

# Legal proceedings and citizens' trust of the system of justice: The test of dematerialization

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## **Abstract:**

The trust that the parties to court proceedings place in the operation of the justice system hinges on the adoption, in both civil and criminal law, of rules of procedure for upholding the law and for fair hearings. The use of information technology can affect the quality of proceedings by bringing under question the conditions for applying fundamental legal principles. Beyond this risk, high tech might, nonetheless, be an opportunity that the judiciary should readily seize.

Various decisions rendered by the European Court of Human Rights (ECHR) refer to the following principle: *"Justice must not only be rendered, but also rendered so as to be seen and known by all. At stake is the confidence that the courts of a democratic society ought to inspire in persons seeking justice."*<sup>1</sup> This principle does not, however, figure anywhere in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF, usually called the European Convention on Human Rights). How, in this case, to explain its prominence in the Court's jurisprudence?<sup>2</sup>

This principle is, in fact, the cornerstone of European jurisprudence on the rule of law.<sup>3</sup> The rule of law implies, above all, that justice be pronounced by independent, impartial judges. As stated in a recommendation by the Council of Europe, the *"independence of the judiciary secures for every person the right to a fair trial and therefore is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system."*<sup>4</sup> This independence, instead of being a privilege granted to judges, should exist only in the interest of those seeking justice. As the ECHR's jurisprudence has shown, the right to a fair trial is not reduced to guaranteeing the independence of judges. The parties to a court action have confidence in the justice system only if the latter sees to the effectiveness and efficiency of legal proceedings. The right to a fair trial does not exist if various obstacles hinder the access to justice or if court decisions are not made within a reasonable time, consonant with the expectations of the parties concerned.

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<sup>1</sup> This article, including quotations from French sources, has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor's approval, completed a few bibliographical references. All websites were consulted in June 2021.

<sup>2</sup> For instance §78 in Case of MORICE v. FRANCE 23/4/2015 (Application no. 29369/10) available at <https://hudoc.echr.coe.int/fre?i=001-154265>.

<sup>3</sup> ANDRIANTSIMBAZOVINA J. (2018) "La 'confiance du public' dans la jurisprudence de la Cour européenne des droits de l'homme", in *Les droits de l'homme à la croisée des droits. Mélanges en l'honneur de Frédéric Sudre* (Paris: Lexisnexis), pp. 11-19.

<sup>4</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805afb78](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78).

We need to probe further and focus attention on the quality of proceedings and procedures as courts implement them. We must ask whether the dematerialization of court procedures affects this quality.

## **The quality of proceedings**

Independently of access to the justice system, which ought to be open to all, citizen confidence in the operation of courts of law cannot exist without procedures that uphold the very principles that characterize a fair trial, as envisioned under European law. Among these principles, relevant to both civil and penal proceedings, are “equality of arms” and the “adversarial” nature of proceedings. According to the ECHR, *“the requirement of equality of arms entails an obligation to afford each party a reasonable opportunity to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent”*.<sup>5</sup> Furthermore, this court’s decisions have always insisted that proceedings must be adversarial: *“The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.”*<sup>6</sup> With respect to judicial proceedings, the conjunction of these two legal principles is what turns the right to a fair trial into a reality for the parties. In the same decision (§63), the ECHR stated as much: *“the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial.”* The equality of arms and the adversarial nature of proceedings take the form of different rules depending on whether the case is civil or penal, but they have the same concrete effect with regard to the right to a fair trial.

In CIVIL PROCEEDINGS, achieving a fair trial entails a strict application of articles 14-16 of the French Code of Civil Procedure, whence it ensues that:

- no party may be judged without having been summoned or heard.
- the parties have to make known to each other in a reasonable time their pleas of facts, the legal grounds for their arguments, and the evidence they bring.
- the judge must, in all circumstances, observe and see to the observance of the principle that proceedings be adversarial.

