

The French Judicial System

Address for the Alliance Française de Brisbane

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Screening of “10^e Chambre, instants d'audiences”

The Hon. Justice James Douglas

No doubt you have all heard the joke that Heaven is the place where the police are British, the chefs French, the mechanics German, the lovers Italian and all under the organization of the Swiss. Hell is the place where the chefs are British, the mechanics French, the lovers Swiss, the police German, and all under the organization of the Italians.

Let me add to the descriptions: Purgatory is the place where the statutes are from our Commonwealth parliament, the regulations are from France, both statutes and regulations are written in Esperanto, the public servants are Indian, the lawyers are Russian and the judges are drawn from the International Olympic Committee.

Purgatory is not really that different from Earth because wherever you go on Earth the statutes and regulations are comprehensible only to the lawyers – but often not until they have lost your case - the public servants are indifferent, but our saving grace is that the judges are wonderful – and, like any good judge, in saying that I’m not biased!

That doesn’t have a lot to do with my topic, the French judicial system, but it might give you a little of the comparative flavour of the exercise I’m about to embark on. In other words let me tell you a little about the French system by comparing it to ours.

There are some major differences. The systems for selecting and training judges are very different, as are many of the conceptual bases of the law and, to a significant extent, the approach to the development of the law and the method of trying cases.

French law makes a sharper distinction between public law, such as constitutional law, and private law, for example a dispute about the meaning of a contract. It also distinguishes rather more definitively than we do among the various sub-branches of the law.

Within the French court system there is also a separation between the ordinary civil and criminal courts and the administrative courts. The administrative courts deal with, for example, arguments between the administration and citizens about whether the administration has acted without proper power in making a town planning decision. Each system has a separate appellate structure, leading up to the *Cour de Cassation* for the ordinary civil and criminal matters and to the *Conseil d'État* for the administrative courts.

The documentary you are about to see deals with the stories of a dozen alleged criminals appearing before Madame Justice Michèle Bernard-Requin in the 10^e *Chambre Correctionnelle* at Paris, a court that is described as a *tribunal correctionnel*, a *tribunal de grand instance* under the French system. That may be translated loosely here as “District Court” or, more accurately, as the Criminal Division of the District Court. Because of the film’s focus, what I say about the French judicial system tonight will concentrate on its penal, or criminal, jurisdiction.

The blurb on the Alliance’s web-site describes Madame Justice Bernard-Requin as “a stern but fair adjudicator with a sharp intelligence and - if provoked - a temper. Her interrogations are occasionally terrifying; her compassion, when infrequently doled out, entirely appropriate. Each of the twelve depicted defendants (from the 169 filmed) pleads their case, and then sentences are requested. Later, after deliberation, the verdict is delivered.” The suspense is said to be unbearably palpable!

The jurisdiction she exercises sounds similar to the work that would be done by a mixture of our Magistrates Courts and District Courts when they deal with criminal cases. She deals with less serious crime and large numbers of defendants. As the publicity for the film says:

« Le temps consacré au jugement n'est pas celui des Assises, ou celui des grandes affaires judiciaires médiatisées. C'est le travail rapide et quotidien de la justice. Ce sont des affaires de droit pénal général: vols simples et aggravés, violences conjugales, séjours irréguliers, conduites en état d'ivresse... »

The Cour d’Assises, mentioned in that passage, is more like our Supreme Court, or the English Assizes – you can see how that word of ours – “Assizes” - is derived. The Assize Court deals with the most serious crimes, unlike the 10th District Court of the film. I shall talk about the Assize Court later.

Let me say something now about the differences in recruitment of judges.

Madame Bernard-Requin was probably selected to become a judge by doing well in a competitive examination, having studied law beforehand. She would then have had initial training of almost three years at the French National College for the Judiciary before being able to carry out her professional duties. The training is costly and the

interventionist, investigatory role of French judges means that there are many more of them, comparatively speaking, than under our system. The French government spends about \$30 million annually on judicial training and at present there are around 7,400 professional judges and magistrates there.

By contrast Australian judges and magistrates are, generally speaking, appointed by the government from the members of the private legal profession and have developed significant experience in the practice of the law, particularly in litigation in court, and are expected to have shown a high level of skill and integrity during their careers. Their experience in private practice is regarded as important in helping to establish an independent attitude of mind, especially important when deciding cases where the government is a party, as in almost all criminal litigation. Some judges here have been appointed from the ranks of government lawyers and, in the past, most magistrates were appointed from the ranks of public servants who worked in the Magistrates Courts registries.

The independence of the judges of our superior courts is also guaranteed by preventing their removal from office except by Parliament, and then only for proved misbehaviour or incapacity. It is only recently, however, that we have undergone training for the positions we hold, beyond our practical experience, and then the training occurs only after we have been appointed. The various Australian governments provide very little funding for such training.

The French judiciary comprises the judges (the Bench or *les magistrats assis*) and the public prosecutors, *les magistrats du parquet* who are loosely comparable to our

Directors of Public Prosecutions and their staff. Like our superior courts, the French Bench is independent, but the public prosecutors are subject to the hierarchical powers of the Ministry of Justice.

The public prosecutor has an important role except in more serious or complex cases before an Assize Court, where an examining magistrate or *juge d'instruction* will lead the proceedings. I shall talk about that position later.

