The French Criminal Jury System
The Hon Justice James Douglas*

My direct exposure to the French criminal justice system is very limited. In December 1984, my family and I were trapped on a traffic island on our way to the Louvre. I was carrying our 19 month old son in my arms. My wallet was, very foolishly, bulging in my hip pocket. My wife was some metres ahead of me and not aware of a small group of gypsies who, spying an easy prey, descended on me and relieved me of the wallet. One of them had the cover of a sign protesting what was then happening in the former Yugoslavia.

Almost immediately an official car pulled over and one of its occupants made a call on a radio telephone. A group of Frenchmen raced across to the traffic island and apprehended the gypsies. A young Englishman, selling paintings outside the Louvre, lit out after the girl who had raced off with my wallet, caught her down by the Seine and retrieved the wallet and, having refused her offer of half the contents, brought it back to me. By then a van full of police had arrived, summoned by the radio telephone. We and the gypsies were bundled into the van and taken off to a nearby police station where I made a statement, a procès-verbal.

Ever hopeful of another trip to Paris, I asked the young plain clothes detective wearing jeans and taking the statement whether this meant that I would be needed to give evidence at the trial (and come back, I hoped, at the expense of the French State!). “Oh no” was her answer. My statement was now on the dossier and my oral evidence would not be needed.

I did return to Paris of course, some time later on the same holiday, found the English artist and bought a painting of the church of Sacré Coeur from him. I was never called as a witness unfortunately but I must say that I was very impressed by the speed and efficiency of the French criminal justice system. Bearing in mind the comparative nature of this essay, I must also pay tribute to the honesty of the young Englishman.

Now that misdemeanour would never have come before a cour d’assises in France, the court where French criminal juries are used. It would have come before a lower court and would, very likely, have been disposed of speedily. If you are interested and can track it down there is a good French documentary film, Le 10e Chambre, Instants d’Audience, which will show you how the system of

---

* Judge, Supreme Court of Queensland.

1 It means literally ‘the court of the seated’. You can see in it the etymological origins of the English Assizes.
summary justice for less serious offences works there. You can see extracts of it on YouTube but you will need to speak good French to follow it.\(^2\)

Those tribunals, where the vast bulk of criminal cases are dealt with, do not use juries and reflect more clearly the popular view of the French criminal justice system here. We think of it as an inquisitorial rather than an adversarial system and many believe inaccurately that it operates with a presumption of guilt rather than innocence. The more accurate analysis is that the French system requires the court to convince itself of the guilt of the accused. In that context another surprising feature of the French system for us is that there has been, historically speaking, no system for pleading guilty. The accused has to be proved guilty to the satisfaction of the court. The process of investigation will weed out many suspects whose prosecutions will not proceed.

I COURS D’ASSISES

That the French use juries, historically inspired by the English jury system and introduced in 1791 to bolster revolutionary democratic principles, is not so well known. Trial by jury is reserved for the most serious offences where the potential minimum sentence is greater than 10 years. Those offences are known as *crimes* in the French system. It is probably useful to call them felonies in English translation.\(^3\)

Since 2011 the court hearing those charges is constituted by three judges and six jurors at the first instance. There used to be three judges and nine jurors. There is now, since 2000, provision for an appeal from such a court to an appellate *cour d’assises* consisting of nine lay people and three judges, an institution which I shall discuss shortly. Again, until 2011, it consisted of twelve jurors and three judges. Typically the serious felonies dealt with before these courts are murder, manslaughter, rape and drug trafficking.

II FOCUS ON THE INVESTIGATION - PRODUCTION OF THE DOSSIER

Another different feature of the French system compared to ours is that the focus is not so much on the trial as on the investigation of the charge through the court system, controlled, in cases such as these, by the *juge d’instruction* who supervises the collection of the evidence by the judicial police. The government of President Sarkozy threatened to replace the *juge d’instruction* by

---

\(^2\) [http://www.youtube.com/watch?v=tDU13Z3FJ3c](http://www.youtube.com/watch?v=tDU13Z3FJ3c)

\(^3\) Article 131-1 of the *Code Penal*. The French *Penal Code* and the *Code of Criminal Procedure* can be found here in French and English: [http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations](http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations)
normal prosecutors, to much opposition from members of the judiciary and the general populace. That particular change was not made. I gather that the current administration supports the continued use of the *juge d'instruction*.

There is no right to silence as we conceive of it. A person under investigation may refuse to answer questions but the normal expectation is that he or she will respond to inquiries. If a suspect fails to do so adverse inferences can and will be drawn. There is also a system of criminal legal aid which is extensive and available from the start of an investigation. During a typical investigation there will be several occasions when the accused will be examined by the *juge d'instruction*, normally with his lawyers present, in respect of the progress of inquiries by the police.