These general conditions do not exclude making arrangements justified by a legitimate, specific interest. For example, there is a dispensation from the obligation to summon the other party to proceedings: the Code of Civil Procedure allows a judge to pronounce certain rulings at one party’s request without consulting the opposing party (articles 493ff). The Code foresees that such rulings be temporary and that the adverse party may ask the judge to review his/her initial ruling, thus making the proceedings adversarial once again.

Another example comes from the judge’s power to state on his own the legal grounds that he deems appropriate for the case at hand. In principle, the parties state the rules of law that ground their claims, but the judge may introduce a legal ground not mentioned by the parties to the case. He may do this in all situations during a proceeding:

- In civil proceedings, he may do so, for example, when one of party, unlike the other, does not have an attorney. In this situation, the judge’s statement of the legal grounds for the proceeding helps reestablish an equilibrium between the parties, in behalf of the one who does not receive advice from an attorney.

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<sup>5</sup> Case of HÔPITAL LOCAL SAINT-PIERRE D’OLÉRON AND OTHERS v. FRANCE, Application no. 18096/12, judgment of 8/11/2018, available at <http://hudoc.echr.coe.int/eng?i=001-187742>.

<sup>6</sup> §63 case of RUIZ-MATEOS v. SPAIN (Application no. 12952/87) judgment of 23/6/1993, available at <http://hudoc.echr.coe.int/eng?i=001-57838>.

- In proceedings of any sort (even if attorneys represent the opposing parties), the judge may state the grounds for the case when he deems that legal arguments should be oriented in a different direction than the one mentioned by the parties.

Regardless of the circumstances, the judge must, it is worth pointing out, restrict himself to introducing in proceedings the rule of law that he deems appropriate, without showing in any way a preference about the outcome of litigation and by leaving the parties a reasonable period for positioning themselves in relation to the questions thus raised.

In PENAL PROCEEDINGS too, the objective of a fair trial is central. Of course, the ECHR accepts that the *“requirements inherent in the concept of ‘fair hearing’ are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge.”*<sup>7</sup> But the following paragraph of this decision emphasizes that certain principles, related to a “fair hearing”, such as equality of arms *“in the sense of a ‘fair balance’ between the parties”*, are valid for both civil and penal proceedings.

Though traditionally marked by their inquisitorial nature and the secrecy of investigations, French penal proceedings have gradually moved away from the most flagrant violations of the principle of the equality of arms. Since 15 June 2000, the first article of the Code of Penal Procedure reads: *“penal proceedings must be fair and adversarial, and maintain a balance between the parties’ rights”*. It then specifies the consequences for the judicial authorities and parties to a court action:

- The separation between the authorities of prosecution and of judgement, a principle that contributes to the preservation of individual freedom (Constitutional Council, 2/2/1995, n°95-360).
- The equality of everyone under penal law, which entails no unjustified discrimination between the parties (Constitutional Council, 3/9/1986, n°86-21).
- The presumption of innocence, which implies that, in principle, the burden of proof falls on the prosecuting party (Court of Cassation, Ch. Crim., 22/4/1993, n°92-81811).
- The respect of the rights of the defense, one of the fundamental principles recognized by French law (Constitutional Council, 2/2/1995, n°95-360). It implies not only that defendant ought to benefit from an attorney’s assistance but also be informed in detail of the nature and reasons of the measures of custody to which he is subject, and that he may present a defense against the accusations and about the eventual aggravating circumstances (Court of Cassation, Ch. crim., 20/9/2000, n°99-82846).
- The judge’s obligation, prior to a ruling about the legal grounds for the case, to ask the parties for their remarks (Court of Cassation, Ch. crim., 4/11/2008, n°08-80495).
- The right to a fair trial and the right of the accused to have an attorney imply that, in penal cases, the court may not judge a defendant who is not present in court and has not been excused without hearing the attorney present for the defense (Court of Cassation, Ass. plen., 2/3/2001, n°00-81388).

Apart from the major differences between civil and penal procedures, the two share the reference to the right to a fair trial with equality of arms and adversarial proceedings. This shows the concern for assuring the parties, through the respect of fundamental rules, about the quality of the proceedings. The question thus arises of whether dematerialization has affected this orientation of the law.

