egyptian criminal law – the one encased in the criminal code written in the Western tradition. This code did not list apostasy among the criminal offenses. So the criminal code was silent, and this silence translated into a legal impossibility to condemn somebody for such a behavior according to the principle of « legality » of offenses and sentences (this principles means that if the offense is not listed in the criminal code as a known infraction, one can not be punished for it). But despite all this, the professor was condemned by application of the islamic law. The example is interesting because it shows an unexpected alteration in the behaviour of the Egyptian judge towards the applicable legal norm. Faced with one of the major crimes recognized by islamic law, this judge that we thought would behave as a civil law judge when dealing with state law (the criminal code) does not hesitate to put it aside to give precedence to a legal system supposed to be inapplicable to the case. This judge thus remains a judge-interpreter according to my tentative qualifications, but he does enjoy the unexpected aptitude to bring outer legal norms in a judicial field that was thought to be closed to them.

Thus, the gradation in the relation between the judge and the legal norm – from the judge-interpreter to the judge-legislator – holds many grey zones according to the mixity of the legal systems. This will stand as the conclusion to the first part of my conference.

2 Judges and conflicts: *Between arbitration and authoritative resolution*

Now for the second one: what about the institutional and procedural structure where this relation (between judges and legal norms) unfolds? Does the judge act in it as an arbitrator, or as an authoritative figure whose decisions necessarily bind the parties? Those questions will be at the core of the second part of my conference (entitled, as you may read, « the judge and the conflict »). I will deal first with procedural logics, then with the repartition of the different types of litigation between the courts and finally, with the image of judges.

2.1 Procedural logics: *A progressive scale*

The procedural logic underlying the practical work of the courts vary considerably through time and space. Historically anyway, proceedings have shaped the body of material, substantive rules: the former generally precede the formation of the latter (when there is no system of substantive law to borrow as a package from abroad – I am talking about the past, not the present). The practical ways designed to solve conflicts – thus, the proceedings – often represent a preliminary preoccupation in a society seeking to organize itself: even before saying what the rule of law is, judges are expected to say who should win the case – with or without substantive rules to support their decision. Thus for instance, middle-age ordeals did not rely upon any substantive norm to decide if a criminal accusation was true or not. After a trial by fire or water (or by the cross, etc. – in ordeals by fire: you had to be burned by a red-hot iron and then a priest would check how it healed; ordeal by water: you were thrown in a pond or lake and the priest would watch how the water « received » you – better not to get upset and rather sink peacefully...), God spoke through the priests watching over the performance of the ordeal and thus indicated to the judge what

the good and true judgment was. In the same way, in the medieval common law, juries which gave their verdict on the issue put to them proceeded as they wished – they were hidden by the secrecy of the deliberation anyway. These two historical illustrations show that proceedings are crucial as to the actual solving of cases – saying who wins and who loses. What is more, proceedings do not necessarily imply the application of precise legal rules: the agreeable solution (the « ok » solution for the judges, the parties and especially the loser and his friends!) matters more than the predictability of legal norms. This is frequently the case in customary systems. But the parties' agreement to the judicial solution (and especially the agreement of the losing party) can also flow from the strict application of pre-established procedural norms: this is the system in place in so-called « developed » systems, such as civil and common law systems. I shall say a word of the procedural culture of the customary systems before evoking the one in force in civil and common law systems.

2.1.1 Judges-arbitrators: Conciliatory proceedings in customary law

So let us first consider the customary systems, where the culture of the negotiated solution generally prevails. I will take three examples among them, that I shall analyze in connection with the corresponding legal culture: first the customary tribunals in southern Egypt, then the *Shotei* proceedings in Japan and finally the practice of the ordeal in Togo.

