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The French legal system for the *patrimonialisation* of historical trials (*Archives audiovisuelles de la justice*)

1. Introduction

In the second Book of the French Cultural Heritage Code of 20 February 2004 the French lawmakers, having envisaged the general regime applicable to archives, focused on the *Archives audiovisuelles de la justice* (Audiovisual Archives of Justice) as a special legal category.[1] Regulations contained in Articles L221-1 to L222-3 are based on the Law of 11 July 1985[2] and therefore constitute a subtype of "archives" legally defined in Article L211-1 as "all documents, including data, whatever their date, place of storage, form and medium, produced or received by any natural or legal person and by any public or private service or body in the exercise of their activity".[3] Through this system, in addition to the physical files (paper and digital) relating to a judicial procedure, the French law provides for keeping audio or video record of a trial which preserves interactions between judges, parties and witnesses, including record of the reactions and emotions in addition to spoken words. As Minister of Justice remarked in 1985, "the heart of judicial life is not to be found in the files themselves, in the writings. It is at the hearing, in its vicissitudes, during the debates and their incidents, and in the interventions of the participants that the essential part is played out".

Recording for the purposes of audiovisual archives of justice thus constitutes a major exception[4] to Article 38 *ter* of the Law of 29 July 1881 on freedom of the press, which

[1] *Rép. pén. Dalloz*, v° Archives, par H. Conchon, n° 49 et s.

[2] Loi n° 85-699 du 11 juillet 1985 tendant à la constitution d'archives audiovisuelles de la justice (JORF 12 juillet 1985 n°0160 p. 7865).

[3] Robert Badinter, Ass. Nationale, séance du 3 juin 1985, p. 1382.

[4] What precised Cons. const. 6 décembre 2019, n° 2019-817 QPC. See commentary in: *AJ pénal* 2020. 76 note Christine Courtin.

prohibits the use in a courtroom of "any device for recording, fixing or transmitting speech or image".[5] The purpose of this provision was to keep order in the court proceedings, to protect the rights of the parties and to guarantee the proper exercise of authority and impartiality of the judiciary.[6] It was supplemented by Article 308 of the Code of Criminal Procedure, which prohibits, as a matter of principle, the recording of the trial from the opening of the hearing.[7] The President of the Court may however, upon motion filed before the hearing, allow recordings to be taken, but only when the proceedings have not yet started and only with consent of the parties or their legal counsel and of the public prosecutor's office.

Not all trials are being recorded in this manner. The framework in question is designed to preserve only the most important legal disputes, ones that may have value or consequences that go beyond the immediate interest of the parties or the ordinary, day-to-day maintaining of public order. In other words, the record of the trials that have significance to the life of the entire nation become a part of national heritage. This article analyses the phenomenon of and legal framework for *patrimonialisation* (introduction of these records into the *patrimoine*, the national heritage) in two aspects – its origin (the moment of constitution of these archives) and legacy (in particular, communication of the records to the general public).

2. Genesis and purpose of the Law of 11 July 1985

The Law of 11 July 1985 on the audiovisual archives of justice was proposed by the Minister of Justice and "Keeper of the Seals", Robert Badinter. France was, at the time, in a particular historical moment for national memory: major trials for war crimes and crimes against humanity following the Second World War were about to start, in particular the

[5] Judged in accordance with the constitution by: Conseil constitutionnel, 6 décembre 2019, n° 2019-817 QPC; *AJDA* 2019. 2521; *D.* 2019. 2355; ibid. 2020. 1324 obs. EM. Debaets et N. Jacquinot; *AJ pénal* 2020. 76 étude C. Courtin; *Légipresse* 2019. 666; ibid. 2020. 118 note E. Derieux; ibid. 127 chron. E. Tordjamn, G. Rialan et T. Beau de Loménie; *Constitutions* 2019. 590 Décision; *DSC* 2020. 99 obs. E. Dreyer; *Légipresse* 2020. 118 obs. E. Derieux.

[6] For this reason, hearings before the Constitutional Court are filmed and broadcast live on its website, as there are no defendants, only the law is judged in its conformity with the Constitution and the court does not judge the case.

[7] Loi n° 54-1218 du 6 décembre 1954 complétant l'article 39 de la loi du 29 juillet 1881 sur la liberté de la presse en vue d'interdire la photographie, la radiodiffusion et la télévision des débats judiciaires (JORF 8 décembre 1954 287 p. 11445) codified by order n° 58-1296 du 23 décembre 1958 modifiant et complétant le code de procédure pénale (JORF n° 0300 du 24 décembre 1958 p. 11711).

trial of Klaus Barbie. But these years were also witness to considerable transformations in the methods of university research in history, in particular by ascribing greater importance to oral testimony and history of representations, by constructing history in a more ascending way from the individual level.[8]

Marie Cornu noted that parliamentary debates were already questioning the nature of recordings made during trials.[9] What is the ultimate purpose of the 1985 law? Is it about freedom of information or about preserving records for future historians? At first glance it is the former: audiovisual recording is a means of immediate, here-and-now public access to information; however, it might also serve as a long-term memory bank, a source of faithful narrative as to the actual course of the trial. The 1979 Law on archives, adopted shortly before, attempted to reconcile these two dimensions in a contemporary design of transparency of the administration; the related Law of 1978 on various measures to improve relations between the administration and the public is similar in this regard.[10]

