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“I WOULD RATHER BE AN ACCUSED IN FRANCE THAN IN AUSTRALIA”

This is the text of a debate between Monsieur **Charles Tellier**, Président du Tribunal de Grande Instance, Aurillac, France and The Hon Justice **James Douglas**, judge of the Supreme Court of Queensland, Australia

Delivered at the *CLE Paris* Program 6 January 2017¹

OPENING REMARKS

Monsieur Charles Tellier: This debate will compare two models of proceedings that are typical of the two major legal systems in the world, the Continental (Roman and German tradition) and the Anglo-Saxon (common law tradition) systems.

These two systems are very different in many ways - just have a quick look at a hearing in a court room. But the differences should not be exaggerated as we can find many examples of hybridization of these models in the world, sometimes in a really profitable way. For instance, the influence of adversarial proceedings over the rights of the defendant during time in police custody produced, in my opinion, a great improvement of our procedure that did not bring the disasters some police officers expected for their investigations. On the other hand, we can find many examples of “copy-paste” of procedures from one system to another that did not take into account the legal culture or framework of the countries they were applied to - for instance, the way the adversarial system has been implemented in many new democracies in Eastern Europe was very open to criticism.

Today the trend is in favour of the Anglo-Saxon world. Despite most countries in the world continuing to be ruled by the continental system, there is an indisputable fascination for the US, English and Hollywood. Maybe the Continent lost the battle of communication, and the influence of both systems is rarely mutual. The adversarial system is often seen as the good one, with the need to replace the old fashioned continental one. The difficult mutual understanding among judges and lawyers in international courts, where both legal cultures have to live together, emphasizes the need for comparative law and exchanges among legal professionals and scholars.

I definitely will be the devil's advocate today. My point will not be to convince this gathering that the French system is superior to the Australian one. I will be quite

¹ The **Powerpoint presentation** used at the *CLE Paris* conference follows at the end of this document.

happy if I succeed in making you understand the major features and strengths of a very different legal system, from which it may be possible to learn. I shall start with a few words about the French criminal legal culture that may explain many things. I believe it is impossible to understand how a legal system works, and why, without such a background.

First, we believe that the judge has the duty to find the truth. Not just to balance arguments shown to him - not only a fair judicial debate. Judges want to be convinced, to know what really happened and not only what can be proved according to admissible evidence. This is especially true in the *cour d'assises* with jurors.²

Secondly, and as important as the first argument if not as well known, we do not think parties themselves can achieve this task and reveal the truth. Therefore there is the need for an inquisitorial judge who will be the only neutral, objective person in the court room, accordingly closer to the truth. Except for major crimes (murder, rape), judges decide guilt and then the sentence, so the one who decides wants to know the truth. Therefore, too, we trust in expertise, independent, objective and technical evidence, that can help the judge in a more reliable way than the parties' arguments, which are always subject to suspicion. Therefore, at last, the reason for our distrust for testimony and witnesses. (Defendants do not speak under oath. Lawyers do not have to a duty to say the truth to the court. It is impossible to consider as evidence something prepared by a party for itself like an affidavit.) All these elements have huge effects on our rules of evidence, as the question is not what is admissible but what is likely to be true.

Thirdly, in France the prosecution has a link with the government (even prosecutors are magistrates too), therefore there is the need for an independent investigator - the *juge d'instruction*.

Fourthly, we think defendants are the key actors of their trial. The presumption of innocence is not incompatible for us with the expectation that the defendant will say something, defend himself. The right to silence is actually quite recent and not often used as accused people want to participate in the investigation and the trial. They do not wish to let other parties or their lawyers speak on their behalf. It is really cultural, people want to talk to their judges, whether they are guilty or not.

Fifthly, we try to make justice accessible to everyone. Free legal aid is available in any sort of case, civil and criminal, and people can expect their cases always to be dealt with by professional judges, sometimes three of them. As a consequence courts are full of all sorts of cases, there is a need for many judges and judicial recruitment is

² The *cour d'assises* is the French criminal court which hears the most serious criminal charges and normally sits as three judges and six jurors at first instance and as three judges with nine jurors on appeal.

very different than in Australia. It is mainly through a competitive exam after graduation.

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 nobly 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, sometime 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 debate, I must also pay tribute to the honesty of the young Englishman.

Since those days my closest exposure to the French system came from discussions with and visits to M Charles Tellier, my companion on this platform, a French judge and my former associate in Brisbane in 2009. I have also been permitted to sit in with the judges and juries in two criminal jury trials at the *cour d’assises* in Bordeaux in 2014.

I must confess that all of those experiences have been very positive but let me now leave the compliments behind! This is a debate and I am here to advance Australia fair!

How is the debate to proceed? We have divided up the topic into five different headings. They are:

1. The investigation: rights of the defendant with the police, access to a lawyer and legal aid
2. In court: the role of the judge and counsel, oral proceedings vs dossier, rules of evidence
3. Considering the verdict: the role of juries and judges
4. The appeal process: rights and mechanisms of appeal
5. Enforcement of sentences

We propose to debate each topic with M Tellier taking the affirmative for each topic in favour of France and me taking the negative - against the French, *bien sûr!* We shall speak for about 5 to 10 minutes on the first topic and include some difficult questions for each other on the way through. We shall then pass to the next topic for a similar period and so on. The topics dealing with the investigation and the process in court will probably take up more time than the others.

What we hope to leave you with is a better understanding of how our respective systems work overall and in the societies they are designed to serve. I am not convinced that we can compare such complex systems in such absolute terms as to say one is better than the other but we hope to persuade you at least of their comparative merits in our respective societies. The answer may well be that the Australian system is good for Australia while the French is effective for France in their different social conditions – that’s something for you to consider and we’d be happy to take questions at the end.

One question to bear in mind is whether your answer to the debate’s question would differ if you were, to your own knowledge, guilty rather than innocent. Would you rather be a guilty accused in France or Australia or an innocent accused in one country rather than the other?

Think about that question while we debate.

M Tellier will then address the opening issue – the investigation.

I THE INVESTIGATION

M Tellier: For most cases, the police investigate under the supervision of the prosecutor who has some discretion (he can lift or extend police custody from 24 to 48 hours) and can ask a judge to allow some deeper investigation (house search without consent, electronic surveillance).