a . The Egyptian *Maglis Al-'Urfi*

The Egyptian *Maglis Al-'Urfi*, in southern Egypt, will allow us to take the pulse of a « classic » customary court (and I confess immediately that I borrow this example from the research field trip of my colleague Muriel Paradelle there). Those customary tribunals sit in the southern agricultural communities, where the

social and family ties are very tight. They try to solve the smaller conflicts which by their very nature would endanger the social harmony; the sentence is therefore secondary compared to the necessity to restore this social harmony. Judges are important people of the locality (according to the social scale). The records are anonymous and the parties are never named. The decisions of the tribunal tend first and foremost to a certain result (the restoration of the social cohesion) rather than to the absolute respect of certain proceedings or rules of substantive customary law. They require the appobation of the two opposing parties to become effective. Thus, the Egyptian *Maglis Al-'Urfi* are rather a negotiation forum where proceedings and substative law are note very important.

b. The Japanese *Tchotei*

As a second illustration of customary proceedings, the Japanese system is interesting because of its mixed nature. Private law has been codified according – mostly – to the German model (the B.G.B.) but public and constitutional law are rather American in inspiration; the rest is stil of a customary nature. When viewed from a closer perspective, especially in the private law sphere, the Japanese legal landscape looks like a fake Hollywood set: beyond a civil-like façade defined by the codes, you can see a customary horizon line occupied by traditional rules of conduct, called the *giris*. There is a *giri* for each social relation and corresponding situation; this *giri* says what each party should do and not do. There is a *giri* for the relation between the father and the oldest son, a *giri* for the relation between the husband and the wife, a *giri* for the employer and the employee, etc. – always in the sense of a relation between an inferior and a superior on the social scale (the older is superior to the younger, the man to the woman, etc.). The enduring prevalence of the *giris* in Japan goes hand in hand with a deep mistrust towards what the Westerners call « law » - this law

which is implemented by the Japanese courts according to the codes inspired by the civil law tradition. This mistrust implies, for instance, that it is considered « shameful » to go to court to vindicate a personal « right » (I only speak here, of course, about private law – not about criminal or public law) – all the more so because the very idea of « losing face » (through losing one's case) sounds terrible for an oriental (Japanese, Chinese, Korean – this displeasure is shared in all Asia). In such a particular context, it is easy to understand why much of the civil litigation in Japan is still conducted outside the courts – thus, for instance, only five per cent of divorces are pronounced at the end of judicial proceedings). But it is interesting also to see how judicial proceedings themselves are easily tuned to the consensual spirit of the *giris*. This is what happens with the *Tchotei* procedure. I heard about it through Professor Jacques Herbots (from the KU Leuven in Belgium) when he was invited in Ottawa. Professor Herbots had taken a sabbatical year leave in Japan and had the opportunity to visit some tribunals and courts there. One day, he had the surprise to discover, while walking down a corridor, a round room with a round table where the judge was sitting with the parties and their lawyers. When he asked, he was told that this was a *Tchotei* procedure, a sort of arbitration procedure conducted by the judge, within the occidental-type judicial organisation, in the presence of the parties and their lawyers. Such arbitration proceedings are certainly not unknown in Western civil law and common law countries (I think for example of the judicial conciliation program implemented by the judge Otis at the Québec Appeal Court). But they do not have the same background. In the Western judicial culture, those arbitration proceedings try and promote the arbitration culture thanks to the prestige and authority of the judge conducting the negotiation. But in Japan, the *Tchotei* proceeding echoes the consensual spirit of the customary system founded on the *giris*.

c. The ordeal in Kabiye country (Togo)

Finally, an occurrence of an ordeal in the Kabiye country was recorded in a remarkable cinematographical document by French anthropologist Raymond Verdier in Togo. As I evoked it earlier (by fire, water, etc.), the ordeal sounds very medieval and outdated – could an ordeal take place today? Actually it could; some occurrences can still be observed in certain customary systems. In Raymond Verdier's documentary, the dispute to be adjudicated opposes two co-wives, the plaintiff accusing the defendant to be a witch (a serious accusation in this community). The truth of the matter, known to most members of the community, is that the plaintiff is a notorious quarrel-seeker and is jealous of the defendant – so she is seeking to ruin her through the sorcery accusation. But since this accusation is serious, it has to be proved true or false and adjudicated: this will be done through a fire ordeal. The main (and longest) part of the movie and of the judicial proceedings concern the preparation of this « judgement of god », god who is called upon to give his verdict by granting to one of the parties the power to triumph of the ordeal. To succeed in the ordeal here, the winning party has to grab a ring placed at the bottom of a caldron filled with boiling oil. As a matter of fact, the « important men » of the village (so, the judges) cut small wood with application during a good half an hour and discuss as much, while psychological tension grows for the parties. When this tension is at its peak, the plaintiff is asked to submit to the ordeal and try grabbing the ring – but she desists, and the defendant then try and succeed. The truth of the matter, again, is that the defendant had previously (and secretly) received a protective cream from the « judges » of the ordeal. Therefore, we see that the ordeal is not closed to trickery (it was also the case in the middle-ages, with the complicity of the priests), but at least, the social concord is restored. Publicly defeated by a « judgment of god », the plaintiff has to drop her accusation and social harmony is restored (at least for a time...).