Members of parliament wanted to make it possible for citizens to learn, if not in real time, then at least with minimum delay, how justice was being administered in relation to particularly important historical events.[11] To quote *rapporteur* of the 1985 law Charles Jolibois, the video recording was then thought to be "a useful counter-power in the fight against the confiscation of justice by specialists".[12] In this way, the key concept of "public hearing" went beyond the ordinary free access by the spectators, and included a more active form of broadcasting of the proceedings of the trial outside the courthouse.[13]

One must note that this conception was rightly considered detrimental to the issues of peacefulness and balance of court debate. Mixing media with judicial procedures endangers witnesses and favours vengeful populism. A broadcast is likely to undermine the rights of the defence. The nature of this enhanced public access is a game-changer. It is no longer a question of mere documentation, but rather of a new way of conducting a trial in contemporary times, a way in which discourse happens not only between the interested parties. As the *rapporteur* wrote, "justice is not a show". In light of this objec-

[8] A change that had already been taken into consideration by the major law of 3 January 1979 on archives.

[9] M. Cornu, "La constitution légale d'une mémoire orale du procès: les archives audiovisuelles de la justice", *Matériaux pour l'histoire de notre temps* 2019, no. 131–132, pp. 61–64.

[10] Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public (JORF 18 juillet 1978 p. 2851).

[11] About the role of the video captation on justice: J.-P. Jean, "La retransmission en direct des procès", *Cahier d'histoire de la justice* 2019, p. 99.

[12] Charles Jolibois, Rapport, Sénat, n° 385, p. 8.

[13] Ph. Théry, "Justice et médias: faut-il une caméra dans la salle d'audience?", *Quarterly Civil Law Review* (*RTD civ.)* 2006, p. 147.

tion, the 1983 Braunschweig Commission had recommended, with educational interest in mind, that television broadcasts be held under the strict control of the judge and a dedicated commission for a provisional period of two or three years.[14] This proposal however was met with reluctance in judicial circles and was never implemented.[15]

The 1985 Law is clearly about heritage. As Minister of Justice stated, it is a matter of "safeguarding, in the interest of history, the documents relating to judicial life" by preserving "the memory of our judicial life, by recording the trials which are of primary interest to it".[16] The recordings made "for the benefit of history" are meant to be of intellectual importance and therefore cannot be used "to comment on or illustrate news items".[17] The 1985 Law adopts logic of safeguarding a living judicial cultural heritage, which is, from temporal standpoint, not the same as the "current affairs" type of interest that is characteristic of the media. Moreover, the use of the recorded archive only takes place after "stabilisation of the judicial truth definitively acquired".[18] The administrator of the archives is therefore a custodian of the recordings, and may only be consulted for historical purposes.

3. The constitution of a documentary material for the history

Article L221-1 of the Heritage Code provides that all public, administrative or judicial hearings may be recorded if the "recording is of interest for the constitution of historical archives". The recording is, in principle, complete. The Consultative Commission on Audiovisual Archives of Justice (CCAAJ) was in charge of encouraging the constitution of a visual judicial heritage for historians until its abolition in 2013.[19] The commission also ruled on the possible interest of recording hearings upon request: the order of 20 February 2003, ratified by the law of 9 December 2004 on the simplification of the law, made it compulsory to refer the matter to it. The CCAAJ was sacrificed on the altar of "administrative simplification": today it is up to the head of the administration wing

[14] "Rapport sur la publicité des débats judiciaires sur la photographie, la radiodiffusion et la television" [in:] *Mettre l'homme au Coeur de la justice hommage à André Braunschweig*, Paris 1997, p. 162.

[15] A. Chauleur, "La constitution d'archives audiovisuelles de la justice: législation et premiers enregistrements 1985–1995" [in:] *Mettre l'homme au Coeur*…, p. 186.

[16] Robert Badinter, Ass. Nationale, séance du 3 juin 1985, p. 1382.

[17] Robert Badinter, Ass. Nationale, séance du 24 juin 1985, p. 1599.

[18] Y. Poirmeur, *Justice et médias*, Paris 2012, p. 170.

[19] Article 7 of the decree n° 2013-420 du 23 mai 2013 portant suppression de commissions administratives à caractère consultatif et modifiant le décret n° 2006-672 du 8 juin 2006 relatif à la création, à la composition et au fonctionnement des commissions administratives à caractère consultatif (JORF n° 0118 du 24 mai 2013).

of a court of each instance to decide whether or not to record a trial, namely the Vice President of the Tribunal des conflits,[20] Vice President of the Conseil d'Etat, President of the Administrative Court, First President of the Court of Cassation or First President of the Court of Appeal (Article L221-2 C.patr.). However, under Article 69 of Justice Reform Act No. 2010-222 of 23 March 2019, recording is carried out automatically upon request by the public prosecutor's office in cases regarding "crimes against humanity or acts of terrorism".

In addition to the above, audio-visual recording may also be ordered by the presiding judge upon motion of the public prosecutor's office or of the parties (Article R221-1 C. patr.). Except in cases of urgency, the decision whether or not to record the proceedings must be taken within eight days before the set date of the hearing. Article L221-3 requires the judge to obtain "the observations of the parties or their representative" when registration is envisaged.[21] The president sets the time limit and procedures for communicating this opinion.[22] The parties to the proceedings receive a copy of the application for registration and may consult the supporting documents at the secretariat of the court (Article R221-3 C. patr.).[23] However, the judge remains free to make his or her own decision in this matter and this decision is not considered a "jurisdictional act" subject to typical adversarial debate.[24] The opinions of the parties need only be collected

[20] In reality its president. Indeed, as Jean-Baptiste Thierry noted, since the law n° 2015-177 of 16 February 2015 relating to the modernisation and simplification of law and procedures in the fields of justice and home affairs, there is no longer a function of vice-president at the Tribunal des conflits; J.-B. Thierry, "Filmer pour l'histoire: l'enregistrement pour la constitution d'archives historiques de la justice", *AJ Pénal* 2020, p. 458, note 12.

