

EVIDENCE AND THE CIVIL LAW TRADITION
IN THIRTY MINUTES FLAT

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OUTLINE

Introduction

- § 1. Scope of “the Civil Law Tradition”
- § 2. Extreme disparities within this tradition
- § 3. Present focus: France, Germany and Quebec

I. Uses and limits of comparisons

- § 4. The *Civil Code of Quebec* as a starting point
- § 5. Complications resulting from substantive and procedural distinctions
- § 6. Two illustrations: (i) objecting to inadmissible evidence; (ii) calling expert evidence
- § 7. Parallel illustrations in French and German Law
- § 8. A third illustration: hearsay in Quebec
- § 9. The place of the Law of Evidence in the *curriculum*: is it even taught?
- § 10. Evidence scholarship in Quebec contrasted

II. The weight of institutional factors

- § 12. A “statist” approach to litigation
- § 13. A different concept of trials and appeals

III. The civil law of evidence as it applies in civil/non-criminal matters

- § 14. Scope of the following observations
- § 15. The effects of inquisitorial case-management
- § 16. *Quod non est in actis non est in mundo*
- § 17. Further misgivings about testimonial evidence

IV. The civil law of evidence as it applies in criminal matters

- § 18. Scope of the following observations.
- § 19. A truly pivotal role for the presiding judge
- § 20. Little or no emphasis on admissibility
- § 21. A radically different approach to evidence of propensity

Conclusion: Fact-finding practices are necessarily situated in time and space

- § 22. A slow convergence on ends, sharp divergences on means
- § 23. The deep cultural and political roots of evidentiary practices

EVIDENCE AND THE CIVIL LAW TRADITION IN THIRTY MINUTES FLAT

Introduction

§ 1. **Scope of “the Civil Law Tradition”.**¹ When we speak of the civil law, we tend to focus on a few Western European countries which belong to the European Union, have large economies and political systems we generally call liberal democracies. But it must be borne in mind that a very broad range of countries on all six of the permanently inhabited continents² fit into that tradition. And if you add mixed systems to the list, such as Quebec, South Africa or even possibly Louisiana, this set of jurisdictions becomes even larger.

§ 2. **Extreme disparities within this tradition.** Politically, economically and also in a deep cultural sense, there are major differences between the countries which harbour these systems. Obviously, countries as disparate as Bulgaria, Uruguay, Vietnam or Indonesia do not have much in common, and in broad terms it is probably the case that there is more cohesiveness among common law countries than among civil law countries. For a common lawyer, taking a close look at how evidence works in Bulgaria must be profoundly disorienting. But not all encounters with the civil law need be that confusing.

§ 3. **Present focus: Quebec, France and Germany.** For a range of practical reasons, such as the availability of sources in English or in French, I will focus here on three civil law systems of evidence: apart perhaps from the odd reference to other systems, I will concentrate on France, Germany and Quebec. I include Germany because it is a sophisticated legal system but also because there is no shortage of excellent scholarship written in English or French about German law.³ All three share important civilian characteristics, but there are as well real differences among them.

I. Uses and limits of comparisons

§ 4. **The *Civil Code of Quebec* as a starting point.** Let me begin by offering a snippet of practical advice which, I believe, by itself, might justify my presence on this panel. If you are Canadian and looking for a succinct, accurate

¹ I will capitalize the phrase only this once.

² That is, all continents except Antarctica.

³ I will refer later to some of the many articles on German law in American and UK legal periodicals, but one source which must figure prominently in any paper such as this one is the comprehensive monograph of Peter L. Murray & Rolf Stürner, *German Civil Justice* (Durham: Carolina Academic Press, 2003) [*Murray & Stürner*].

and user-friendly summary of how the substantive rules of civil evidence work in a civil law system, read Book Seven of the *Civil Code of Québec*.⁴ The Code came into force in 1994, replacing the *Civil Code of Lower Canada* of 1866. It exists in an official English version, which, I regret to say, is not perfect (translators in Quebec City appear to have a special fondness for gallicisms) but is intelligible enough to Canadian eyes.

Book Seven contains only 71 fairly concise articles (2803 to 2874). If you take the time to read them, you will have an account, in the manner of an “executive summary”, of the dynamics of evidence in civil trials in a civil law system. In criminal matters, it is a different story altogether for there, of course, Quebec is purely and simply a common law system, far different from anything you will find in continental European jurisdictions.

§ 5. Complications resulting from substantive and procedural distinctions. But even in civil matters, complexity always lurks in the background. While the image projected by the *Civil Code of Quebec* is accurate, it is far from complete. Why is that? Because Quebec is a mixed system, and the entire institutional apparatus for the day-to-day operation of the law of evidence, that is, civil procedure, the structure of the courts, the legal profession’s approach to litigation, etc., unquestionably takes after a common law model.