So, the « negotiation » associated with this mode of conflict solving can be more or less « forced » by the pressure of the group on the parties, thanks to a proceeding (the ordeal) organized according to a set of rather strict rules. Therefore, we are not that far, despite the rather exotic character of this conflict-solving mode, from the strict and pre-established proceedings in civil and common law systems that I am going to compare now.

2.1.2 Judges-spectators & Judges-actors: Accusatory and Inquisitorial proceedings in common and civil law

Judges-spectators or judges-actors, civil and common law judges evolve within two antagonistic types of proceedings: the accusatorial model for the common law and the inquisitorial model for the civil law. Historically, the source of this dualism (which is particularly strong in criminal matters) is linked to the disparition of the ordeal in France and England following the fourth concile of Latran in 1215. How could private disputes be solved without the ordeal? And how could judges possibly determine if the accused person is guilty or not without it? England and France came up with two very different procedural solutions. England turned to the jury and France towards the inquisitorial model inspired by Roman and canon law. But as a consequence, their two procedural systems have diverged greatly from then on because the role imparted to the judge in each is very different. In England, the intervention of the jury assigns a « secondary » part to the judge: he is more a spectator than a player. On the contrary, in France, the Roman-canonical model implies that the judge is a very active player during the whole length of the trial. This general trend is still very much alive in civil and common law systems. The common law judge tends to be more of a referee (in the sense of a football referee, not a legal arbitrator): he has to keep the score and let the parties and

their lawyers play the game. By contrast, the civil law judge participates more actively in the proceedings: he conducts them, chooses the experts, asks for this or that evidence, etc. In the criminal sphere, the distinction between the inquisitorial and accusatorial proceedings crystallizes in the opposition of specific rules and practices. This is the legal area where the distinction matters the most, particularly when an international criminal court has to be created (like the one in La Haye): one model needs to be chosen over the other, or a new one should be created in mixing the characteristics of both accusatorial and inquisitorial proceedings. Just to give you an idea of the technical ramifications of this duality, here are some of their characteristics. The accusatorial model implies that the witnesses are questioned in court by the lawyers, where the inquisitorial model makes this the task of the *juge d'instruction* out of court (*juge d'instruction* that has no equivalent in the accusatorial model). Concerning the weight of the evidence, the accusatorial trend insists on the importance of evidence obtained in court (especially through witnesses), but the inquisitorial trend rather favours written evidence and in general, evidence obtained out of court. Paradoxically, the accusatorial model is more familiar for the public in general, including the French one, than the inquisitorial procedure that prevails in French law – this is the direct consequence of the diffusion of the American legal culture through many T.V. series. I won't say more about this because I am not a specialist of criminal law (rather a private and civil law one). So I would like to end my presentation of the procedural logics by talking briefly about the occasional failures of the Western model, especially on the civil law side: what I call, in my outline, the « half-judge ».