[21] But the judge is not obliged to hear the observations of the parties and of the public prosecutor (and at the time of the Consultative Commission of the Audiovisual Archives of Justice) when he is about to pronounce a refusal of registration: Conseil d'État 29 juillet 2002 n° 240050 et 240278, *Lebon*; *AJDA* 2003. 47 (request for registration of a litigation procedure before the National Council for Higher Education and Research).

[22] When the advisory commission existed, if it could not give an opinion within the time limit, the opinion was given by its Chairman or by the member of the Commission delegated by him, which was sufficient for the validity of an order to refuse registration: Cass. Crim. 26 avril 1989, Bull. Crim. n° 171; *RSC* 1990. 113 note A. Braunschweig (concerning the order on the application of 25 September 1988 to the First President of the Paris Court of Appeal for registration of the hearing of 10 October 1988 of the 17th Criminal Division of the Paris Court of First Instance).

[23] It was on the basis of this dossier that the Consultative Commission on Audiovisual Archives of Justice gave its opinion until 2013. The suppression of the commission therefore makes it difficult to interpret the reasons for recording or non-recording, in particular as regards the reasons for the heritage and "historical" nature of the trial.

[24] And consequently escapes the requirements of Articles 6§1 and 6§2 of the European Convention on Human Rights (ECHR). On this aspect: *AJ pénal* 2017. 498 note David Aubert (sous cass. crim. 29 septembre 2017).

and the judge is not bound by their submissions.[25] The decision to allow or dismiss the motion must have written reasons and is transmitted to the parties and to the public prosecutor's office. If the decision is affirmative and the trial is to be recorded, the Ministry of Justice must be informed (Article R221-5 C. patr.). The parties' options as to appeal against the decision are limited: Article R221-6 provides that within eight days following notification of the decision, the person contesting it may lodge an appeal for annulment, but this appeal does not have a suspensive effect. If the appeal succeeds and the final decision is to prohibit recording, the recording already made may be destroyed by court decision.

The method and technical scope of the actual recording is specified by the Decree No. 86-74 of 15 January 1986 and the options are, at the judge's discretion, either audio-visual or audio-only recording.[26] However, only the first method seems to be of interest and is in use today. The actual recordings are made by specialised companies operating under supervision by Ministry of Justice (D. 221-14 C. patr.). The cameras are installed in the courtroom at appropriate positions upon direction of the Presiding judge who is responsible for maintaining order in the hearings. In any case, the recording is purely descriptive. There is no artistic aspect to the filming. Article L221-4 as amended by Law of 9 December 2004 specifies that the video recording of the trial must be made "from a fixed point", under conditions that do not prejudice "either the smooth running of the proceedings or the free exercise of the rights of the defence", and in accordance with a precise protocol set by the Ministry of Justice – with very discreet cameras and focusing on the only person who has the floor.

It is undeniable that the very presence of a camera in the courtroom, both for the accused and for the prosecution, changes the relationship with other individuals, with the court and with the judiciary in general. According to opponents of the regulation, there is a risk of disturbing free speech that the trial should entail. From this point of view, the *patrimonialisation* of the trial has a modifying effect on its purpose. Here, however, the historical interest of the recording takes precedence, so much so that case law considers that the historical interest prevails over the individual rights of the accused, in particular their privacy.[27] There are also fears – particularly in court cases involving

[25] Cass. Crim. 29 septembre 2017 n° 17-85774; *Dalloz actualité* 9 oct. 2017, obs. W. Azoulay; *AJ Pénal* 2017. 498, obs. D. Aubert; *Légipresse* 2017. 526; *ibid.* 603 Etude N. Mallet-Poujol; *JAC* 2017, n° 51, p. 6, obs. P. Noual; *CCE* 2017, n° 12, comm. 99, obs. A. Lepage.

[26] Décret n° 86-74 du 15 janvier 1986 pris pour l'application de la loi n° 85-699 du 11 juillet 1985 tendant à la constitution d'archives audiovisuelles de la justice (JORF 17 janvier 1986 p. 824).

[27] Cass. Crim. 16 mars 1994 n° 94-81.062; Bull. crim. n° 105; *D.* 1994. 103; *RTD Civ.* 1994. 832 obs J. Hauser; *JCP* 1995. II. 22547 note J. Ravanas.

intentional acts – that defendants who know they are being filmed might make the trial "a platform for the glory of their acts and ideology";[28] this is particularly likely in terrorist cases. The presiding judge can always order to stop the recording, temporarily or permanently, if he or she considers that the recording disturbs the trial in an abnormal manner. Moreover, the defendants' contentions that the mere fact that their speech was being recorded limited their freedom of expression (by altering their testimony and constraining their right to defend themselves), diminished presumption of innocence and practically erased the right to be forgotten – were overruled by the Criminal Division of the Court of Cassation.[29] According to the case-law, the recording is therefore a legitimate limitation of rights on grounds of historical public interest.