And this brings me to what is perhaps the first important point I would like to stress today. The major differences between approaches to evidence in the civil law and in the common law traditions are likely rooted in civil and criminal procedure, rather than in the law of evidence itself. To be sure, the rules of evidence differ in many subtle or not so subtle ways, but in my view they do so in large measure because, procedurally speaking, these systems go about elucidating disputed facts in radically different ways. And it is because civil and criminal procedures are so different in these two traditions that evidence is also conceptualized a different way. It follows that consulting the *Civil Code of Quebec* will only bring you so far. Why? Well, because most procedural rules in Quebec bear the unmistakable mark of the common law.

§ 6. Two illustrations: (i) objecting to inadmissible evidence; (ii) calling expert evidence. Let me provide two specific illustrations. First, most evidentiary rules in a common law system are rules of admissibility. In civil and

⁴ It can be consulted online:

<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CQ1991_A.html>.

criminal trials, these rules are enforced by means of objections (a sort of oral motion to exclude), raised by counsel in a timely manner, and usually adjudicated upon by an interlocutory judgment which may be appealable under certain conditions. Second, whenever technically arduous issues of fact, requiring a specialized knowledge or know-how, arise during litigation, it is common practice for the parties to rely on the opinions of experts whose evidence is subject, here in Canada, to the rule of admissibility set forth in *Mohan*.⁵ These two illustrations accurately describe the civil law of Quebec. But they most certainly do not describe what goes on in a purer civil-law system, that is, one which is not mixed.

§ 7. Parallel illustrations in French and German Law. In French or German law, as strange as it may seem to a common lawyer, there is no procedural device to raise objections to the admissibility of evidence⁶ (whereas as I have said there is such a device in Quebec). In French or in German law,⁷ experts are appointed by the court from an official list, they conduct enquiries as mini-trials and they report to the court in a manner which effectively settles the issues of fact brought to their attention, often in a manner that blurs the distinctions between fact and opinion, and between fact and law. It is all very economical and fast, though perhaps not as analytically stringent as our way of doing things. By contrast, in Quebec, as in common law systems, there are often as many costly and partisan experts as there are parties in the case, and more often than not, each one of them will strenuously pull the blanket in the direction of his or her client.

§ 8. A third illustration: hearsay in Quebec. In several respects, the substantive rules of evidence in civil matters in Quebec resemble those enforced in France, particularly those governing documentary evidence or

⁵ *R v Mohan*, [1994] 2 SCR 9.

⁶ And there is no need for one either, as there is no such thing as discovery. The rules of evidence (few of which qualify as rules of admissibility) are administered by the investigating magistrate (the *juge de la mise en état*) and, to the limited extent that that leaves room for argument, the point may be raised at trial in the final submission of the party who questions the use of some evidence. Some years ago, I asked a close French friend, who is perfectly familiar with Quebec law and who also happens to be the Dean of Law at Sciences Po in Paris, whether he knew of anything in French law that might resemble objections to admissibility of evidence. He answered: “Ce n’est pas du tout une question française.”

⁷ This was one of the points so famously and provocatively addressed by John H Langbein in his well-known article “The German Advantage in Civil Procedure” (1985) 52 U Chicago L R 823, notably at 831-846. The title of the piece announces its colour. According to HeinOnline, until September 2013, the article was cited 373 times in other journal articles. It set in motion one of the most spectacular academic squabbles in comparative law scholarship: see in particular Ronald J Allen, Stefan Kock, Kurt Riechenberg and D. Toby Rosen, “German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalizations in Comparative Law Scholarship” (1987-88) 82 Nw UL Rev 705, John H Langbein, “Trashing the German Advantage” (1987-88) 82 Nw UL Rev 763 and Ronald J Allen, “Idealization and Caricature in Comparative Scholarship” (1987-88) 82 Nw UL Rev 785.

evidence in writing.⁸ Quebec Law also developed rules on professional privileges which are different from the French rules, but which certainly draw their fundamental inspiration from French civil law. But Quebec law also departed from the civil law tradition and metabolized some major common-law rules, such as the hearsay rule.⁹ And above all else (my apologies for repeating myself), the procedural framework in which these rules are enforced is a common law framework.

§ 9. The place of the Law of Evidence in the *curriculum*: is it even taught? These differences of approach have at least one curious consequence. As a topic in legal education, the law of evidence in France is atrophied: it is not taught as a course in French law schools and it is not considered a separate, autonomous field of research or scholarship. At the very most, it will serve for one or two *practicums* in workshops or seminars for first-year students. Perhaps it is taught separately at the *École de la magistrature*, the postgraduate institution that trains professional judges in France, but if that is so, there is scant printed documentation on the topic.

