IMPROVE JUSTICE :
INQUISITORIAL OR ADVERSARY CRIMINAL PROCEEDINGS
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The main concern is that, very often, most of the lawyers (professors, judges, accusation or defence practitioners) of each system do not know the other system.

On the one hand, they are convinced of the existence of fundamental differences due to the appellation of each system ('inquisitorial' versus 'adversary'). On the other hand, they deeply believe that the core of both proceedings are, broadly speaking, the same because they would pursue the same purpose. That is to say: to punish the guilty defendant and to acquit the innocent.

The truth is that the technical rules of each criminal proceedings are so different that they express more distant law philosophies than we think.

We will focus on one point: the rules which underpin the access to the file by the defence in the inquisitorial criminal proceedings ('Icp') and in the adversary one ('Acp').

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I. <u>In the Icp in force in France and in all the continental countries where criminal proceedings derive from that of France, a complete copy of the file is given to the defence.</u>

In France, this <u>complete</u> copy is delivered at different moments depending on the nature of the proceedings.

In case of a proceedings conducted by the prosecutor (97 % of cases, ie, small and medium offences), the complete copy is delivered when the defendant is summoned to appear before the judgement court, usually one month ago.

In case of a proceedings conducted by an examining judge (the most importance offences: murder, drug traffic, fraud offences, etc. which deserve a thorough investigation), the complete copy is delivered after the first appearance before the

examining judge when the judge decides to charge the person in question with the offence or to grant her an intermediate position (‘assisted witness’).

This complete copy consists of: all the interrogations conducted by the police (interrogations of the persons in question, interview of the witnesses, etc.), all the forensic reports, all the police findings and, of course, all the interrogations and interviews conducted by the examining judge, all forensic reports ordered by him, etc.

Practically, the copy is now given in the form of a CD.

It is of utmost importance to understand that every information gathered in a pretrial investigation conducted by a prosecutor or by an examining judge takes a written form and is placed in the file. In the case of the file of the examining judge, each page of the documentation is scored by the judge’s registrar in the order of arrival like this: D1, D2, D3, etc. to D14.000… for the most important cases.

As such, each party in a case (prosecutor, accusation or defence attorney and, of course, judges) is aware of all the evidence collected during the course of the pretrial investigations.

We are sure that all the investigations made before the trial are disclosed to everybody for the following reason. When the person is sentenced by a final decision, she can request before the court of revision of trials only if a fresh evidence unknown by the ‘sentencing’ judges will undermine their verdict of guilty.

Since 1945, solely 10 (ten) finding of guilt returned by the jury courts (ie: courts in charge of the most important cases) have been set aside because of such fresh evidence.

But the average number of convictions by French jury courts is 3.000 per year.

Even if the ‘dark number’ of the wrong convictions is surely higher (especially in sexual crimes cases), the official number is so low that we can think that the pretrial investigations have got all the ‘available evidence’.

Moreover, since the DNA tests have greatly improved in recent years, French criminal justice does not face a flow of miscarriages of justice, ie, wrongful convictions, as opposed, for instance, to the US one.

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II. In the Acp in force in the UK and in Anglo-Saxon countries, the access to file by the defence is not either free or complete.

The main idea is that each party (prosecution and defence) gathers its own evidence and has no real obligation to communicate this evidence to the other party.

Indeed, in practice, the investigations are conducted by the prosecution event if the defence can carry on its own researches.

But the disclosure to defence by the prosecution (UK) or the discovery (USA) of the evidence by the defence vis-a-vis the prosecutor is clamped under very restrictive rules.

Those rules are difficult to understand for continental lawyers.

For instance, in the UK, the "disclosure to defence" is organized as follows.

The last scheme is that of the Criminal Justice Act (CJA) 2003, which has amended the Criminal Procedure and Investigations Act 1996 and which has been completed by the General Attorney's Guidelines 2013: "The prosecution must now, at the earliest possible stage, disclose all material (unless it is 'sensitive' (…) which 'might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused'"[1].