Once the trial is over and the work of the audiovisual production team is completed, the recordings are sent to the administration of the Archives de France[30] by the President of the Court. From this point on the Archives' administration is "responsible of their conservation".[31] The magistrate must report any incident that may have occurred during the making of the recordings when handing over the files to the Director General of Heritage at the Ministry of Culture. The secretariat of the court keeps a copy of the minutes in its archives. Article R221-17 of the Heritage Code provides that "the modalities of conservation, classification, inventory, and consultation" of these audiovisual archives of justice are regulated by a joint decree of the ministers of budget, justice and culture.

[28] Crim. 29 sept. 2017, n° 17-85.774, *CCE* 2017, n° 12, comm. 99, obs. A. Lepage.

[29] Cass.Crim. 17 février 2009 n° 09680.558 Bull. crim. n° 40; *Dalloz actualité* 26 février 2009 obs. S. Lavric; *D.* 2009. 634; *AJ pénal* 2009. 235; *RSC* 2009. 924, obs. J.-F. Renucci. Réaffirmé par Cass. Crim. 29 septembre 2017 *préc.*

[30] However, the full audiovisual recordings of the three trials for crimes against humanity which took place in France between 1987 and 1998 are stored at the *Institut National de l'Audiovisuel* (INA) with duplicates at the National Archives. The other audiovisual archives of the judiciary are kept exclusively at the National Archives. Following a technical service agreement signed in December 1991 between the Ministry of Justice, the Ministry of Culture (*Direction des Archives de France*) and the INA, in order to entrust the latter with this task, three agreements were successively signed (13 January 1993 with respect to the Barbie recordings, 13 October 1997 with respect to Touvier and 30 June 2000 with respect to Papon) by virtue of which the INA was entrusted with three missions: "the transfer of the original material on a reliable medium and the making of two back-up copies" (1993 agreement for the Barbie trial), the "preservation of an original copy of the recordings considered as a 'second original' as well as a copy of the minutes of the recordings of the hearings and the payment slip of the recording" (agreements for the three trials) and "the communication to the public of the recording, ensuring its consultation, reproduction and distribution in whole or in part" (agreements for the three trials).

[31] As a side note, *Archives de France* as the administrator may deposit these recordings with a third party. This was the case for the recordings of the AZF trial entrusted to the departmental archives of Haute-Garonne.

4. Communication and consultation of recordings

Under the initial system set up by the 1985 Law, consultation is free after a period of twenty years, unless there is prior authorisation. Subject to exceptions, reproduction and diffusion are free after fifty years. The system was revised by the law of 15 July 2008 on archives which, like the whole of this law, opens up access to the archives more widely.

The principle of free access, which concerns archives in general, is limited in the case of audio-visual archives of justice. Article L222-1 of the Heritage Code provides that "the audiovisual or sound recording is accessible for historical or scientific purposes as soon as the proceedings have ended with a decision that has become final".[32] These two conditions – finality and scientific purpose – must be met jointly, and the burden of proof as to the purpose of access is on the applicant.[33]

In addition to these, the Law adds another limitation in the form of a fifty-year-rule. For a period of fifty years, the reproduction or dissemination of all or part[34] of the recorded proceedings must be authorised by the president of the Tribunal de Grande Instance de Paris[35] or by a judge whom he assigns for this purpose[36] in accordance with

[32] However for the judgment CA Paris 22 janvier 2003 14e ch. A; D. 2003 p. 1393 note Germain Latour (concerning the Papon conviction of 22 January 2003 and the authorisation of early broadcasting by the Gayssot law of 13 July 1990 for the benefit of the television channel Histoire), a sentencing decision is not final within the meaning of the Law of 11 July 1985, as long as the convicted person has the right to have his conviction reviewed.

[33] This interest seems to be interpreted flexibly. According to Julie Brafman, the wife of one of the witnesses in the Papon trial appears to have been able to view the recordings of the trial: "Procès Papon: la mémoire suspendue à un film", *Libération*, 15 septembre 2020, p. 7).

[34] In principle the broadcaster must ensure a balance between the parties' points of view. The Tribunal de grande instance de Paris, citing Article R222-2, had issued an order of 18 October 2004 with respect to the television channel "Histoire". The channel had chosen to produce a 24-hour television program on the Papon trial in the form of weekly two-hour programs, including 8 hours of audiovisual archives of the trial. The archive material contained fragments of pleadings of the lawyers for the civil parties and the requisitions of the two magistrates of the Public Prosecutor's Office present at the hearing. The pleadings of the defence attorneys and the testimonies for the defence were excluded. The court required the television station to give the floor to the parties on the set to avoid any risk of bias. Although full broadcasting would ensure impartiality, such solution was hardly practical as no one would watch a television programme that ran for hundreds of hours. The judge's solution was therefore reasonable. It should be noted that the Klaus Barbie and Paul Touvier trials, which were also broadcast by the television station, did not, however, give rise to such a dispute.

[35] A Parisian jurisdiction that bears witness to the "centralist" conception of justice in France, but also to the French-style to make history from the capital.

[36] One can undoubtedly think that the legislator introduced this precision concerning the hypothesis of capturing an administrative lawsuit or in case of particular issues.

the forms provided for in Article 494 of the Code of Civil Procedure (Article R222-1 C.patr.). Before authorisation is granted, the judge may order investigation if necessary. The judge's order is reasoned and a copy of the decision is kept at the court registry. According to Article R222-2 the judge may impose special conditions on the reproduction or broadcasting of the recording. The order may be contested by the applicant with an appeal filed within fifteen days. There is an exception to the fifty-year-rule: since the amendments introduced by Article 15 of the Gayssot law, recordings may be available for reproduction and broadcasting, in full or in part, as soon as a judgment is reached in cases of crimes against humanity or acts of terrorism.[37] Article L222-2 amended by the same law specifies that the provision may apply retroactively to trials already recorded and which can then be freely broadcast, fifty-year-rule notwithstanding.

