HOW THE FRENCH UNDERSTAND THE *INQUISITORIAL* SYSTEM

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> "It is not in winning 40 battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my code civil will not be forgotten, it will live forever".[1]

The importance of codification in the French psyche is paramount. The famous British jurisconsult James Fitzjames Stephen considered the French system as *the great rival system of criminal procedure.*[2]

The first Code of criminal procedure, called the Code of Criminal Instruction, was promulgated in 1808. A new Code, called the Code of Procedure (CPP), was promulgated in 1958[3] just 150 years later. Perhaps this suggests that the French need a strong man to update or change their codes because at the time Général de Gaulle was head of the French government.

The first major difference between the Australian and French legal systems is linguistic: in Australia, just as in most common law countries, English is the language spoken in court; in the civil law countries a Latin (Romance) language is spoken (except in Germanic Europe).

In Australia, while some people like Joan Dwyer[4] and Margaret Allars[5] advocate an inquisitorial system, some commentators, like Sir Anthony Mason[6] speaking at the AAIJAC in 1999, seem less enthusiastic about a system of that kind .

But what do we mean by *inquisitorial* or *accusatorial* system? Should we equate *inquisitorial* with an *activist, investigative, dynamic* judge? A clue to its basic meaning stems from its linguistic roots.

Inquisitorial comes from the Latin: *inquiere, inquisivi, inquisitum:* to ask.

The Latin root is *quae*, connected with *quaestio*: questioning. In old French "question" ominously means torture. So when a book published (and banned) in 1960 during the Algerian war was called *La question* everybody knew it was about torture exercised by the French army on the Algerian rebels. In English the root has derivations and cognates like "query", "quest". The verb *quaeso/ro* means to seek, to get, to obtain, to acquire, carrying with it a sense of *requesting to be told*.

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1 Napoléon at Saint-Helena, quoted in CJ Friedrich: “The Ideological & Philosophical Background”, *The Code Napoléon & the Common Law Tradition*,1956, New York, NYU Press, p 7.

2 E M Wise (ed); “The French Code of Criminal Procedure”, (rev ed 1988), *The American Series of Foreign Penal Codes*, Little, Col, USA, p XV.

3 loi 31 déc.1957 & Ord.58-1296 23 déc. 1958, loi of 30 déc 1985, 9 sept 1986, 6 juil. 1989, 10 juil. 1991, 4 jan 1993, 24 août 1993, 23 juin 1999.

4 Joan Dwyer; "Overcoming the Adversarial Bias in Tribunal Procedure", (1991) 21 *Fed L Rev* 225; Joan Dwyer; "Fair Play the Inquisitorial Way" (1997) 5 *A Jo Admin Law* 5.

5 Margaret Allars; "Neutrality, the Judicial Paradigm & Tribunal Procedure", (1991) 13 *Syd LR* 337.

6 A Mason, "The Future of Adversarial Justice", (2000) 27 *Brief* 20.

Accusatorial comes from the Latin: *ad causam provocare*: to call one to account: the accused is the one called to account**,** *accountable*.

Inquisitorial: the emphasis lies with the active role: *questioning*. Accusatorial : the emphasis lies on the passive role: *to be asked questions*.

One system focuses on the accused: accusatorial and will try to protect him/her. The other focuses on the act of questioning, looking for something, seeking. In these two adjectives we can see the main difference between the two systems. One is centred on the accused and his/her protection and rights. The other on the official whoever he/she might be, who will ask the questions. One system is *question*-centred the other *questioner*-centred. One system will focus on the questions asked; the other on the answers.

How can we define an inquisitorial system?

In Australia, coroner's inquests, tribunals such as the Refugee Review Tribunal and Royal Commissions follow a form of inquisitorial procedure.

In the common law countries the inquisitorial system has a negative image. The reminiscences of the Spanish Inquisition, the defiance *vis à vis* the Church of Rome and its law (Canon law) and of course the fact that all dictatorships use the inquisitorial system give such a system a deplorable name. In modern English the adjective *inquisitorial* has a negative connotation, while in French *inquisitorial* along with *accusatorial* are totally neutral technical terms.

In the common law world many people still believe that once committed for trial before a French criminal court one is supposed to prove one's innocence. This is not exactly the case but it is not totally false either. One must not forget that the very name of the Code before 1958 was Code of *Criminal Instruction.* For the French "instruction" is almost the equivalent of penal procedure. *Instructio*: means in Latin: *to build a case against someone*.

What is the definition of an inquisitorial system?

Even in France it is only in criminal law that we can truly speak of an inquisitorial system.

There are three main criteria:

1) a *parquet* (the prosecution);
2) a judge of instruction;
3) evidence by any means of proof.