2.1.3 Half-judges: Effectivity problems in civil law systems

Modes of conflict solving – procedural rules – should not stop abruptly at the lecture of the judgment. They also have to guarantee the effective application of the judicial decision – if not, they are lose half their meaning. This problem is more potent in civil law systems because more emphasis is placed on the first aspect of the judicial mission (to say the law) than on the second one (solve conflicts). Talking about the symbolic attributes of justice (the scales and the sword), Pierre Drai thus remarked that « the evolution, in time, was that the scales became more important than the sword: the judicial science, in the formulation and application of the legal rule, took over on his power to command and impose ». Take for instance the rule protecting public property from demolition in application of a judgment: even if a military casern encroach on a private property, the encroachment can not be suppressed and the private owner has to satisfy himself with damages – money. But what is odd is that in Belgium or France, the judgment itself will formally order the demolition: it just won't be possible to execute it. By contrast, in common law systems, the application of a judgment is as important as the judgment itself. Through the judgment and its application, it is the whole image and credibility of the courts that is at stake: the application is never taken lightly. Thus, for instance, a party that refuses to comply with an injunction (a judicial order to do or not to do something) will be guilty of contempt of court and can be sentenced to a fine, or even to a prison time (including in civil matters). But in the example I used for Belgium and France (the public property can never be demolished as a sanction), it also means that the injunction in demolition will simply not be pronounced. To do otherwise (grant the injunction in demolition in the judgment and then leave it unexecuted) would undermine the authority of the

common law judicial system. Therefore, common law judges are more aware than their civilian counterparts that the sword is as important as the scales. To avoid being half-judges, they concern themselves – to a certain extent of course! – with the execution and effectiveness of their decisions.

But I have said enough about procedural logics and, even if I have to restrain myself because this is such an interesting topic, I will now say a few things about the allocation of the cases between the courts.

2.2 The allocation of conflicts: A *divisible competence*

This question, fortunately, is easy to summarize briefly. Civil law systems (at least the ones I know in Europe) are characterized, generally, by a principle of specialisation of the judicial institutions. Common law systems, on the contrary, usually present a greater centralization of the judicial competences and missions in the hands of fewer courts. This duality is once again historical in origin, but I will not dwell upon it. I will just present the two opposite principles (of specialisation and centralisation) briefly in turn.

2.2.1 The specialisation principle

The French system, that I will take as an illustration of the civil law trend, is characterized by the explosion of the different areas of competence between several specialised courts. There are commercial courts and work courts (the *Prud'hommes*) operating beside the « general » courts systems like the *tribunaux d'instance* et *de grande instance*; other courts specialise in administrative law (administrative courts topped by the *Conseil d'état*) and in constitutional law (the *Conseil constitutionnel*). Such a specialisation of course leads to problems of attribution – should this case go to this court or that one? Reality is rarely amenable to legal categories. Specialisation also

brings, of course, dissenting opinions about the content of the law on certain subjects – the *Conseil d'état* may, for instance, entertain a different opinion on the extent of the protection of the right of ownership than the one advocated by the Court of cassation.

2.2.2 The centralisation principle

By contrast, in England, the common law system is organized around the centralised competence of a few courts in London: the High Court, the Court of Appeal and the House of Lords. There are no other equivalent-ranking courts endowed with specialized attributions. The « common » courts are entitled to adjudicate any type of conflicts: civil ones, criminal ones, commercial, work-related, administrative, constitutional ones,... This centralisation has the advantage of preventing conflicts between the specialised courts like in France, and increases of course the uniformity of the legal rules applied. It is true that administrative tribunals can be found in England, but those are not real courts of justice and their work is supervised by the main courts in London – this is because, remember, the common law is the benefit of every subject and they can not be deprived of this benefit, etc.: the English judges are the guardians or trustees of the common law.

In Canada or in the United States, the judicial organisation is similar, except that the federal structure of the country gives the Supreme Court (which is the equivalent of the English House of Lords) of an additional constitutional competence that allows its judges to decide the conflicts between the federal institutions and the states (in the US) or provinces (in Canada).

After those precisions concerning the repartition of the judicial competences, centralised in common law and specialised in civil law systems, I will now embark on the last section of my

conference, devoted to the image of the judge. I will present it in the form of a comparative conclusion.

2.3 Figures of judges: *An expandable status*

The image of the judge vary considerably in the different systems we talked about today, and also within each of those systems.