In any case, after fifty years, the recordings, regardless of the type of trial, are freely reproducible and can be distributed.

The case-law has also made it clear that judges are exempt from the rules as to temporary restrictions on access to the recordings. A judge, under the Article 379 of the Code of Criminal Procedure, may obtain any document "useful for the establishment of the truth" without any delay.[38] For the same reasons, the depositions taken in a filmed trial may be allowed as evidence in another trial; this was the case with the Klaus Barbie trial.[39]

5. Diversity of the trials so far

Despite the broad textual scope of the regulation, recording for the audiovisual archives of justice happened in very few trials. This fact is hardly helpful in filling the gap between public perception of justice and actual performing of judicial functions. This observation prompted some scholars to call for extending the regulations so as to cover more, not just the extraordinary, "non-standard" trials, as soon as the risk of disrupting the trial is eliminated.[40] It should be noted that while the decision whether or not to invest public assets to this end will be a source of disagreement, the legal challenges tend to relate more to the conditions for opening and accessing these archives rather than to

[37] Loi n° 90-615 du 13 juillet 1990 (JORF 14 juillet 1990 p. 8333) tendant à réprimer tout acte raciste antisémitisme ou xénophobe qui modifia l'article 8 de la loi du 11 juillet 1985 sur la constitution d'archive audiovisuelles de la justice.

[38] Cass. Ass. Plén. 11 juin 2004 n° 98-82-323 (n° 517 P); *D.* 2004. 2010; *ibid.* 22005. 684 obs. J. Pradel; *AJ pénal* 2004. 325 obs. P. Remilleux; *Ibid.* 327 obs. P. Rémilleux; *JCP* 2004. IV. 2597.

[39] Cass. Civ. 2e 17 mars 2005 n° 02-14.514 (n° 445 FS-P+B+R) Bull. civ. II, n° 72; *D.* 2005 p.1051; *RLDI* 2005. 122.

[40] J.-B. Thierry, "Filmer pour l'histoire…", p. 458 (conclusion).

the decision itself.[41] As a side note, only strictly judicial court cases were recorded so far and no administrative court case ever was, although at least one application has been submitted in such case.[42]

The 1985 Law initially applied to criminal and intentional acts only. The Law was designed around the idea of building a judicial memory of the repression of crimes against humanity or war crimes. The following trials of Nazis and Nazi collaborators during the Vichy regime were filmed first: Klaus Barbie (1987, 185 hours of hearings), Paul Touvier (1994, 108 hours) and Maurice Papon (1998, 380 hours). The next wave comprised of trials of crimes committed by the Chilean regime in 2010[43] and cases regarding the Rwandan genocide, with Pascal Simbikangwa in 2014 (including appellate proceedings in 2016) and Octavien Ngznei and Tito Barahira in 2016 (including appellate proceedings in 2019). The trial of the Holocaust denier Robert Faurisson was also recorded in 2007.

Recording for the purposes of audiovisual archives of justice was later extended to include a second category of trials – criminal negligence, usually in cases with high media interest. France has experienced a series of "disasters" that have left their mark on public opinion (Mont Saint-Odile crash, Mont Blanc tunnel, accident to the liner Queen Mary, the growth hormone affair et al.). The first case of this sort to be recorded was the Contaminated Blood trial (1992–1993); then in 2017 the search for responsibility for the explosion of the AZF factory in Toulouse in September 2001, when the explosion of a stockpile of ammonium nitrate – an event similar to the widely publicised port explosion in Beirut in 2020 – caused the death of some thirty people, injured thousands and damaged the city.

Finally, the third and newest category is terrorism. Yves Mayaud noted that these cases will unfortunately multiply in the future "as terrorism develops in increasingly odious and barbaric forms"[44] and because France has been particularly affected. Thus, the trial of the fourteen defendants indicted in the Court of Assize for participating

[41] Civ. 1ère, 30 juin 1987, D. 1987. Somm. 364, obs. Julien. – Crim. 16 mars 1994, n° 94-81.062, Touvier, *Bull. crim.* n° 105; *JCP* 1995. II. 22547, note Ravanas. – Crim. 17 févr. 2009, n° 09-80.558, AZF, Bull. crim. n° 40; *Gaz. Pal.* 8-9 avr. 2009, p. 13, note Desprez. – Cass., ass. Plén., 11 juin 2004, n° 98-82.323, Papon, Bull. ass. plén. n° 1, *JCP* 2004. I. 182, obs. Dreyer.

[42] Ordonnance du Président du Conseil national de l'enseignement supérieur et de la recherche du 5 novembre 2001 (confirmed by Conseil d'État 29 juillet 2002 n° 240050).

[43] Trial of seventeen Chileans, mostly soldiers, prosecuted for the murder of four Franco-Chileans during the repression that followed the 1973 putsch. It should be noted that this trial, which took place from 8 to 17 December 2010 at the Paris Assize Court, surprisingly was given very little coverage in the media. The memory of the audiovisual archives will therefore compensate for the media silence of television.

[44] Y. Mayaud, "Terrorisme – Poursuites et indemnisation – Procédure interne", *Répertoire de droit pénal et de procédure pénale*, Dalloz, Février 2020, no. 457.

in the terrorist attacks of January 2015 against Charlie Hebdo and the Hyper Cacher began, despite the COVID-19 pandemic, in the Autumn of 2020, in front of cameras. It has been decided to record this trial for the audiovisual archives of justice.[45]

6. The nature of the "historical interest"

Each time an application for registration is made, the presiding judge is the only person to decide on the source materials that will eventually be subject of historical research. There are three aspect to the criterion of historical interest: the first one is history itself, the other two – the course of the trial and the establishment of facts.