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<sup>7</sup> §32, Case of *Dombo Beheer BV c. Netherlands*, 27 October 1993, (application n°14448/88), 27/10/1993, available at <http://hudoc.echr.coe.int/eng?i=001-57850>.

## The quality of dematerialized proceedings

Dematerialization should be but a means for improving the operation of courts and making it easier to have access to the system. As the reforms of procedure made in France in the past few years have shown however, it also affects the legal or regulatory provisions and procedures that apply during a trial or lawsuit.

The French judicial system has definitely turned toward computerizing its interventions. Besides digital applications for simplifying the management of penal and civil cases, from filing to judging, computerization has also affected the rules of procedure. At the Court of Cassation for instance, nearly all civil courts have been dematerialized, from filing an application in electronic format through its transmission by the plaintiff's attorney over the Internet to the Court and up to the announcement of the decision made, not to mention the electronic communication of briefs and documents. The litigants may also, via secure Internet connections, access the principal sources of information about their case and follow its advancement on line.

For ordinary CIVIL PROCEEDINGS with mandatory representation by an attorney before a lower or appellate court, the instruments (in particular the summons and the conclusions of the parties) have to be transmitted electronically.<sup>8</sup> Article 456 of the Code of Civil Procedure also foresees the possibility of rulings being made electronically.

Dematerialization has not gone so far in PENAL PROCEEDINGS, but the Code of Penal Procedure does not overlook these technological trends. In particular, it broadly accepts the recourse (for several procedural instruments and even, in certain cases, for the hearing of defendants by lower courts) to video teleconferences and exchanges that are not in person (Article 706-71). This last point raises questions about the place of hearings.

The concept of the "publicity" of legal proceedings is a key element in the right to a fair trial,<sup>9</sup> as the Constitutional Council recalled by stating that the "*hearing is a legal guarantee of constitutional requirements about the rights of the defense and the right to a fair trial.*"<sup>10</sup> The hearing is an important phase in a trial for two reasons:

- A hearing is, above all, the time when the parties are present before the judge. It is the place where the facts of the case, its legal grounds, and the evidence are cross-examined. Hearings are important in criminal cases, but also in tort cases, since the proceedings are oral. In civil cases, the hearing cannot be overlooked, even for written procedures where representation by an attorney is required, since it might be the occasion for a dialog that improves on the elements being debated.
- Through a hearing, the system of justice "presents itself to be seen" and, thanks to the transparency of exchanges at the hearing, helps convince the public that the system's unique objective is to respond to the expectations of parties and apply the rules of law.<sup>9</sup>

Despite the criticism often directed at it, video conferencing does not expunge the principle of holding a hearing, since the hearing, though much "lighter" in form, still retains its major characteristics. The Consultative Council of European Judges, an advisory board of the Council of Europe on questions related to justice, has remarked that video conferencing might have a drawback, namely "*the disadvantage of providing a less direct or accurate perception by the judge of the words and reactions of a party, a witness or an expert.*"<sup>11</sup> Likewise, a decision by the French Council of State has emphasized that video conferencing should not be systematic and should not be

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<sup>8</sup> Article 850 of the Code of Civil Procedure for lower courts and Article 930-1 for appellate courts.

<sup>9</sup> FRICERO N. (2017-2018) *Droit et pratique de la procédure civile*, Dalloz Action, n°212-71, 2020 (decision n°2020-866 QPC).

<sup>10</sup> Decision n°2020-866 QPC of 19/11/2020.

<sup>11</sup> §30 in Opinion n°14 on justice and information technologies (IT) of 9/11/2011, available at <https://rm.coe.int/168074816b>.

used in cases before a criminal trial court (Assize Court) since an oral proceeding is a fundamental principle for examining cases in a criminal procedure.<sup>12</sup>

Beyond the question of video conferencing, we observe a tendency over the past few years toward reducing the place of the hearing in proceedings. This holds for penal law given, in particular, the many hypotheses that allow the prosecution to demand recourse to a procedure of simplified sentencing (*ordonnance pénale*) in criminal cases. The presiding judge may then, for certain offences, sentence the accused to a fine (or certain other sanctions) without a hearing.<sup>13</sup> Although this trend is not linked to dematerialization, the latter evidently tends to be conducive to practices related to simplified sentencing.