For the most serious and complex cases, the police investigate under the supervision of a judge, the *juge d'instruction*. The main explanation of the survival of such an old-fashioned inquisitorial institution is the lack of independence of the prosecution. Even if prosecutors are magistrates like the judges, they still have some link with the ministry of justice, hence the need for an independent investigation in sensitive matters.

The prosecutor-monitored investigation is quite secret and suspected persons have no particular access to documents or the investigation itself. The investigating judge, on the contrary, works according to very precise procedure, giving the suspected person a status allowing him to have access to all the documents of the investigation, to ask for specific investigations (lawyers have no right to investigate themselves). The judge will gather elements in favour of and against all possible defendants, hear witnesses, order searches, surveillance, ask another judge to order a pre-trial detention, and eventually order a non-suit or indict the defendant.

Good points: Firstly, be he or she rich or poor, with a good or bad lawyer, the same investigation will be held. Secondly, it is maybe the only way in our system to prosecute and indict powerful people ... a way to skip the refusal of the prosecution to investigate; hence the continuous attempts of the politicians to abolish the position of the *juge d'instruction* without giving full independence to prosecutors.

Bad points: the apparent schizophrenia of the *juge d'instruction*, who must be neutral at every stage of his investigation and gather elements in favour of and against suspected people. I must say that I did not feel that myself, as I tried to act like a criminal review judge rather than a real investigator. But there is a risk, especially in sensitive matters.

Douglas J: The separation between the judicial role and the investigative role in Australia is very strong and representative of Montesquieu's idea of the separation of powers between the judiciary and the executive. If you ever visit the University of Bordeaux's law school you will see a fine statue of Montesquieu in its foyer but the French have clearly decided to ignore one of his best ideas in merging these two roles in that of the investigating judge.

When I visited M Tellier in Caen in Normandy in 2011 one of my biggest surprises was to find that the president of the Court of Appeal there had his chambers next door to those of the chief prosecutor. They were old university friends too and both took us off to lunch! In fact the prosecutors and judges train together in the *Ecole Nationale de la Magistrature* in Bordeaux and can routinely change functions during their professional careers.

The other big surprise of that trip was when the president of the *Cour d'Appel*, recognizing that I came from Brisbane, started singing the old Australian folk song, Moreton Bay, for me. What could I do but join in? I think he must have been a fan of John Denver who had recorded the piece!

We do have a similar position to that of the *juge d'instruction* in the coroner's role in investigating unusual and unexplained deaths. Our coroners are normally magistrates but act as investigators with the assistance of police and perform a very important function but they are divorced from the prosecuting role of the *juge d'instruction* in France.

We now also have Crime Commissions in most States, often led by judicial or quasi-judicial figures who do have important functions in investigating organized crime and corruption but, again, do not normally have a prosecuting function.

In other words, when I preside as a judge in an Australian court I do so disinterestedly, with no particular leaning to prosecution or defence and no cultural background, coming as I did from the independent bar, predisposing me to one side or the other. If police evidence is challenged as gathered in breach of the rules governing their behaviour I have a discretion whether to admit it or not but it is a discretion exercised independently in circumstances where an informed observer would be unlikely to expect that I would be biased in favour of the police or against them.

The suspect's right to silence is also strongly reinforced in Australia by the warnings police are required to give, the right of a suspect to seek legal advice and the obligation to record interviews electronically. I must say, however, that it is normally the experienced criminal who most often exercises the right to silence. I continue to be surprised at how much many suspects will own up to when first interviewed by police.

QUESTIONS

M Tellier: *What happens if the police or the prosecution do not want to investigate? What happens if a party does not have the money to ask for extra investigation or expertise?*

Douglas J: M Tellier's two questions are good ones. The first question is what happens if the police or the prosecution don't want to investigate. Police may be reluctant, for example, to prosecute fraud claims below certain amounts of money. There is an ability to bring a private prosecution but in most of our systems that can be halted by the intervention of the Attorney-General who can stop such a procedure. In any event a private prosecution would be an expensive operation. So there is the potential for politically sensitive prosecutions to be terminated but one would have to be a brave politician to be seen to connive at such a result where an apparently valid case was available. Our directors of public prosecutions also hold independent public offices.

M Tellier's next question is what happens if a party does not have the money to ask for extra investigations or engage witnesses with more relevant expertise. For most trials on indictment public defence is available for those who qualify for legal aid.

That appears to be the case for most accused people. Legal aid does not often extend to summary prosecutions before magistrates, however. Normally legal aid will fund further inquiries and conduct investigations through other potential witnesses but they do have their own budgetary constraints. Nor is there any inhibition on the defence lawyers speaking to prosecution witnesses before the trial to clarify issues that have not been dealt with on the evidence thus far.

If an accused is funding his or her own defence it is likely to be expensive, however. From what I have heard lawyers in France do not charge nearly as much for this sort of case as lawyers in Australia and have a professional obligation to accept legal aid work.

Douglas J: *Are French judges seen as part of the overall prosecution system rather than as separate from it?*

M Tellier: I would say we all belong to the public service of justice. Being part of the judiciary is not an honour, it is a job. Prosecutors and judges all participate in justice with a personal independence.

II IN COURT

M Tellier: One who watches TV series of countries with different legal cultures will quickly find out that hearings are quite different. I can see three major differences, each being the consequence of the previous one: the role of the judge, the role of the defendant and the rules of evidence.

The role of the judge would be the first difference between Australia and France.

In France, criminal courts can be dealt with by one judge, three judges (roughly where more than five years imprisonment can be pronounced), or three judges and six jurors (nine on appeal) for the most serious crimes (the *cour d'assises*). The meaning of the inquisitorial procedure is all summarized in the role of the judge during the hearing: he leads the debates, presents the case according to the file (the *dossier*), asks questions and lets parties do so if they wish. He will decide on both guilt and sentence. There is no particular difference depending on whether the defendant pleads guilty or not. In the *cour d'assises*, judges and jurors will decide on both guilt and sentence together.

One has to understand that under the French system, most of the work was done before the hearing, gathered in the file. In the *cour d'assises*, proceedings are oral as in Australia, so that witnesses will be heard. Before the more common courts, the file will be considered as enough in most cases. A major consequence of this system is that the judge, who will eventually decide, wants to know the truth (therefore his inquisitorial behaviour in court).