In 1985, when the law was being drafted, the historical significance of Nazi collaborators' cases was never disputed. This is perhaps the reason why the term "historical interest" was introduced into the text without a proper legal definition.[46] If we refer to the language of Article L221-1 of the Heritage Code, the recording must be of "interest for the constitution of historical archives". The problem, however, is far from obvious. To quote Marie Cornu, what is the "protected legal cultural interest" exactly?[47] Does this historical aspect refer to the facts in question or to the trial itself? The history of justice and judicial memory are constantly intermingled when it comes to assessing the interest of audiovisual recording.[48]

The 1985 Law speaks of "historical archives" and not of historical interest in constituting them. The lawmakers thus seemed to be aware of the difficulty of judging the historicity of the facts or of the trial. It is therefore the conservation process that is historic. History is linked to the way in which memory is preserved. Although it is highly likely that the legislature expressed a conviction of obviousness centred on the Barbie trial; according to *councillor* Jean Fourre, it undeniably uses a vocabulary "narrower in scope than simply archiving and more modest in inspiration than the search for historical interest".[49]

Given the polysemy of the adjective "historical", one must admit it denotes both the nature of the facts and of the trial, but above all – their resonance on society. The *rapporteur* Charles Jolibois considered that historicity should be "understood in a very broad sense" by including "the historical event, of course, but also the sociological history,

[45] Paris, Ordonnance du premier président, 30 juin 2020, n° 315/2020.

[46] Rapp. Ass. Nat n° 2717; Rapp. n° 385 Sénat et Rapp. Commission mixte paritaire n° 436.

[47] M. Cornu, *Le droit culturel des biens. L'intérêt culturel juridiquement protégé*, Bruylant, Bruxelles 1996, p. 206.

[48] On this subject: N. Mallet-Poujol, "De l'intérêt à constituer des archives audiovisuelles de ma justice", Cours et tribunaux, *Légipresse*, n° 355, décembre 2017, p. 2.

[49] J. Fourre, "L'enregistrement audiovisuel des audiences de justice", *Les petites affiches*, n° 58, 14 mai 1986, p. 15.

which can include for future generations the memory of our daily judicial life" on the sole condition that the recording facilitates "the understanding by future generations of what was ours",[50] in particular by integrating the "evental, political or sociological dimension" of trials that deserve to be "preserved for history".[51]

Aside from what Warren Azoulay calls an "abstruse criterion",[52] one surmises, however, that the historicity of the facts in question is not to be confused with the historicity of the trial. This is why in 2017 the President of the Paris Court of Appeals did not grant a request for registration of the civil parties in the case of the attacks in Toulouse and Montauban perpetrated in March 2012 against military personnel and a Jewish school by Mohammed Merah. The perpetrator of these killings was dead and the case concerned accomplices and arms suppliers. The absence of the main perpetrator was undoubtedly a major factor in assessing the historical significance of the trial. Indeed, one could no longer expect his testimony detailing his background, his plan and its execution. No perpetrator means the cathartic dimension of the hearing is also absent, and so is the historical interest justifying its recording. In his denying order the judge thus considered that despite the "extreme seriousness of the facts against the accused and the context in which the crimes committed took place" and "despite the international context dominated by current events on terrorism", the case did not present "an interest that would justify the recording of the proceedings in order to enrich the historical archives of justice.[53] The parties on appeal claimed "manifest error of assessment",[54] but the judges of the Court of Cassation did not agree. It is therefore clear that terrorist litigation does not, in the eyes of the rather restrictive jurisprudence of the *Cour de cassation*, have a systematic historical interest. The qualification is subject to case-by-case assessment. This seemed to be the prevailing judicial opinion on this point – until recently.

The author of the present article has previously questioned this change in the position of the French justice system, in particular the historical dimension of the 2020 Charlie Hebdo and the Hyper Cacher trial.[55] The historical dimension of this trial is in its content. If it is historical, its significance is of symbolic nature and, to a certain extent, lies in a precedent-like example for future cases regarding similar acts. No one can

[50] Charles Jolibois, Sénat, 24 juin 1985, p. 1600.

[51] Charles Jolibois, Rapport, Sénat, n° 385, p. 15.

[52] W. Azoulay, "Constitution d'archives historiques de la justice: un critère d'intérêt encore abscons" (note sous Cass. Crim. 29 septembre 2017 n° 17-85774), *Dalloz Actualité*, 9 octobre 2017.

[53] Cass. Crim. 29 septembre 2017 n° 17-85774 (F-P+B); AJ Pénal 2017. 498, obs. Aubert.

[54] This is a rare case, not of contestation of the registration authorisation by the defendants, but of refusal of registration by the civil parties.

[55] R. Bretel, "Du procès historique à l'histoire d'un procès", Cercle K2, 1 septembre 2020, https://cercle-k2.fr/etudes/du-proces-historique-a-l-histoire-d-un-proces-434 (accessed: 10.10.2020).

deny the historical character of the attacks of January 2015, where apparent motif of the shooters was to punish cartoonists for exercising freedom of speech. The public outcry against the crime was also historic in its proportions: a series of nation-wide marches brought together 4 million French people, most notably in Paris with the presence of 44 foreign heads of state. However, does the trial itself have also a historical dimension? The magnitude of the facts, the degree to which the perpetrators violated values deemed fundamental and the political angle cannot be confused with the trial itself. As in the Merah trial, this one is only a peripheral trial since the main perpetrators either died or fled to Syria. The defendants are merely operational supporters of the criminal acts, and only one individual is indicted as an accomplice in a terrorist act.