This is the process of the development of the *dossier* or file which lays the basis for the prosecution and of the evidence which will be led at the trial. The *dossier* will consist of documents similar to those gathered in a police investigation here, such as witness statements, photographs, scientific evidence including expert evidence and recordings including transcripts of statements made by the accused. It will also include the results of interviews before the *juge d'instruction* where the evidence, as it is gathered, will be presented to the accused and his comments requested.

A significant and separate part of the *dossier* will focus on the character of the accused, something which does not normally become relevant in our system until and if any sentence is to be imposed. The accused's general character is regarded as relevant in the French system, not only in respect of penalty but also in respect of guilt on the basis that the court's focus is on the nature of the person being charged as much as on the nature of the acts said to constitute the charge. In French terms they judge the person not the crime. The rules of evidence are far less technical than apply in common law systems and focus on relevance, taking a much broader view than in our system where, of course, we normally exclude “propensity” reasoning in considering whether a crime has occurred.

### III  EXPERT EVIDENCE

Expert evidence will often be sought in the investigation and called at the trial. The courts themselves in France keep lists of relevantly qualified experts who are called on to examine the scientific issues in the individual cases. It is a mark of prestige to be appointed to the courts’ panels. Typically a case may require ballistic or other scientific evidence and there will often be medical and psychological reports concerning the condition of any victims and the mental state of the accused. The accused is given the opportunity before the trial to
examine those reports and, if he or she wishes, to ask for further reports either from the same or from another expert to deal with particular issues.

IV THE TRIAL

At the trial the dossier will be in the hands of the three judges but is not made available to the jurors. They are selected by a process similar to ours where jury panels are drawn from the electoral roll to sit in court for particular periods.

In a normal criminal trial conducted without a jury the dossier would supply the evidence required for the hearing without the need for oral evidence unless a party wanted to cross-examine a witness. The accused would still be interrogated by the judge. In jury trials, however, the important witnesses are called. That may reflect the orality connected with the English jury system as well as the wish that the jurors observe the witnesses to assist them in reaching their decision. The parties may agree that certain witnesses need not be called. Accordingly, a significant body of oral evidence may be led before the French jury but much of it focuses on what may be called an audit of the dossier rather than a detailed exposition of all the facts contained in that file. In other words it is not necessary to lead orally all the evidence obtained by the investigation. The accuracy of the most important information on the file is what is most commonly addressed.

The questioning in a French criminal court is traditionally conducted by the judge presiding. In 2000, their Code of Criminal Procedure was amended to permit the parties also to examine witnesses.\(^4\) Previously the system was that the judge would examine witnesses and parties could suggest lines of questioning to him or her. I understand that continues to be the normal procedure. There is, however, an increasing incidence of the use of cross-examination by the lawyers, perhaps stimulated by the expectations of French citizens used to seeing television crime dramas from English speaking countries.

As I indicated earlier, there is no general right to silence in the sense that inferences can and will be drawn against an accused who does not answer questions. Normally the accused is interrogated before the jury, another significant distinction from standard practice in our courts where the calling of an accused is the exception rather than the rule.

\(^4\) See Article 442-1 and my paper given at a symposium organised by Bond University which can be found at: http://archive.sclqld.org.au/judgepub/2012/douglas241112.pdf
A complicating feature of the French system is that civil parties, those who have been affected by the crimes alleged, normally appear and pursue claims for civil damages or other relief in parallel proceedings at the same time as the criminal trial is heard.

When the judges and jury retire together to consider their verdict, the issue is not whether the accused is guilty or not guilty. Rather the jury is asked to answer a series of questions relevant to the issues raised by the charge, the answers to which will determine whether or not the accused is guilty. The judges and jurors consider the issues in conference, including questions of penalty. To that extent, at least, the interaction between judge and jury is quite unlike our system.

Four years ago my associate was a young French judge and one of the differences between our systems which drew his attention was the care we judges use to make sure that we do not speak to the jury except in the court room and then in a very formal way.

Nor is the decision one that must be arrived at unanimously or by a majority of ten out of twelve as may occur in most cases here now. There has to be a two-thirds majority of the combined numbers of the jury and the judges. They need to be thoroughly convinced of the accused’s guilt, or in the French term, have an intime conviction of it, guilt, in the “sincerity of their conscience.” Before the court retires, the president of the court is required to read the following instruction which is also placed in the jury conference room prominently in large letters:

5 The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of

5 Using the translation at the Légifrance website. The original in French is:

“La loi ne demande pas compte aux juges des moyens par lesquels ils se sont convaincus, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d’une preuve; elle leur prescrit de s’interroger eux-mêmes dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l’accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs: ‘Avez-vous une intime conviction?’.”
his defence. The law asks them but this single question, which encloses the full scope of their duties: ‘Are you inwardly convinced?’.

The language is not the same as our formula of “beyond a reasonable doubt” but the gravity of the conclusion required is just as obvious.