Good point: the one who decides can have all the information he needs.

Bad point: the judge needs particular attention not to look partial.

The second major difference is the role of the defendant. It was the most surprising thing for me when I started working for Justice Douglas. Defendants look passive, they watch their case instead of taking part in it. At the maximum they can give evidence like witnesses, under oath.

In France, the key actor of the case is the defendant. We expect him to be part of the trial. He has the right to remain silent, but it is so alien to our legal habits that this right is very rarely used. We don't believe that expecting answers from someone who is charged with a crime is a breach of the presumption of innocence. There is probably a misunderstanding between us regarding this notion. One has to keep in mind that defendants, unlike witnesses, are not under oath. They have totally free speech. Even lawyers can support the lies of their client without shocking anybody.

Good point: hearings are more lively, people are actors in their own fate.

Bad point: some defendants can be their own enemy, and should preferably restrain themselves from talking. There is a risk, too, of the judge drawing incorrect inferences from the silence of the accused.

The last major difference in court, a consequence of our legal culture and the role of judicial actors in the courtroom, is the effect of the rules of evidence.

This is a long topic, I will make it very short for this paper. We do not have all the rules about admissibility of evidence and questions lawyers can ask that you have in Australia. There is no "objection". Cross examination is unrestricted. Evidence must be legal (not obtained by fraud) and open to discussion with the parties. Then it is admissible. The question is: is the evidence relevant? Some statements have a higher level of reliability (expertise, police statement, confession) but none is binding upon the judge. Lawyers believe more in the *plaidoirie* (final speech that is supposed to convince judges and jurors) than an effective cross examination (which is happening more and more).

Good points: all that matters is the truth, not the formal admissibility of evidence. Our civil system works more like in Australia but in criminal proceedings, the evidence is unrestricted. And I do not really believe in oaths (let us go back to basic principles: everybody lies!)

Bad point: the task of assessing the reliability of evidence is harder.

Douglas J:

Role of the judge

It is true to say that our judges, compared to the French, have a relatively passive, umpire-like role. We play no part in the gathering or presentation of evidence and will rarely question witnesses or the defendant. The parties are responsible for presenting their case.

Nonetheless the judge's role in directing the jury during the trial and summing up before the case goes to the jury is very important and can be crucial to the fairness of the trial. Those directions and the summing up need to be accurate as, if they are not, then the accused will be likely to succeed on an appeal and receive a new trial. It is important that the directions and summing up are explained as clearly and simply as possible to the jury.

Role of the defendant

As M Tellier has said, the defendant normally has a passive role in our criminal courts. This is because of the adherence to the rule that the onus of proof lies with the prosecution. As I have already mentioned we have strict rules regarding detention and cautioning before interrogation. This helps preserve a defendant's right to silence which is reinforced to a jury by the standard direction that they are not to draw an inference that the accused is guilty because of the exercise of that right. Nor is a defendant required to give evidence at trial. The defendant is entitled to put the prosecution to proof of their case. In fact most defendants do not give evidence although they are perfectly entitled to do so. I expect the reason they do not is that most defence lawyers have seen how badly things can go for an accused when cross-examined by the prosecutor. Defence counsel are not expected to be passive, however, and engage, often vigorously, in cross-examination of prosecution witnesses and in making submissions to the judge in their client's interest.

Although in France as well as in Australia a defendant benefits from the presumption of innocence, in my experience the culture in France is that the defendant expects to be interrogated by the judge and will normally respond and, if there is no response, then inferences may be drawn against him or her. In fact the French trial normally starts with the presiding judge conducting a preliminary questioning of the accused.

The historical reasons for the converse attitude in common law countries go back at least to the court of Star Chamber under the Stuart monarchs in the 17th century and the perception of tyranny associated with their procedures. There have been moves to weaken the attitude to the failure to give evidence in Britain and elsewhere but the rule is still regarded as significant.

Rules of evidence

Our oral system of evidence and detailed rules about the admissibility of evidence also require the judge to be very experienced in the application of those rules to ensure the trial proceeds without too much interruption. Normally the barristers who practise in crime are also experienced in this area and most evidentiary disputes are worked out between them or in pre-trial rulings but still the judge's role is key.

These rulings occur in the absence of the jury to stop them hearing what might be inadmissible evidence. The hearing is normally public. The system operates on the assumption that it is for the prosecution to prove its case and the defence normally has no onus to prove anything, but the defence is also able to dispute prosecution evidence by producing their own witnesses even if the accused does not give evidence. Our strict rules of evidence as to relevance and admissibility normally preclude propensity evidence on the basis that, merely because a person has a bad criminal record, it does not mean that he has committed the particular crime with which he has been charged. The French take a different view which, to my mind, tends to allow prejudicial evidence in that is not particularly relevant to whether the accused has committed the crime charged.

Experts are commissioned by parties in Australia and are partisan in the sense that they are expected to support the case of the party calling them. Nonetheless, in my experience, the experts I have seen in Australian criminal trials take their duty to the court to tell the truth seriously and there are many cases where experts can genuinely disagree about how best to interpret the evidence. That having been said, in my experience, most expert evidence led by the prosecution is not seriously challenged. A system of court appointed experts has its merits but is not particularly useful where there is a serious dispute about the issue to be debated.

Let me say something about cross-examination too. It is traditionally and, in my view, rightly seen as one of the greatest engines for the discovery of the truth and one of the great inventions of the common law procedural system. 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. 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, as M Tellier tells me, an increasing incidence of the use of cross-examination by French lawyers, perhaps stimulated by the expectations of French citizens used to seeing television crime dramas from English speaking countries. If I ever needed representation in a French court I would want to make sure that it was by somebody who knew how to cross-examine!

QUESTIONS

M Tellier: *A judge who is sure something is missing in the file, can he do something without giving the impression of being partial?*

Douglas J: Yes, all the judge has to do is to send the jury out and point out to the prosecutor or defence counsel that there is no evidence opened on a particular point that could be crucial. It happened to me as a young barrister conducting one of my few prosecutions. I mainly did civil work!