First remark: it is up to the prosecutor to decide whether an evidence is capable to undermine the case for the prosecution. We understand easily how eager is the prosecutor to undermine his own work.

In practice, "it is up to police disclosure to fully inform the CPS[2] " in sending to him the list of all non-used items that they think meet the above-said test. "They should describe the items sufficiently clearly for the CPS to decide what should be disclosed to the defence –or, at least, to decide what the CPS should examine so that informed decisions
can be made."

That is to say that the disclosure to defence is at least a two-tier process: a police officer then a prosecutor are successively in charge of undermining the case for the prosecution.

Moreover, "(…) relevant material is frequently missing (eg, 'the omission of significant negative forensic findings in a child abuse case). Some non-disclosure is due to laziness, antipathy to 'paperwork', error and lack of understanding. Some arises from reluctance to disclose information (…)." It seems so evident.

In fact, this is a three-tier process: "In Crown court cases, the defence must respond with a statement setting out its main points, if a not guilty plea is anticipated. (…) Following this, and throughout the pre-trail and trial stages, prosecutors must keep this

[1] *« Criminal Justice »,* Richard Sanders, Richard Young, Mandy Burton, Oxford University Press, Fourth Edition, 2010. All quotations are taken in pages 389 and following ones

[2] The CPS is the Crown Prosecution Service.

test under review – in other words, if they become aware subsequently of material that has not been disclosed when it should have been, they must disclose it."

In other words, it is mandatory for the defence to disclose to the prosecution the main trend of its argument before the trial; in order to be sure that all the exculpatory evidence have been disclosed to her.

Second remark: even if the prosecutor determines that an evidence which undermines, etc. is to be disclosed to the defence, he can claim a PII, "Public Interest Immunity". A PII is supposed to protect police informants. "This is a very vague principle capable of a range of interpretations." In practice, the judge at a PII hearing can proceed in one of three ways: conduct an inter partes hearing (ie, with the defence), conduct an ex parte hearing (ie, no defence) or conduct an ex parte hearing "without even informing the defence (who, if the application is granted, will never know that material has been withheld)."

Consequently, "The disclosure system as actually operated leads to delays, adjournments, inappropriate discontinuances and a waste of public money (…). Worse, it is a continuing recipe for miscarriages of justice."

Indeed, the vast majority if not the whole lot of the miscarriages of justice (ie, wrong conviction of innocent accused) in the UK rests on this sole circumstance: long after a final sentence, it is discovered that the prosecution had hidden exculpatory evidence.

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III. It must be said that the ECHR agreeds with that disclosure system.

Indeed, the ECHR returned three decisions this way : Edwards v UK in 1992[3], Jasper v UK and Fitt v UK in 2000[4].

In Jasper, the defendant is arrested for having transported in his truck three tonnes of cannabis resin[5]. "(…) Shortly before the commencement of the trial, the prosecution made an *ex parte* application to the trial judge to withhold material in its possession on the grounds of public interest immunity. The defence were notified that an application was to be made, but were not informed of the category of material which the prosecution sought to withhold. They were given the opportunity to outline the defence case to the trial judge, (…). The trial judge examined the material in question and ruled that it should not be disclosed. The defence were not informed of the reasons for the judge's decision" in an *ex parte* hearing.

During the trial, "the defence served the following written request on the prosecution:

[3] Edwards v United Kingdom (1992) 15 EHRR 417,
[4] Jasper v United Kingdom (2000) 30 EHRR 44, Fitt v United Kingdom (2000) 30 EHRR 480.
[5] The following extracts come from the ECHR's decision.