French law, both criminal and civil, is codified. Codified law attempts to lay down precepts deemed to be universally valid irrespective of the time or place in which they apply. In other words the rules precede the solutions. Under the common law approach the general rules are extrapolated from the solutions to individual disputes by an empirical method. If one wanted to be philosophical one could contrast the French approach with the British by contrasting the rationalist approach of Descartes of working from *idées claires* or basic principles with the inductive approach of philosophers such as Locke and Hume who were empiricists rather than rationalists. Empiricists are not attracted to *a priori* positions regardless of underlying experience – or as the famous American jurist, Oliver Wendell Holmes Jr said of the common law: “The life of the law is not logic; it is experience.”

The precepts of French law are laid down in their Civil, Penal and Procedural Codes, which are the essential references for judges and magistrates and all the parties to proceedings. The jurists deputed by Napoleon to undertake that codification just over 200 years ago did a very effective job of reducing to a coherent, scientific and intelligible structure the essential rules of French law, themselves derived to a great

extent from Roman law. The French system has had enormous influence throughout the world since then, both in Europe and South America as well as in many African and Asian societies. Louisiana and Quebec remain heavily influenced by it in countries otherwise dominated by the development of the English common law, while Scotland has always had a Roman law based system possessing many similarities to French law. The same applies to South Africa.

French judges' main concern is to apply the principles expressed in the Codes, developing them if needs be to meet modern social changes, but not departing from the principles stated in them. By contrast, although most of our criminal law and minor parts of our civil law are also codified, the decisions of our courts in interpreting our legislation assume more importance than is normally the case in France. Our courts are required more strictly to apply decisions of courts superior in the judicial hierarchy. Also, reasons for decisions here tend to be more discursive and argumentative in expressing what the law is and why it should be stated in a particular way than normally occurs in France. For that reason what the French academic lawyers have to say becomes particularly important in the development of their law.

Much of our civil law is not the creature of statute at all, but depends, for statements of principle, on the decisions of the courts over the centuries. That is the body of law known as the common law. Parliament can and does intervene to change the common law if it is no longer consistent with the needs of modern society but the judges retain an important role in its development and restatement.

What happens in a French criminal hearing? In the film you are about to see there are no jury trials. The 10th District Court is not a *Cour d'Assise* dealing with the most

serious offences. The judge is responsible for maintaining order during the hearing and leads the proceedings. She will question the person appearing and the witnesses. The public prosecutor - who is also nominally a judge - and the prosecuting counsel and counsel for the defence may intervene in the hearing with the leave of the judge by asking questions or calling witnesses to appear. The presiding judge may order additional information, in other words, exercise powers of inquiry or, depending on the case, call on the services of the police or an examining magistrate to lead an inquiry.

At the end of the hearing, the presiding judge calls on the counsel for the victim or the victim in person to make a final speech, and then the Public Prosecutor will request a penalty. The accused, assisted where appropriate by his counsel, will have the final word. The decision is given in the form of a written, reasoned judgment.

It is possible to appeal to a Court of Appeal, which will re-examine the case. An objection may then be raised against the decision of the Court of Appeal, but only on matters of law, to the *Cour de Cassation*, the Supreme Court of Appeal based in Paris.

The procedure before the Assize Court, mentioned earlier, which deals with serious crimes such as murder and rape, is not like the procedures you will see in the film. That system dates from 1810 and, curiously, was based on the English criminal jury trial. When a crime is tried before this court the public prosecutor is obliged to appoint an examining magistrate or *juge d'instruction*. This person will assume responsibility for the inquiry and gather the information which should reveal guilt or innocence. Defence counsel can also ask for further evidence to be gathered.

Once the examining magistrate decides that he has gathered sufficient information to summon the accused before the courts for trial he sends the file to the public prosecutor. The public prosecutor draws up the charges, bringing together the various elements on the file, on the basis of which he instructs the accused to appear before the Assize Court.

The presiding judge selects nine jurors, at random from a panel of fifty-two people present in court. As in our system they have been selected at random from the electoral roll. The presiding judge again leads the proceedings, supported by two other professional magistrates as well as the jurors, arranges the order in which evidence is presented and examines the witnesses. This is popularly called the inquisitorial system but, in truth, the French system combines elements of the inquisitorial and our adversarial processes and has been reformed about 12 years ago to reduce the emphasis on the inquisitorial role of the judge. The counsel and the public prosecutor may also cross-examine, having obtained authorisation from the presiding judge. At the end of the hearing, the presiding judge allows the counsel for the victim to speak, then asks the public prosecutor for the prosecution address, then allows the counsel for the defence to speak. The defence should always have the last word.

The court's decision is made by secret ballot of all twelve members, the three judges and the nine jurors and a clear majority of them must be convinced of guilt. There is no need for a unanimous verdict. The presiding judge and the professional magistrates without the jury then come to a decision on the damages and interest the accused must pay to the dependants of the victim.

An appeal can be made to a new Assize Court; different in that it comprises twelve jurors instead of nine, that is a total of fifteen persons including the professional judges.

Since the State, through the judiciary, bears most of the expense of preparing the trial for a hearing and discovering the evidence, the expense of the proceedings is less for the parties than under our system. The system of justice is, however, significantly more expensive for the taxpayer because of the larger number of judges employed. The French penal system has also been criticized as slow and for its excessive use of pre-trial detention.

You will not see an Assize Court in action in this film. The crimes are less serious and Madame Justice Michèle Bernard-Requin is perfectly used to dealing with those charged before her own court without a jury - as you will see. You will also see that, unlike our system, there is no right to silence. Those accused have to answer the judges' questions. In doing so most of them illustrate why many defence lawyers here prefer not to lead evidence from their clients!

I am anticipating with interest the working out of these different solutions to the ancient problems of proof of guilt and of punishment and to the fascinating variety of human frailty with which the criminal courts anywhere are obliged to deal. I expect you will find the evening interesting.