M Tellier: *What happens if the judge realises that a person who pleads guilty is maybe not guilty? For example, the case of someone who pleads guilty to a lesser crime in order to avoid a bigger conviction where the charges are weak.*

Douglas J: It is sometimes appropriate for a judge to refuse to accept a plea of guilty when a review of the evidence presented for the prosecution does not, in the judge's view, justify a plea of guilty to the charge. It is not common and I have never done it but I have seen it done when I was a judge's associate.

Douglas J: *How does a French judge assess a defendant who does not respond to the judge's questioning but where there is some indication that the defendant is not capable of expressing himself or herself coherently or intelligently?*

M Tellier: It depends if the *dossier* already has a lot of evidence or not. Silence should not imply anything in itself, especially if evidence is weak. If there is such evidence, we could deduce answering is uncomfortable for the defendant. But we cannot use this as an argument.

Douglas J: *How would you go about finding an advocate who knew how to cross-examine effectively?*

M Tellier: It happens sometimes. I would love to see in French courtrooms what I saw in Australia. It happens now in France too, in major cases with efficient lawyers.

III CONSIDERING THE VERDICT

M Tellier: Once judges or jurors have to consider their verdict, they must follow their "*intime conviction*", which cannot be translated properly into "inner conviction". I would define this as the perception of the strong likelihood that the defendant is guilty or not. Actually I do not think it is very far from the "beyond a reasonable doubt" system. Often we are convinced by a series of evidence, individually not sufficient, but relevant all together.

France is a country of civil law, not common law. Previous legal decisions are not binding on us, especially in criminal cases where there is no real database of the

sentences (yet). The law sets the limit of a sentence (length, probation or not), judges have to apply it according to the specificity of the case, the personality of the defendant and the risk for the community. Therefore, there is a wide range of sentences, including combinations of prison and suspended sentence.

Judges and juries need to give reasons. For small cases we skip it often though. In the *cour d'assises*, with jurors, it is usually the job of the three judges who sit with them.

Good points: decisions are tailored, taking into account all the elements of the case and personality of the defendant.

Bad points: there is a higher level of uncertainty about the sentence, especially with jurors, more sensitive to public opinion (therefore the need for professional judges to be among them), and one can argue that judges have too great a power (therefore the need for there to be three in many cases).

Douglas J: Criminal cases charged on indictment are usually decided by a jury of 12 in Australia but, in some cases now, the defendant can elect to be tried by a judge alone who must give reasons. Summary trials are dealt with by magistrates who also have to give reasons for their decisions.

A majority jury verdict is available, with some exceptions (e.g. a murder charge).

The judge directs the jury on matters of law in open court and the jury determines matters of fact and the ultimate question of guilt separately from the judge. The jury hears the evidence at trial of all of the witnesses and has access to the exhibits during deliberation.

The punishment is imposed later by the judge alone with no jury involvement. The jury rarely has information about the defendant's *personnalité* or character. That only becomes relevant on sentence for the judge to determine.

Another unexpected experience for me when I attended the jury trials in Bordeaux I mentioned earlier was to hear the judges directing the jury in private in the jury room and in the absence of the parties. The judges and the jury deliberate together both on verdict and penalty but I was surprised to hear what I would regard as jury directions being given in private. (I was allowed to be present during those deliberations, something impossible in our system.)

Jury directions are normally parsed and analysed in our system to see whether they give rise to a ground of appeal and the inability to do so in France would be regarded as a significant inroad into the accused's right to a fair trial if it occurred in Australia.

When it comes to the imposition of sentence Australian judges are assisted by counsel referring them to comparable sentences from other similar cases to arrive at a result that is consistent across the State and the country in the case of federal offences. The

French have no similar records to assist in the maintenance of consistency in sentencing.

QUESTIONS

M Tellier: *Is the jury system compatible with the necessity to give reasons?*

Douglas J: Not particularly is my answer. I believe that the English have persuaded the European Court of Human Rights that the combination of the detailed summing up and the right to an appeal where reasons must be given is sufficient to equate to the giving of reasons. In Australia now also many judges sum up by suggesting a question trail to assist the jury in their deliberations. I also assist juries by providing them with a written summary of my summing up, normally including a question trail at the end.

Juries in France are 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. I gather that process combined with the right to an appeal to an appellate court *d'assises* satisfies the ECHR's requirement for reasons.

M Tellier: *How can we be sure jurors will not check on the Internet or talk about the case out of the court? Is the principle of a jury not being polluted by non-court elements a bit formal?*

Douglas J: We can't be sure that jurors will not check on the internet no matter how much we tell them not to do so. The problem is increasing and there may be something to say for M Tellier's proposition that our attitude to pollution of the jury by non-court elements is too formal but it is important to do our best to ensure that an accused is tried on the evidence rather than in the court of public opinion which is so often wrong and/or prejudiced by the media. I am not sure how our system differs from a French jury trial on this point however.

Douglas J: *How can the defence counsel be satisfied that the judges are directing the jury appropriately about the law and the evidence where those directions are given in the privacy of the jury room and there is no record of them?*

M Tellier: We do not consider judges and jury to be separate in the *cour d'assises*. They all are part of the jury, and jurors are free to talk to each other. The defence wants to convince the judges too. There are three judges, so they are supposed to make a balance and try not to be too prescriptive to jurors. My experience is that jurors are adults, and not so easy to influence.

Douglas J: *How can judges be satisfied that the sentences they impose result in similar punishment for similar offending across the country?*

M Tellier: The personalisation of the sentence is very important for us. A similar punishment for a similar offense would not be something lawyers would necessarily advocate, as they would rather explain that the defendant's situation is very specific, therefore the sentence would be tailored. One has to keep in mind French judges cannot make the law, they just apply it.

Douglas J: *How do French courts deal with jurors accessing information on the Internet that is not in evidence in court?*

M Tellier: It cannot be helped – it is the judges' job to explain to the jurors in the jury room that only the court debate matters. At least judges in the jury room can temper this sort of thing.

IV THE APPEAL PROCESS

M Tellier: In France appealing means asking a higher court to judge the case again. It is formally much less complicated than going to the court of cassation³, and is only in charge of the law and not facts. Courts of appeal have to judge again, using the dossier and conducting a hearing from scratch. They are in charge of the coherence of sentences within their jurisdiction. *Cours d'assises* are specific as appeals from them are heard by another *cour d'assises*, with three more jurors.