1) A parquet:

In the French system, the *parquet* or the *Public Ministry* or the *standing judiciary* is a corps of people holding a judicial office. They are not trial judges. The name comes from the fact that they used to speak from the well of the court (its wooden floor). Each criminal court has a *parquet* attached to it. In the police court, the *parquet* is replaced by a police officer.

The *parquet* represents the executive branch of government; it is subordinate to a special hierarchy and independent vis à vis the judge. The Minister of Justice is the true head of the *parquet*. He/she can issue orders to the prosecutors (CPP art 36). The chief prosecutor has also authority over his/her subordinates (CPP art 37). These people can be removed from office after advice from the High Council of the Judiciary. The Minister of Justice can give

general directives on criminal policy but cannot give orders concerning individual cases (CPP art 30-1).

The Minister can order prosecutions. The chief prosecutor of a court must obey such a direction and require the particular prosecutor of a criminal court to do so. The prosecutor will then be obliged to make some written submissions about the matter.

But the head of the Prosecution, the General Prosecutor and Chief Prosecutor can prosecute without orders or even against their superiors' orders. If they prosecute on their own volition, it is still valid. If they refuse to prosecute, their supervisors cannot replace them to prosecute. At the hearings, significantly, a subordinate can contradict his/her written submissions (CPP art 33). The members of the same *parquet* can replace each other for the same case.

In France, the *parquet* is the only one to engage public action. The judges cannot do it on their own volition. The *parquet* cannot be held responsible (for prosecuting) except in very peculiar circumstances.
The *parquet* is not a judge but a party in the criminal trial. The *public ministry* is the plaintiff and cannot stop the machinery once engaged. The standing *judiciary* will, however, control and direct the whole trial.

It is the *parquet* that will approach *(seize)* the judge of instruction. The parquet will ask the judge of instruction to perform any act conducive to "*the discovery of the truth*". The prosecution may lodge an appeal against all the decisions of the judge of instruction.

2) A Judge of Instruction

The judge of instruction or the *judge instructeur* or the *judge informateur* is the keystone, the archetype, of the inquisitorial system. He/she is supposed to be the most powerful person in France. He/she is the most distinctive person in the French criminal trial.

The judge will be asked by the prosecution[7] to start a judicial investigation commencing with the process of instruction of the case. *Judges of instruction* are junior judges of the Tribunal of *Grande Instance*. This is a problem; the *status* had to be dissociated from the *function*. Because of the problems of dealing with cases of terrorism a young graduate cannot assume the functions of *judge of instruction* in certain very specific matters.

Judges of instruction are seconded for 3 years to conduct judicial investigations of serious offences. They may have assistants. Six per cent of the criminal cases are dealt with by a *judge of instruction*; the others by the *parquet* alone.

The *judge of instruction* will collect, select and present the evidence, interview witnesses and decide whether or not there is a case to answer. The *judge of instruction* had the power to detain people during the investigation. He/she lost this power in January 2001[8] and the *judge of freedoms and detention* has replaced him/her.
The judge is not answerable to the chief prosecutor. The police/gendarmerie[9] are at his disposal. The function of the judge is primarily to investigate. He may widen the scope of his inquiries to include any relevant persons but may not without the permission of the

7 CPP arts 51 & 80.

8 Act n°200-516 June 2000 on the Presumption of Innocence, art 145.

9 The police is a national force under the supervision of the Minister of the Interior while the gendarmerie is a paramilitary force under the supervision of the Minister of Defence. These two forces can investigate criminal matters.

prosecutor investigate other matters.[10] He will exercise his powers through a series of warrants which are delegations to the police or the gendarmerie. The judge will order reports to be made on technical aspects of the case: medical, psychiatric, etc. Instruction is a written procedure and supposed to be secret.

The judge will interrogate the defendant in his office with a clerk and *in camera*. He/she will put questions to the defendant officially under examination. The replies are not given under oath.[11] Counsel will be present to protect the defendant's rights. There will be confrontation with hostile witnesses and all of them will be asked to sign a statement which they may refuse to sign. Other witnesses are questioned under oath.[12]

3) Evidence by any means of proof

Evidence is an important subject in criminal law. It is of paramount importance, though in the French system evidence is an under-researched subject. Only a handful of PhDs have been written on it. Very few manuals or textbooks and no treatises have ever been written on criminal evidence. The major exception is H. Lévy-Bruhl *La preuve judiciaire.*[13] Even the word evidence cannot be translated into French law. We use the term proof but it is different so we use other methods and translate it into French law, such as criminal procedure or the criminal process. *Evidence* has the meaning in French of "obviousness"

The Code of penal procedure has no general theory concerning evidence. A person is presumed innocent until proven guilty legally. In criminal law testimony is essential. The trial judge can only make up his mind on evidence brought to him at the hearing. Evaluation of evidence is free and unconstrained. All statements will have been consigned to the *dossier.* At the end of the instruction, the judge must examine whether there are sufficient elements to make up the offence.