2.3.1 Judges-administrators

Some judges are so only by name when they amount to nothing more, from a practical point of view, than to anonymous automatons in the application of the law – like administrative agents. This the case, for instance, of County Courts judges in England. Even though those judges decide 95 percent of civil cases at trial level, they are only viewed as the « menial workers » of the common law. Their decisions are not published in law reports, because they are implicitly considered as forming an « inferior » class in the English judiciary. They only apply the common law – they do not create it. This creative privilege belongs to the central courts in London : the High Court, the Court of Appeal and the House of Lords. The only « plus » of the County courts judges is that they are professional judges, where other « judges-administrators » in England are not (like those sitting in the administrative tribunals, like the *magistrates* who decide criminal cases at trial level, etc.).

2.3.2 Judges-associates

French judges fare better than those poor « judges-administrators ». They are considered by the legislator as its « associates » in the application of the law. Portalis, the « mother » of the French civil code (the father being Napoleon in this view), already called upon them in his famous « preliminary discourse » to the code when he wrote that : « we have been

struck by the opinion, so widely entertained, that in the redaction of a civil code, a few precise articles on every subject would be enough, and that the supreme legislative art is to simplify all while providing for everything. 'Simplify all', is an operation that should be more clearly defined. 'Provide for everything' is an impossible goal. We thus refrained ourselves from the dangerous ambition to regulate and foresee everything. A code, as complete as it may seem, is no sooner written, that a thousand unexpected questions present themselves to the judge. (...) It is up to the judges and the doctrine authors, attentive to the general spirit of the laws, to direct its application ».

Therefore, if civil law judges – as we have seen – must officially not act as legislators, at least their aptitude to creative interpretation is practically unavoidable in the application of the written law. But nevertheless, their official role (I refer here to the image of Lasser's double portrait) limits their status. French judges are relatively numerous, and the principle of specialisation (regarding the attribution of cases) weaken their margin of power and influence. They never speak at the first person, in their own name: the identity of each judge is absorbed in the one of the court to which they belong – it does not matter if they decide collegially or individually. Their dissenting opinions are artificially muffled in an inexorable unanimity, because the court and the law can only speak in a single voice. Even the form of the decisions of the highest French jurisdiction in civil matters (the Court of cassation) strenghtens this appearance of unity and de-personalisation. But to really understand the status of French judges, nothing speaks better than a comparison with the status of common law judges.

2.3.3 Judges-kings

My contract law teacher at the University of Moncton (New-Brunswick, Canada) used to tell us half-jokingly that judges

were « little kings ». She aptly described the privileged status enjoyed by common law judges, in Canada as in England (and to talk only about those because I know them better). Anglo-Canadian judges are few – compared to the « army » of French judges. They come from practice (they usually were preeminent lawyers) and not from some school for judges (like the Ecole de la magistrature in France). They enjoy a wide array of competences in every legal area (private law, criminal law, commercial and business law, administrative law, constitutional law, etc.) and see themselves as the guardians or « trustees » of the common law for the benefit of the citizens (or subjects). The common law itself is a judge-made law competing with the parliament-made law... and this parliament-made law is applied by the judges anyway : they thus apply both set of rules. Canadian judges do not stop at being law makers. They also act as arbitrators in the power struggles between the federal state and the provinces. In England as in Canada, the judges' individuality expresses itself very distinctly through long nominative decisions and through concurring and dissenting opinions. Some would even say that the current length of the Canadian Supreme court's judgments allow them to fully express their opinion on a thousand and one subjects – and not all of them pertinent to solve the case. Finally, procedural rules such as the sanction of the contempt of court make the prestige of common law judges even stronger, since their orders can not be disobeyed without a potential condemnation to a fine and/or a prison sentence. It is hard to convey fully, to outsiders, the nature and the extent of the prestige enjoyed by the judiciary in England or Canada – including in Québec, since Quebec judges enjoy the same status as their common law counterparts.

I will spare you a long « summing-up » conclusion; instead, I will just quote the French poet André Breton: « nobody does, when speaking, better than to submit to a possibility of mysterious

conciliation between what he knew he had to say on a certain subject, with what he did not know he had to say and that nonetheless he managed to say ». I hope I was able to achieve a little of this mysterious conciliation and I thank you very much for your attention.