Good point: for the defendant, it is easy to appeal, without high court fees.

Bad point: too many people appeal or go before the court of cassation, which is overburdened.

Douglas J: A guilty verdict can be appealed as of right to a Court of Appeal in Australia on broad grounds (miscarriage of justice, unsafe/unsatisfactory verdict etc). The Court of Appeal consists of three judges, with no jurors. This system may be better suited to dealing with appeals raising issues of admissibility of evidence and directions of a trial judge. There is no appeal against acquittal except by the Attorney-General on a point of law. That will not affect the result in the particular trial but can clarify the law for the future.

Traditionally in France 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

³ The Cour de Cassation is France's highest court for normal litigation and has the function of deciding whether to quash the decision of a lower court for error of law.

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 in France 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, I understand that 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.

The problem of private directions to the jury by the judges still remains, however. The lack of transparency about what the judges say to the jury is a feature that I find perplexing.

QUESTIONS

M Tellier: *What would be the cost of appealing the decision for a defendant?*

Douglas J: If the defendant is legally aided there should be no cost to the defendant for an appeal. If not then the cost would be significant, maybe in the tens of thousands of dollars or more, depending on the length and nature of the trial evidence and the legal points argued on the appeal, but it would not be likely to approach the cost of a trial as appeals are normally quite brief compared to trials.

M Tellier: *How does the automatic life sentence work in Queensland?*

Douglas J: Murder is the only offence to attract a mandatory life sentence in Queensland. Now there is a minimum period of 20 years before a murderer becomes eligible for parole. That period used to be 15 years unless the defendant committed

multiple murders on one occasion. If a murderer commits multiple murders on the one occasion he or she could expect to serve upwards of 30 years before becoming eligible for parole.

Douglas J: *How does a French appeal court identify a legal problem in the conduct of a trial in the absence of a record of the evidence or the rulings or directions by the judges in the jury room while they are deliberating?*

M Tellier: *Cour d'assises* hearings are recorded now in order to be able to find out if such an issue is raised. The clerk is supposed to record legal incidents that happen in the court anyway. And the court of appeal will judge again from scratch, so it is more for the court of cassation (our High Court) to deal with these questions.

Judges are part of the jury, so we do not record what they say in the jury room as you do not record jurors in Australia. We do not consider the judges are a threat to the decision, they are part of it.

V ENFORCEMENT OF SENTENCES

M Tellier: The last short point of this speech will deal with the enforcement of sanctions. It aims to make sure the sentence is as close as possible to the very personal situation of the criminal and the case. This task is dealt with by a specialized judge, the enforcement judge (*juge de l'application des peines, JAP*), with wide powers over the penalties decided by the court. This judge supervises the work of the probation officers, who inform him almost in real time of any incident.

According to the length of the sentence, the criminal record, professional or family situation of the person, the risk of re offending, his efforts at social integration, the risk for the victim of the crime (elements the court may not have, or that can change after the sentence), this judge will be able to adapt, amend or transform the sentence, before being served (short sentences) or after half or two thirds are served (longer sentences, dangerous criminals).

Good point: the sentence is tailored, which is a better guarantee for social reintegration.

Bad point: A lot is decided out of the courtroom, out of the public, by a judge who can change what other judges decided after a public hearing.

Douglas J: An Australian judge can sentence to imprisonment with or without a recommendation for parole. Other available sentences, depending on the circumstances, include, e.g., fines, convictions without further punishment, suspended sentences, intensive correction orders, community service and probation. In Queensland, e.g., for shorter sentences of three years or fewer the judge can fix a parole release date. Otherwise a parole eligibility date is fixed either by the court or by the legislation. Commonly, if there has not been a plea of guilty, parole eligibility

will be set at 50% of the head sentence. If there has been a plea of guilty it is common to recommend an earlier parole eligibility date, in Queensland perhaps after a third of the head sentence. Those considerations differ from State to State and do not normally apply to sentences for federal offences. Parole orders are supervised by the executive through the administration and the Parole Board but breaches of probation and suspended sentences are dealt with by the courts which can revoke such orders and re-sentence the offender.

We do not have an equivalent to the JAP but do have Parole Boards that can determine when prisoners will be released on parole where there is no fixed parole release date. In doing that they rely on information about a prisoner's conduct in custody and other assessments of any danger he or she may present to the public if released. The Parole Board is normally constituted with an experienced lawyer as a member and its decisions may be reviewed through the normal administrative law remedies.

We also have a specific jurisdiction over dangerous sexual offenders regulating what happens to them at the expiration of their normal sentences if they still represent a danger to the public. The possibilities range from continuing detention to release on conditions designed to reduce the danger of their re-offending to unconditional release.

CONCLUSION

M Tellier: I understand the French criminal legal system sounds rather bizarre to citizens of English speaking countries. Please keep in mind the Anglo Saxon system is not that common in the world, so that what you might consider obvious is not obvious for many other countries with a time-honoured legal culture.

I think the main philosophy of our system is that the defendant is the key actor in his trial. I would feel very frustrated to see the hearing going on without me giving my opinion for every witness or every piece of evidence. At the end of the trial I would feel quite frustrated as well to see that my sentence is almost already decided according to previous cases, which are not about my story. As well, I would feel quite secure to know that the post-sentence time will be tailored as well, with a wide possibility of avoiding prison if I show efforts to improve my conduct.

I believe a combination of systems would be good. For instance if courts of appeal had the technical means to have a thorough database of the cases and sentences, it could be a guideline for first instance judges, that could not be binding. Open data will bring such information soon I believe.

We can see three major differences with Australia though. Here the judiciary is very poor. For historical reasons, there is nothing such as a judicial power in France. Judges are independent, justice is not. French people spend 30% to 50% less on their courts

than their neighbouring countries and judges' careers are still handled by the executive power. The government never forgave the judges for threatening the monarchy in the decades preceding the French revolution...

Then please keep in mind that legal aid is available for every case for people with income of less than 1,000 euros per month (full legal aid) or 1,500 euros per month, and all judges are professionals. We are quite happy with this easy access to justice and judges.