Onus of proof

Art 427 al.2CPP: "*actori incumbit probatio; onus probandi incumbit ei qui dicit*: "he who advances something must prove it". It is up to the prosecution to prove the case. The onus is heavier for the prosecution than for the plaintiff because of the presumption of innocence. According to the French 1789 Declaration of Human Rights: "*Any person accused of an offence is presumed innocent until proven guilty legally".* In the French context, what is the presumption of innocence?

This presumption means that the suspect does not have to establish his/her innocence. The right of silence does exist - it has been so declared in a famous case by the European Court for the Protection of Human Rights.[14] The benefit of any doubt must be given to the accused. But of course arrest, custody and detention pending trial are exceptions. The prosecution must prove *mens rea.*

The standard of proof

Any means of proof are admitted.[15] The categories of proof include written documents, testimony, expert reports, observation of witnesses *in situ*. Inferences can be made from

10 Art 80-al.1 C.P.P.& Crim.10 mai 1994 Bull.n°180; Crim 1er déc 1998, Bull n°323.

11 Stefani, Levasseur & Bouloc; *Procédure pénale*, Paris, 2000, Dalloz, 17 e Ed, p 557 n°668.

12 CPP art 103.

13 H Lévy-Bruhl: *La preuve judiciaire*, Paris, 1964.

14 Funcke 25 fév 1993 Dalloz (1993) 457.

15 CPP, art 427.

statements made by people. Witnesses must take an oath in court. Confession is an element of proof but it must be corroborated and can be discarded by the judge. The court may appoint experts. There should not be any coercion of witnesses. The probative value of evidence is freely appreciated by the judge. In the French system, evidence is appreciated through a process of *inner belief and intimate conviction .*

All the evidence obtained during the early phase of the criminal procedure is only of probative value of the charge and must be produced at the trial. At the hearing there is consideration of the written *dossier* prepared by the *juge d'instruction* but the accused and witnesses may be examined and questioned. The bench can stop the examination of witnesses when they choose fit.

There is no hearsay rule as such. The inquisitorial system is supposed to aim at the discovery of the truth through the unrestricted evaluation of the evidence. French courts are concerned more with the weight or value of the evidence than its admissibility.

The principle of *inner belief* has been introduced by the Code of Criminal Instruction art 427:

> According to the free scrutiny principle, the law does not demand of judges and jurors that you take account of the means by which you were convinced. The law does not prescribe rules according to which the completeness or the sufficiency of the evidence can be determined, it only requires that you reflect in silence and with careful thought in order to determine in sincerity of your consciences what impression has been made upon your reasoning by the evidence adduced against the defendant and the way he/she has defended him/herself. The law asks only one question which sums up your entire duty: Are you thoroughly convinced?

The court is therefore free to determine guilt or innocence without having to express what weight has been given to the various means of proof produced to it. The trial judge may therefore decide to attach little or no weight to a confession but he may also attach full weight to a confession which has been retracted.

In the Anglo-Australian system, the parties are primarily responsible for the trial, while the judge is neutral. The prosecution and the defence are basically equal. The collection, selection and presentation of the evidence belong to the parties. In the common law system the judge is an arbiter who ensures fair play. The prosecution is conducted not by the holder of a judicial office but by a barrister or solicitor who may or may not be a civil servant.

In the Anglo-Australian system, if the accused pleads guilty, there is no trial, just sentencing. This is not the case in France where the whole process will go on. The French system does not accept that a party should determine the evidence even if it is the evidence *par excellence*: confession. The very word "trial" cannot be translated into French. The Anglo-Australian system is based on the principle of equality between the parties. This is not the case in the French system where holders of judicial office represent the prosecution.

The basic differences between the two systems, apart from the language used in court, are:

- Who is responsible for the collection, selection and presentation of the evidence - the parties or a judge?

- In the Anglo-Australian system any evidence produced in court must be tested in that court. In the French system all the collection of evidence has been performed upstream. The day in court is just a rehearsal of what has happened before.

The result: 7.3% acquittals before the French Assize Court; 45% before the British-English Crown Court.[16]

Conclusion

When we look at the differences between the French criminal trial and the Australian criminal trial, there is no doubt that the French way of doing things would not meet the standards of a *fair trial* in the United States or in Canada. The inquisitorial system accordingly has a very bad name especially in criminal law. British and Irish judges had to admit that the French system is acceptable only because the United Kingdom and the Irish Republic are members of the Council of Europe and of the European Union and accept the jurisdiction of the Strasburg and Luxemburg courts. It is almost certain that 30 years ago the French system would have been considered not protective enough of human rights. It is up to Australian readers to judge for themselves the acceptability of such procedures.

16 A Sanders & R Young: *Criminal Justice*, London, 2000 (2nd ed), Butterworths, p 599; Frase: "Comparative Criminal Justice as a Guide to American Law Reform", (1990) 78 *Cal L Rev* 631.