“9.The Crown are formally asked to indicate (a) in general whether there is unused material in connection with this case, apart from the subject-matter of the *ex parte* application to the Court on Friday 14 January 1994 ... which has not been disclosed and (b) in particular:
(i)whether any listening device or telephone intercept was used, and whether there exists any resulting recording, note, memorandum, or other record;”

The prosecution counsel submitted:
“I have refused and still refuse to answer the questions set out in ... paragraph 9 because I contend that I am not required to reveal to any person whether there has been any interception of communications under the [Interception of Communications] Act”

“That position was upheld by the trial judge who, in his ruling of 24 January 1994, stated *inter alia*: “I cannot invite [prosecution counsel] ... to go behind the stand that he is taking, at this stage, where he takes the view that even an *ex parte* application is unnecessary, which is the way he looks at it.”

The applicant did not give evidence at his trial. (…). On January 1994 the applicant was convicted of the offence charged and then sentenced to ten years' imprisonment.

On February 1995, prior to the hearing of the appeal, defence counsel applied to the Court of Appeal for an order that the defence should be given a transcript of the *ex parte* hearing of 14 January 1994, to enable them to argue the non-disclosure as a ground of appeal.

The Court of Appeal, which had before it the transcript of the *ex parte* hearing of 14 January 1994 and the material which had been its subject-matter, declined to order the disclosure of either to the defence on the following grounds: “We have read the record and it seems ... that the learned judge ... knew precisely the scope of the application and listened with the greatest possible care to the matters which were placed before him.”

On 28 March 1995 the Court of Appeal dismissed the applicant's appeal.

The Commission expressed the opinion, by nineteen votes to eleven, that there had been no violation of the Convention.

The Courts recalls that Article 6 § 1 requires, as indeed does English law (…), “that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.”

But we understand that, according to this wording, this is up to the prosecution authorities to ascertain whether an evidence is relevant or not.

The Court also holds: “In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.”

Here lies the major concern: for the European Court of Human Rights, a complete access to the prosecution file by the defence is not mandatory.

The court rules that, at the occasion of the trial, it is satisfied that the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.

“57. In addition, the applicant alleged that his trial had been unfair because the product of a telephone intercept had been withheld from the defence without being placed before the trial judge. However, the Court notes that it is not established that any such material existed at the time of the trial. Moreover, since under section 9 of the 1985 Act both the prosecution and the defence were prohibited from adducing any evidence which might tend to suggest that calls had been intercepted by the State authorities, the principle of equality of arms was respected. It would, further, have been open to the applicant himself to testify, or to call evidence from other sources, as to the fact and contents of the instructions he allegedly received by telephone the day before his arrest.”

In sum, in the event that the prosecution does not reveal an existing evidence, this is up to the defence to determine whether such evidence exists (or not) by calling elements from others sources.

In this Jasper case, the defence was not given access either to the evidence provided to the judge by the prosecution or to the phone transcript done.

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iv. Those very different rules of the Icp and the Acp assess a different law philosophy.

The French Icp system is based upon the discovery of the truth. Accordingly, the pretrial investigations pretend to be as complete, thorough and full as possible, each act of investigation take a paper shape and is scored by the examining judge’s registrar, a free access is given to all parties, in particular to the defence and all the judicial actors are working on this common basis.

The disadvantage of the Icp rests at the time put leading the investigations before the trail: in France, there is no explicit equivalent to the Acp ‘speedy trial’ rule such as the US Federal Rules.

For instance, in big fraud offence cases, the pretrial investigation usually lasts several years. In a case where the defendant was charged with a misappropriation of euros 200 millions, the complaint was raised in 2008 and the first trial took place in 2015.

On the other hand, this case was planned to last only 6 half days of hearing since the fact finder time was taken before the hearing and not at the occasion of the hearing.

The Acp system is mainly based on the search for a solution. In addition, it is a race between two competitors where the discovery of the truth is not the main concern.

Moreover, the prosecution is deemed to leave with a handicap: since the defendant has a right to silence, the prosecution must benefit from some powers which counterbalance this extraordinary rights. Those powers are framed in the (non) disclosure to defence’s rules.