Last point: we have a huge number of proceedings, a lot of crimes, now terrorist attacks. Australia is far from the problems of the rest of the world. Even the US and the UK had to amend their systems (Patriot Act, longer police custody in the UK), and the right to see a professional judge for any kind of matter, small or big, makes the workload very heavy. Few means and a big workload: there is a need for efficiency. At least in this we are good.

Douglas J: M Tellier spoke at the start about the French judges' wish to get at the truth of a case. I would argue that we are driven by the same aim but expect that it is more likely to become apparent from a contest between parties rather than through a judicial investigation. Those of you who saw the recent French film "*L'hermine*" or "Courtied" in English will sympathise with the French judge's scepticism about our ability to ascertain such an abstract notion as "the truth" at the best of times. From recollection that was a difficult case where the accused was a man charged with murdering his infant child. The proceedings during the course of the trial suggested that, actually, he may have been trying to protect his female partner, the mother of the child, as the real killer. We can only do what we can to arrive at the truth. I am glad in most cases that it is the jury charged with that responsibility rather than the judge. If I feel strongly that there is a reasonable doubt about an accused's guilt I can say that to the jury but they are not obliged to agree with me about the facts.

On the macro level, however, I suspect that both of our systems produce comparable results. I gather that about 95% of French prosecutions result in guilty verdicts. I also understand that, in Australia, about 80% of accused plead guilty and that about 15% to 17.5% of the remaining 20% are found guilty. Not so far apart!

If I were ever accused of a crime in France, however, I would be particularly concerned about the absence of an effective right to silence and not just because I am not a native French speaker. I would also be concerned about the right of French police to detain me with only limited access to legal advice for a considerable period.

If I had a criminal record I would be concerned about that being before a jury, particularly if it had no relevance to the charge I was facing. I would certainly want to have an advocate who knew something about cross-examination and would be glad that my representative can now use that tool to defend me.

I would be alarmed that I had no chance to find out what the judges were saying to the jury behind closed doors and if there was no record of the evidence given by the witnesses at my trial or appeal.

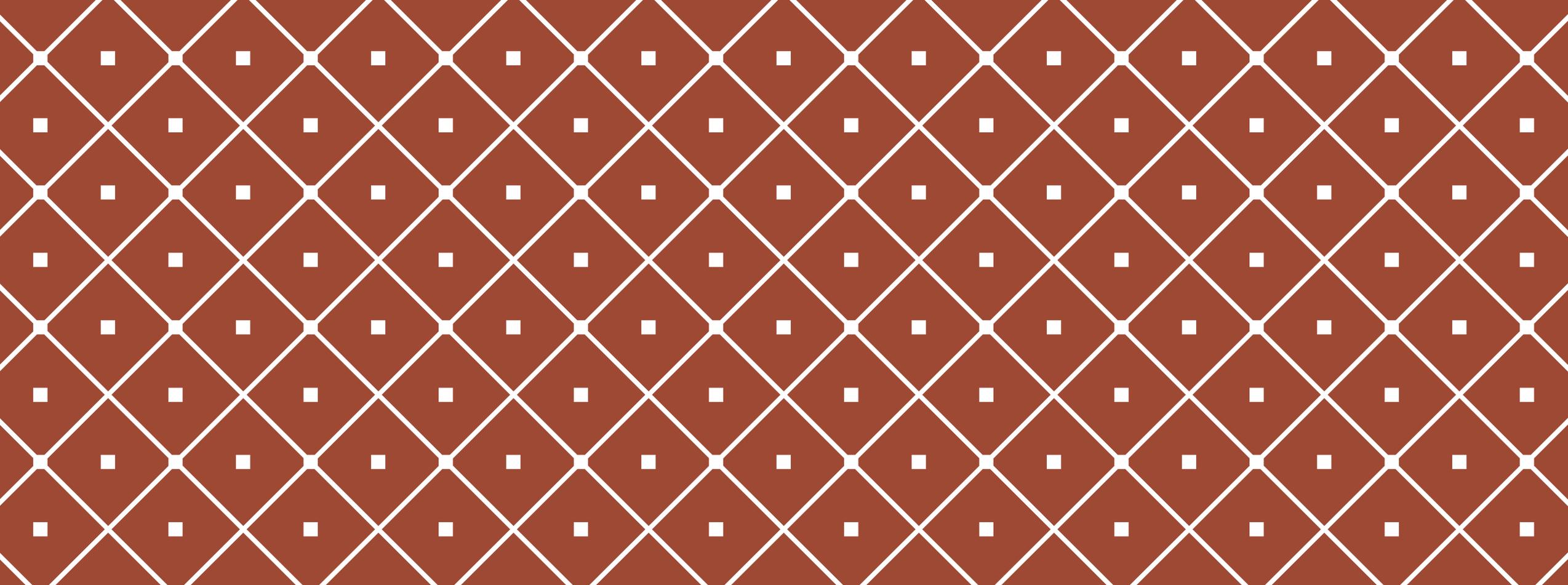
The ability of a French judge to make further investigations about issues raised by me would be a comfort but I would infinitely prefer it if my own lawyers were making those inquiries too and were prepared to take up the cudgels for me actively.

If it came to sentencing me I would also find it unacceptable that I could be imprisoned without reference to other comparable sentences producing what could be an apparently arbitrary result.

The absence of a proper record of the evidence and the directions given in the jury room would also concern me in respect of any appeal.

Give me the true right to silence, an effective cross-examiner and the chance to review the judges' rulings effectively. It's probably fair to concede that I would be even more convinced about that if I knew I were guilty but, speaking dispassionately, I suggest the same conclusion applies to those who are innocent. As a non-native French speaker in a difficult or nuanced case I would hate to be interrogated by a French judge even with an interpreter and the same must apply to many French citizens with less than the normal powers of communication.

I'd rather be an accused in Australia any day of the week and suggest that you should be too!