Admittedly, some aspects of this trial do make it extraordinary. First of all, one must note its scale, as it brings together more than two hundred parties and a hundred lawyers. Secondly, it is a model for future reference in terrorism cases that the country will experience in the years to come, especially for the upcoming trial concerning the attacks on the Bataclan auditorium, which will begin in 2021. In all these cases the main perpetrators are dead. Finally, there are symbolic aspects at play – a crime of considerable magnitude is being met with equally large-scale response from the authorities. All these considerations however do not dissipate concerns for possible distortions given the media dimension and the pressure from public opinion. In the same way, we must be very careful about the memorial significance of the trial. While the victims will naturally be able to speak again in court, taking over the narrative and will be active in recounting the horror that happened to them,[56] a criminal trial must remain focused on the perpetrators who are to respond to the acts they are accused of; a trial is not supposed to be built around the pain of the victims, however legitimate, or upon direct construction of an empathetic memory and resilience for a nation. The historical dimension of the 2020 trial therefore seems real, but lies less in its content than in its form. The historical nature of the facts, particularly in terms of their media or symbolic impact, does not seem to be decisive. Moreover, contrary to the comments by *rapporteur* Philippe Marchand, who in 1985 referred to the trials of the Landru and Marie Besnard killers and the Auriol massacre,[57] no current criminal cases have been recorded under Article L221-1 of the Heritage Code. Historicity is therefore well characterised in the trial.

The case concerning the explosion of nitrogen fertiliser stockpile in the AZF chemical factory in Toulouse was different in nature. At first glance, the case did not merit recording; it was "merely" a factory accident, in which the authorities sought responsibility for negligence. But the order of the First President of the Toulouse Court of Appeal authorised

[56] On this aspect: E. Jeuland, *La justice des émotions,* IRJS éditions, Paris 2020, pp. 479.

[57] Philippe Marchand, Assemblée nationale, 3 juin 1985, p. 1381.

the recording due to the fact that the trial concerned of one of the greatest industrial disasters France has ever known. The trial was to require several weeks of debate and opinions of highly specialised experts who were to discuss the causes of the explosion. In addition to that, the measures taken to organise the trial were extraordinary, requiring the rental of a huge courtroom with video broadcasting in adjoining rooms to accommodate the hundreds of people present – victims, lawyers, court personnel, spectators and the media. Moreover, the judges pointed to the magnitude of loss – both in terms of lost lives and material damage – and its overall impact on the city and the inhabitants of Toulouse. The main victim was the city, as a place with its inhabitants. The disaster deeply affected the physiognomy of the urban agglomeration since the explosion completely razed a portion of the city. Finally, the AZF factory had been established since 1919 and was part of the history of Toulouse; the judges invoked an interest in the constitution of a "living memory" concerning the disappearance of part of the city's heritage.

There is therefore historicity through symbolism. And the historical dimension, in its legal sense,[58] even aside from the facts, concerns the aura of the proceedings. Thus "the notion of historical interest should not be understood as applying only to legal cases which, by their very subject matter, are likely to have a historical interest, but also to all cases which are likely to make history in the history of justice", and whose heritage interest manifests itself in the way they are conducted. This is undoubtedly in the context in which the decision to record the trials of the attacks of January 2015 are to be understood, where the historical interest is external rather than internal. It is the trial itself, together with its political and sociological dimensions that mark its historical interest more than its content.

It is worth to note in this context that the documents and materials on proposals, discussions and drafting of the 1985 Law indicate that the lawmakers did not originally wish to limit the application of the system to trials with a historical dimension and extended it "to trials that illustrate the daily functioning of the judiciary and which, one day, may be of interest to historians, as well as to magistrates or lawyers of future generations" since "the creation of audiovisual documents helps future generations to understand what our own was".[59] In other words, the Minister of Justice – the actual proponent of the Law of 1985 – imagined the possibility of recording ordinary judicial life. This day-to-day record, supposedly to be made in order to encourage "the preservation of a few examples so that historians of justice may later know how our daily justice system functions", was never actualised.

[58] J. Pradel, "Les techniques audiovisuelles, la justice et l'histoire", *Recueil dalloz* 1986. chron. 113.

[59] CA Toulouse, Ordonnance du 15 janvier 2009 autorisant l'enregistrement audiovisuel des audiences de leur procès pour homicides et blessures involontaires qui s'ouvrira le 23 février 2009 devant le tribunal correctionnel de Toulouse.

7. The implementation of the process of *patrimonialisation*

The judge deciding on authorisation of recording must be able to think about the case beyond its immediate, contemporary characteristics and must ask himself if the facts, and even more so if the entire trial is of interest to posterity.[60] This entails adoption of the logic of "sorting",[61] which is typical for a mindset of an archivist. Reaching this historical perspective is problematic and the decision making process must involve a certain degree of modesty; the threshold for "audiovisual archives of justice" is rarely unquestioned. On one hand, the casuistic approach to the historical significance is delicate and the judgement on the materials needed to construct history in the future is often subjective. Is it proper to limit the number of recorded cases in light of the exceptional nature of the 1985 Law? Or should it be widely allowed? Where do the needs of history end? What is the standard of diligence in the process of authorising it?