This trend has not left civil law behind: the possibility of a trial without a hearing has been introduced in civil procedures.<sup>14</sup> The parties may file their briefs with the court clerk. Designed as a simplification for improving the court's efficiency, civil court actions without hearings will probably have a full impact once Article L212-5-2 of the Code of Organization of the Judiciary takes effect. This article foresees that certain claims before a court may be handled without a hearing in the context of a dematerialized procedure.

Even if, for the penal and civil proceedings mentioned, precautions are taken to uphold the rights of the parties and restore, if need be, a hearing, the waning of oral proceedings is evident. This trend is amplified by the facility resulting from computerization.

Computerization leads to questions about the judge's place in settling disputes. Might the shift not ultimately be toward a digital justice without magistrates? Toward a justice subject to rulings made by algorithms alone? A recent decree<sup>15</sup> arouses this fear, since it foresees using personal data to develop algorithms for:

- making a set of specifications about the compensation for bodily harm;
- informing the parties and helping them assess the amount of compensation to be claimed by a victim (the purpose being to favor an amicable settlement); and
- providing documents and information to the judge who is to rule on claims of compensation for bodily harm.

To do this, algorithms will report the amounts: demanded and offered by the parties, proposed in out-of-court settlements, and allotted to the victims of each type of tort. The objective of ensuring equality between the parties before the court is legitimate in and of itself. Is it acceptable that the victims of similar torts receive substantially different compensation depending on their jurisdiction?

Even though the aforementioned text has set the general rules for designing these algorithms, close attention should be paid to the conditions under which data for the case are collected and processed. Furthermore, we should see to it that judges retain full power for assessing cases. It is easy to understand why people fear lest justice be dehumanized. After all, dehumanization could be for real if judges were forced to comply with a schedule of compensation or if algorithms were to set an automatic compensation without any possibility of going to court.

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<sup>12</sup> Decision of 27 November 2020 (req. n°446712).

<sup>13</sup> Articles 398-1, 495ff of the French Code of Penal Procedure.

<sup>14</sup> Article L212-5-1 of the Code as modified by order n°2019-964 of 18/9/2019 and completed with provisions in the Code of Civil Procedure stemming from decree n°2020-1452 of 27/11/2020.

<sup>15</sup> Decree n°2020-356 of 27/3/ 2020.

## **Conclusion**

In its aforementioned opinion, the Consultative Council of European Judges stated that information technology “*should never infringe guarantees and procedural rights such as that of a fair hearing before a judge*”.<sup>16</sup>

A point worth making is that dematerialization, whatever its risks, might also be a chance for the parties, especially in civil cases. Spread out among various jurisdictions (civil, commercial, social), civil cases too often start out with a dispute about the competent jurisdiction (in terms of subject matter or of location). Since appeals may be made of the decision about this competence, several years sometimes go by before the parties to a suit actually know which jurisdiction is competent for handling their case. A fundamental, necessary reform would be to introduce a change so that a litigant need not, via a computer, submit his case to the justice system which would then be responsible for determining — via administrative measures that may not be appealed — the jurisdiction (civil, commercial, social) for ruling on the merits of the case. This simplification could be facilitated by the dematerialization of legal proceedings; it would obviously improve the system’s efficiency.

As the Consultative Council of European Judges stated in its opinion, information technology requires big investments, which must be allotted to jurisdictions according to their needs. The equality of users of our court systems must be preserved in the context of computerization. This is far from being so at present, given that far too many people do not have access to the system of justice. The public will have confidence in the operation of the justice system only if the latter is accessible to everyone and if it upholds citizens’ fundamental rights.

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<sup>16</sup> Conclusion §iv in Opinion n°14 on justice and information technologies (IT) of 9/11/2011, available at <https://rm.coe.int/168074816b>.