**I'D RATHER BE AN ACCUSED IN THE
FRENCH CRIMINAL JUSTICE SYSTEM
THAN THE AUSTRALIAN**

Justice James Douglas
M. Charles Tellier
Ms Camille Boileau

OVERVIEW

1. The investigation: rights of the defendant with the police, access to a lawyer and legal aid
2. In court: the role of the judge and counsel, oral proceedings vs *dossier*, rules of evidence
3. Considering the verdict: the role of juries and judges
4. The appeal process: rights and mechanisms of appeal
5. Enforcement of sentences

THE INVESTIGATION

Feature	Australia	France
Who is responsible for carrying out investigations	<ul style="list-style-type: none"> Investigations are carried out by the police. Little judicial or prosecutorial direction (though some judicial oversight). Coroner the closest equivalent to the <i>juge d'instruction</i> – investigates unexplained, violent or unnatural deaths with police assistance. Magistrates decide whether there is enough evidence to justify a jury trial. 	<ul style="list-style-type: none"> Serious offences (crimes and some <i>délits</i>) are investigated by an investigating judge (<i>juge d'instruction</i>) on a commission from a prosecutor (<i>procureur</i>). The investigating judge is assisted by judicial police. Fewer than 5 per cent of investigations are carried out under this procedure. Judicial supervision is considered an important safeguard, guaranteeing the thoroughness and proper conduct of the investigation and providing a form of pre-trial judicial evaluation of the evidence. For less serious offences, judicial police investigate under the supervision of a prosecutor. This accounts for over 95 per cent of cases.
Role of the judge	<ul style="list-style-type: none"> Judges have a relatively passive, umpire-like role. They play no part in the gathering or presentation of evidence and will rarely question witnesses or the defendant. The parties are responsible for presenting their case. 	<ul style="list-style-type: none"> A judge is empowered, during the investigation, to order detention of the defendant, searches and seizures, telephone interceptions, interrogations of the defendant and witnesses, arrange confrontations of witnesses with the defendant, reconstructions and to obtain reports from experts. The court's function is not simply to pass judgment on the evidence presented by the parties but also to conduct its own enquiries into the case. The judge adopts an interventionist stance.
Path to becoming a judge	<ul style="list-style-type: none"> Judges are appointed after successful careers as practitioners, usually barristers. 	<ul style="list-style-type: none"> French judges are trained for the role of judge, including in investigation work.

THE INVESTIGATION

Feature	Australia	France
Role of prosecutors and police	<ul style="list-style-type: none"> • Police investigate with little direction and supervision. • Prosecutors become involved in cases at a later stage, when they have received the results of the police investigation. • Crime commissions in most states investigate organized crime and corruption with wider powers than available to normal police. 	<ul style="list-style-type: none"> • Police are directed and supervised by prosecutors or an investigating judge. • Prosecutors, in addition to reviewing the evidence and determining whether or not to pursue a prosecution also exercise a supervisory function over the investigation. • Even where cases go to a <i>juge d'instruction</i>, the <i>procureur</i> retains a close involvement, often having been involved in the preliminary enquiry preceding the opening of an information.
Interrogation of accused	<ul style="list-style-type: none"> • Police can detain a suspect for up to 8 hours unless extended by court order (in Queensland). • Before questioning, the police must advise a suspect that any statements made might be used as evidence against the suspect and that he or she has a right to speak to a friend or relative and/or lawyer to be present during questioning. • A suspect has the right to remain silent during interrogation. • If practicable, questioning must be electronically recorded. 	<ul style="list-style-type: none"> • During the instruction the suspect may only be interrogated by the <i>juge d'instruction</i> after having first been informed of the right to silence. Normally this takes place in the <i>juge's</i> office and the <i>greffier</i> will type the statement in the presence of the suspect and defence lawyer. Defence lawyer has notice of the questioning and can consult the <i>dossier</i> beforehand. The environment is relaxed and professional. • Most investigations however are under the supervision of the <i>procureur</i> where the suspect is interrogated by the police and may be detained and interrogated for up to 48 hours (<i>garde à vue</i>). The suspect can consult with their defence lawyer for 30 minutes. The defence cannot access the <i>dossier</i> and is not present during the interrogation. This is designed to encourage the suspect to cooperate with police.

IN COURT

Feature	Australia	France
Purpose of a hearing/trial	<ul style="list-style-type: none">• The purpose of the trial is to determine the guilt of the defendant.• The defendant can hold the Crown to proof or present a positive alternative case.• The parties are taken to stand on equal footing.	<ul style="list-style-type: none">• More of a judicial confirmation in public of the conclusions of guilt drawn from the investigation. Has been described as an “audit” of the <i>dossier</i>. There is a high conviction rate (around 95%). Normally there is no opportunity to plead guilty. The court itself has to be satisfied of the accused’s guilt.• The investigation is seen as the crucial phase for determining guilt. It is unlikely that a case would be sent to a prosecutor if the <i>dossier</i> did not allow for a conclusion of guilt.• A more state-centric conception of justice.
Recording information in a trial, rulings and directions	<ul style="list-style-type: none">• Transcripts of evidence usually produced.• Transcripts and court records document the rulings of the judge.	<ul style="list-style-type: none">• Normally no transcript of evidence given by a witness.• No record of any directions or guidance given by the presiding judge to the jurors.• Brief written summary of proceedings made by a clerk (<i>greffier</i>).

IN COURT

Feature	Australia	France
Evidence	<ul style="list-style-type: none">• Oral system of evidence.• This means that the system is largely open/public.• Defence often dispute evidence produced by the police by producing their own witnesses.• Strict rules of evidence as to relevance and admissibility – normally no propensity evidence.• Experts are commissioned by parties and are partisan in the sense that they are expected to support the case of the party calling them.	<ul style="list-style-type: none">• Evidence against a defendant is found in the <i>dossier</i>, rather than in testimony and exhibits at a hearing.• The <i>dossier</i> contains information about the alleged crime but also about the suspect's biography (<i>enquête de personnalité</i>), including propensity evidence.• The <i>dossier</i> is accorded a high degree of credibility by the trial court.• Largely a documentary system.• This means that the system is more secretive.• On the other hand, it may be more objective to rely on the written form rather than a subjective evaluation of witnesses.• Rulings on the admissibility of evidence are rare (evidence, if relevant, is generally admissible and its source is already in the <i>dossier</i>).• It is difficult for defence to challenge police evidence outside the pre-trial enquiry phase because this is seen as a challenge to the integrity of the judiciary itself (since the investigations are judicially supervised).• Experts are court appointed.