Under current law it is up to the judge alone to grant or to reject a motion for authorisation of the recording of the upcoming trial for the "living memory of justice".[62] The court is sovereign in their decision and the Court of Cassation only controls the "manifest error of assessment". However, the decision is almost always about prediction rather than scientific approach. This should lead to humility.[63] This framework accentuates the importance of rules of procedure concerning decision-making, which should include voices of experts assisting the judge – historians and image professionals – which is no longer the case today. Would it reasonable to entrust, as a rule, the decision on authorisation of recording to an expert, a person operating outside the judicial system? This solution appears promising because under the current regulation the magistrate is both "a judge and a party" – the judge decides on shape and possible

[60] On the occasion of the decision to capture the AZF trial by the order of 15 January 2009, the former Minister of Justice Robert Badinter stressed that it was regrettable that the technical means of the time did not make it possible to keep films of the various trials in the Dreyfus case in order to better write its history. (F. Bissy, C. de Bragança, "Les images du procès et l'entrée des caméras dans les salles d'audience", *Légicom* 2012, p. 83). An example he had already given in 1985 to express the interest that the recording of proceedings before the Cour d'assise in Paris and the Conseil de guerre in Rennes would have had (Robert Badinter, Sénat, 24 juin 1985, p. 1598).

[61] In the provisions on archives, the expression "historical interest" is moreover essentially found in articles L212-2 and L212-3 on the elimination of archives that do not become cultural heritage.

[62] Rapport de Charles Jolibois n° 385, Sénat, 19 juin 1985, p. 3

[63] Concerning the prudence of the present time with regard to history: C. Vivant, *L'historien saisi par le droit. Contribution à l'étude des droits de l'histoire,* préface Ph. Pétel, avant-propos R. Rémond, series: Nouvelle Bibliothèque des Thèses, vol. 68, Dalloz, Paris 2007, pp. 525 et sur les archives audiovisuelles (pp. 138–142).

constraints of a trial he or she is about to preside over. The judge will also decide in the event of an action for invalidation. The questions of legitimacy of the present system in light of the *nemo iudex in causa sua* argument remain valid. All the more so, as Jean-Baptiste Thierry has pointed out, since registration, which is obligatory when the public prosecutor requests it, demonstrates the power of the "control exercised by the institution over what it wishes to show".[64]

Aside from the question of "who decides", the question of checks and curbs over the merits of the decision is a major weakness of the current system. Marie Cornu is correct to warn of risk of arbitrariness and argues that procedural guarantees must be strengthened by providing greater control, at least of decisions to refuse capture.[65] It is surprising that the law does not distinguish between negative and positive decisions. In this context, the abolition of the consultative commission is regrettable; the commission provided a useful viewpoint, independent of the direct judicial issues at stake in the case. It brought together lawyers and cultural heritage professionals, but also members of parliament and journalists. Its opinion, albeit non-binding, informed the judge in his or her decision-making. The commission was abolished in 2013 in order to simplify administration but without considering the harmful consequences of the decision. In terms of judicial history, the law anticipates the judgement … of history!

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Summary

The French legal system for the *patrimonialisation* of historical trials (*Archives audiovisuelles de la justice*)

Since 1985 France has introduced special legal provisions for the recording and communication of major trials called *Archives audiovisuelles de la justice* (Audiovisual Archives of Justice). These archives, which are subject to the Heritage Code, are an exception to the principle of prohibition of recording of trials. This measure was adopted in the context of the major trials for war crimes and crimes against humanity following the Second World War in order to preserve the memory of these judiciary process. These measures, originally exceptional, were then extended to a few trials relating to major national disasters. These archives are intended to constitute documentary material for historians. Recording is allowed as soon as there is "historical interest". This notion raises questions whether historicity is about the recording, the trial itself or the subject matter of the case. These problems are key to the concept of *patrimonialization*, together with its uncertainties and a dose of arbitrariness in application.

Keywords: judiciary, trial, archives, historical interest, *patrimonialisation*, war crimes, terrorism, historical research

Streszczenie

Francuski system utrwalania procesów sądowych o znaczeniu historycznym (*Archives audiovisuelles de la justice*)

W roku 1985 we Francji uchwalono prawo o utrwalaniu i upublicznieniu przebiegu procesów sądowych o znaczeniu historycznym i o utworzeniu Audiowizualnego Archiwum Wymiaru Sprawiedliwości (*Archives audiovisuelles de la justice*). Archiwum, podlegające ustawie o ochronie dziedzictwa kultury, jest odstępstwem od zakazu nagrywania przebiegu procesu. Prawo to wprowadzono na użytek procesów w sprawach zbrodni wojennych i zbrodni przeciwko ludzkości z czasów II wojny światowej. Regulację tę następnie rozciągnięto na sprawy katastrof o skali krajowej. Archiwum z założenia ma stanowić materiał źródłowy dla przyszłych badań historycznych. Pojęcie interesu historycznego, będącego prawnym warunkiem utrwalania, budzi wątpliwości co do istoty owej historyczności – czy leży ona w samym nagrywaniu, w doniosłości procesu czy też w doniosłości roztrząsanych zdarzeń. Kwestie te są kluczowe dla regulacji, w tym dla uchwycenia niejasności i arbitralności sądowego postanowienia o utrwaleniu procesu.

Słowa kluczowe: wymiar sprawiedliwości, proces, archiwa, interes historyczny, patrymonializacja, zbrodnie wojenne, terroryzm, badania historyczne