V APPELLATE COURS D’ASSISES

Traditionally there was no appeal from a decision of the cour d’assises. That approach stemmed from the view that the jury’s verdict was inviolable, itself derived from the revolutionary belief that the voice of the people was equivalent to the voice of God. Yet, in 2000, the decision was made to create the appellate cours d’assises. This was partly driven by concerns raised by France’s accession to the European Convention on Human Rights and the view of the European Court of Human Rights that there should be a system of appeals and a system equivalent to providing reasons for decisions.

What seems unusual to us is that the appeal is conducted as a retrial. The evidence is called again before a slightly larger jury, nine instead of six with the same number of professional judges. It is curious for us to see a trial court substituting its decision for an earlier trial court as part of an appeal process. We leave the appellate process to a panel of judges who review the evidence and the conduct of the trial below. Even if we do give our judges wide powers to set aside a jury verdict they will either quash the conviction or send the decision back to the trial court if a new trial is needed. Our courts of appeal sometimes receive fresh evidence but do not conduct a complete new trial.

It seems likely that the sacrosanct nature of the jury’s verdict requires any review to occur before a court which also includes a jury, and, at least for form’s sake, a larger number of jurors. Moreover, there is no system in French courts to transcribe oral evidence. The appeal must, therefore, necessarily be one constituting what we would think of as a hearing de novo on fresh evidence. The record, the dossier, does not contain the oral evidence that was before the original jury. The appellate jury court does, however, receive evidence of the answers provided by the earlier jury. When it began, the appellate system was not used frequently but is used more now as the legal system becomes more familiar with the new institution.

---

A final appeal, solely on points of legal principle, lies to the *Cour de Cassation*, France’s highest court in the normal court structure.\(^7\)

**VI  CONCLUSION**

The criminal jury trial in France began as a legal transplant from England. The revolutionaries believed in the importance of citizens’ involvement in the criminal trial to reflect democratic principles. The English system was an obvious model to adapt. The system is still an important aspect of French democracy and legal culture, although there have been differing dynamics affecting it over the years depending upon politicians’ perception of the severity on crime of judges compared to jurors. Limitations have also been imposed over the years on the types of charges that may be dealt with by jury trial.

In my view, the jury trial in our system similarly retains its importance as a protector of democratic principles. The fascination, as with many aspects of comparative law, lies in examining how an idea takes root in foreign soil and is transformed, often dramatically, by its adaptation to a different society. The examination of the French jury trial system throws an interesting light on how the closed bureaucratic investigative system, otherwise typical of French criminal law, can be opened to the scrutiny of ordinary French citizens, if rather differently from the way the jury operates in the common law.

From the comparative viewpoint understanding the French system can assist when considering possible changes to ours. The converse is also true. The introduction of cross-examination into the French system is one example of the common law’s influence there. Bron McKillop in his 1997 monograph, *Anatomy of a French Murder Case*,\(^8\) describes three features of the French system of which we could take advantage: greater control by the judiciary over the legality and propriety of the use of police powers to obtain evidence; the use of independent experts from panels supervised by the courts; and the ability to draw adverse inferences from the silence of the accused. England and some Australian jurisdictions have adopted legislative changes reflecting those sorts of concerns, sometimes controversially.

While the International Criminal Court and the specialised international criminal tribunals do not use juries, their criminal procedure is essentially a

---

\(^7\) They have a separate system of courts dealing with the review of administrative decisions which culminates in the *Conseil d'État*. There is also a body called the *Conseil Constitutionnel* which reviews the constitutional validity of legislation.

\(^8\) *Anatomy of a French Murder Case*, Bron McKillop (Hawkins Press, 1997) 100-102.
hybrid of civilian and common law systems. They provide further examples of the internationalisation of legal norms. Complaints about the dilatory pace at which cases proceed in those courts suggest, however, that a greater focus needs to be placed on improving their procedures. Informed comparative analysis about ways to improve that system should start from a proper understanding of the procedural sources, a course which needs to draw on an understanding of how the rules reflect the particular societies from which they came. Legal transplants or hybrids do not always grow as expected. They may need pruning and fertilising to achieve their potential, a useful task for cooperation among comparative lawyers.
SELECT BIBLIOGRAPHY

I have tried to limit the citing of references but the following sources located by my current associate, Mr Hamish Clift, have provided much of the information as have my conversations with and observations in court of M. Charles Tellier, my former associate, now a judge attached to the Court of Appeal in Nîmes. I am indebted to both of them. If you wish to read just one of the sources I would focus on the monograph by Bron McKillop of Sydney University, *Anatomy of a French Murder Case*, published in 1997. It provides fascinating detail and useful comparative analysis of the progress of a murder case through the French system from an author who has written frequently in the area.

A   Books


B   Articles

Daly, M., ‘Some thoughts on the differences in criminal trials in the civil and common law systems’ (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 65