IN COURT

Feature	Australia	France
Role and rights of the accused	<ul style="list-style-type: none"> • Strict rules regarding detention and cautioning before interrogation. • Helps preserve a defendant's right to silence. • A defendant is not required to give evidence at trial. • A defendant has a right to silence and privilege against self-incrimination. • A defendant benefits from the presumption of innocence. • Legal aid is means-tested and commonly available for jury trials but less so for summary offences. 	<ul style="list-style-type: none"> • The defendant is viewed as a necessary information source in revealing information about the offence. • A suspect is expected to, and usually does, cooperate with investigators and the court. • Cautions have only lately been required. • Adverse inferences from silence are not prohibited. • Defendant is invariably interrogated by the presiding judge based on the <i>dossier</i>. • The presumption of innocence exists in France but the right to silence is rarely exercised. • Legal aid is means tested but available for most accused and almost all cases.
Role and rights of the victim	<ul style="list-style-type: none"> • The victim is not a party in the case, only a witness. • Victims and their families can submit victim impact statements to be considered by the court in sentencing. • Victims can claim compensation after the trial in a separate application if the accused is convicted of injuring them physically. 	<ul style="list-style-type: none"> • At trial the victim may constitute himself/herself as a party to the case (<i>partie civile</i>) and claim compensation directly from the criminal court. • Where no investigation or prosecution has been instituted, the victim may activate proceedings directly. • This is advantageous in starting proceedings in political cases where there might otherwise be reluctance to proceed, however it may also clog up the caseload of the investigating judges with minor affairs.

IN COURT

Feature	Australia	France
Role of the defence	<ul style="list-style-type: none">• Defence role is to counterbalance the prosecution, especially given the passive role of the judge.• The accused requires his or her interests to be protected and advanced by his or her representative.• Defendants are entitled to a robust defence from their advocates, within the bounds of professional and ethical rules.	<ul style="list-style-type: none">• Defence role is comparatively less important, focusing on ensuring correct procedure is being followed and challenging any irregularities.• In theory, the interests of the accused are protected during the pre-trial phase by the investigator.• The defence rarely puts forward an alternative case or challenges evidence directly, rather the defence engages in a more moderate process of re-reading the <i>dossier</i> in a way most favourable to the defendant.• With the influence of the ECHR, there is a move towards strengthening the defence's role.• A reform now allows defence and the <i>partie civile</i> to request the <i>juge d'instruction</i> to carry out any investigations which they consider will assist in the discovery of the truth. This helps to place them on more equal footing with the <i>procureur</i>.• The suggestion that defence should have a greater role during the <i>garde à vue</i> is seen as usurping the role of the supervising magistrate and privileging the interests of the accused over those of the victim.• Suspects enjoy the right to silence in the sense that they are not compelled to answer questions or provide self-incriminating evidence, but only suspects appearing before the <i>juge d'instruction</i> are informed of this right.

CONSIDERING THE VERDICT

Feature	Australia	France
Composition of criminal trial court	<ul style="list-style-type: none">• Criminal cases are usually decided by a jury of 12.• A majority verdict is available, with some exceptions (e.g. a murder charge).• Judge directs the jury on matters of law in open court. Jury determines matters of fact and the ultimate question of guilt.• Jury hears the evidence at trial of all of the witnesses and has access to the exhibits during deliberation.• Punishment is imposed later by judge alone (no jury involvement).• The jury rarely has information about the defendant's <i>personnalité</i> or character.	<ul style="list-style-type: none">• The <i>cour d'assises</i> is the French jury court. It consists of three judges, a President and two assessors, and six jurors.• The judges and jurors sit and deliberate together on both culpability and punishment.• The parties do not hear the directions given by the judges to the jurors in the jury room during their deliberations.• A two thirds majority is required for a finding against the accused in relation to culpability.• Jurors do not have access to the <i>dossier</i> (only judges). They rely on the oral evidence of the witnesses adduced by the presiding judge at the hearing.

THE APPEAL PROCESS

Feature	Australia	France
Appeals from convictions	<ul style="list-style-type: none">• Guilty verdict can be appealed to a Court of Appeal on broad grounds (miscarriage of justice, unsafe/unsatisfactory verdict etc).• Court of Appeal consists of three judges, with no jurors.• This system may be better suited to dealing with appeals raising issues of admissibility of evidence and directions of a trial judge.• There is no appeal against acquittal except by the Attorney-General on a point of law.	<ul style="list-style-type: none">• Judgments in the lower-level criminal courts with no jury (<i>tribunal correctionnel</i> and the <i>tribunal de police</i>) can be appealed to the criminal appeals division of the <i>cour d'appel</i>. The appeal is by way of rehearing based on the <i>dossier</i>.• For convictions by jury, previously one could only appeal to the <i>cour de cassation</i> which could order a retrial where an error of law was apparent on the face of the record. Since 2001, a conviction can be appealed to a <i>cour d'assises d'appel</i> for a retrial.• The <i>cour d'assises d'appel</i> is a jury court that re-examines the case as if hearing it afresh. It is constituted by 9 jurors and three judges.• The prosecution has the power to appeal against an acquittal.

ENFORCEMENT OF SENTENCES

Feature	Australia	France
Enforcement of sentences	<ul style="list-style-type: none">•The judge can sentence to imprisonment with or without a recommendation for parole.•Other available sentences, depending on the circumstances, include, e.g., fines, convictions without further punishment, suspended sentences, intensive correction orders, community service and probation.•In Queensland, e.g., for shorter sentences of 3 years or fewer the judge can fix a parole release date. Otherwise a parole eligibility date is fixed either by the court or by the legislation, commonly, if there has not been a plea of guilty, at 50% of the head sentence. If there has been a plea of guilty it is common to recommend an earlier parole eligibility date.•Parole orders are supervised by the executive through the administration and the Parole Board but breaches of probation and suspended sentences are dealt with by the courts which can revoke such orders and re-sentence the offender.	<ul style="list-style-type: none">•In certain circumstances the prison sentence can be enforced at the verdict or shortly after by the prosecutor.•In most cases, the enforcement will be the task of a specialized judge, the <i>juge de l'application des peines</i> (JAP).•The JAP can transform prison sentences (up to 2 years) into probation, electronic surveillance and/or community service according to the situation and efforts of the defendant.•The JAP controls suspended sentences and probation orders and can revoke such orders.