Stranger still, despite the considerable and often majestic doctrinal production in French legal literature, Evidence as a topic is rarely given more than, say, thirty pages in the introductory volume of a general treatise on the Civil Law (which will often have ten or more volumes). One fact which common lawyers may find rather startling is that the *very first* French monograph entirely devoted to the law of evidence only appeared, as far as I know, in 2013.¹⁰ Though it is a good book and it provides an up to date overview of the topic, as a monograph on the law of evidence, it is very slim indeed by the standards of a common law jurisdiction.

§ 10. Evidence scholarship in Quebec contrasted. This comparative lack of interest for the law of evidence appears to be widespread in most, though perhaps not all, mono-judicial civil law systems. But not so in Quebec, where there is a long and vigorous tradition of teaching evidence in law schools (typically in two 3 credit courses in upper years) and where doctrinal

⁸ And the contour of the Quebec law of evidence is different from its common law counterparts: for example, the *Statute of Frauds*, which in common law systems is usually thought to form part of the law of contract, deals with matters which, in France or in Quebec, are addressed by the substantive law of evidence.

⁹ See articles 2869 to 2874 of the *Civil Code of Québec*.

¹⁰ Augustin Aynès & Xavier Vuitton, *Droit de la preuve – Principes et mise en oeuvre processuelle* (Paris: LexisNexis, 2013) [*Aynès & Vuitton*]. Standard French encyclopaedias used by practitioners (e.g. the *Dalloz* or the *JurisClasser*, in scope not unlike *Halsbury's* or the *Corpus Juris Secundum*, but shorter) do offer, however, a more thorough treatment of the topic.

scholarship in the law of evidence is well-established and extensive.¹¹ Of course, Quebec is a mixed system, and hence the paradox: it is the more obviously procedural and adjectival component of the law of evidence (that is, the part which Quebec inherited from the common law tradition) which energized this branch of the civil law in Quebec. In the end, this factor also accounts for the fact that the legal profession in Quebec may be operating under a civil code but that it treats evidentiary matters much like a common law bar.

II. The weight of institutional factors

§ 12. A “statist” approach to litigation. In both France and Germany, judges presiding over criminal trials exert considerable influence on what evidence is presented in court and in what order it is to be presented. But the German system does not go quite as far as the French system in incorporating what I would call a “statist” approach to litigation. I mean by this that the investigating judge, who plays a crucial role in France, does not exist as such in Germany. In the preparatory phase of a civil case, during what is known here as discovery and pre-trial proceedings, the parties in Germany act under the supervision of a judge¹² but they have a fair amount of leeway in delineating what will be in dispute between them. Much less so in France, where the *juge de la mise en état* effectively controls the progress of the case right up to trial and exercises all along various powers that in a common law system would require party initiatives and, sometimes, judicial approval in the form of a court order.

The contrast is even more pronounced in criminal matters, where the powers of the *juge d’instruction* coincide with those exercised here by the police, the prosecutor and the court itself. Here again, there is no *juge d’instruction* in German criminal procedure, it is the police and the prosecution who prepare the case for trial. The net result is that the French system (and a number of other civil law systems that take after it) evinces a stronger commitment to

¹¹ Among other titles frequently cited by the courts, a few treatises dominate the landscape: Jean-Claude Royer, *La preuve civile*, 4th ed (by Jean-Claude Royer and Sophie Lavallée) (Cowansville: Éditions Yvon Blais, 2008) at 1891, as well as Léo Ducharme, *L’administration de la preuve*, 4th ed (by Léo Ducharme and Charles-Maxime Panaccio) (Montreal: Wilson & Lafleur, 2010) at 668, and its companion volume, Léo Ducharme, *Précis de la preuve*, 6th ed (Montreal: Wilson & Lafleur, 2006) at 702. But there are also substantial manuals on evidentiary problems: e.g. Donald Béchar, *Manuel de l’objection*, 3d ed (Cowansville: Éditions Yvon Blais, 2009) at 2000.

¹² Murray & Stürmer, *supra* note 3 at 164, list certain powers exercised by German judges and it is true that these powers resemble those of a “*juge de la mise en état*”, but there appears to be a real difference in attitude: “It must be emphasized that the area of ‘judicial activism’ for German judges is fairly restricted and relatively well defined. The judicial activities listed above do not relieve the parties of their essential control or responsibility for the proceedings, nor do they clothe the judge in the mantle of an inquisitor. Overall they have been referred to as part of the judges ‘duty to provide clarification’ (*Aufklärungspflicht*) in the processing of the parties’ case.”

“statist” values than the German system (and those that are patterned after it). But “statism,” and a reluctance to empower the parties in the early phase of litigation, does seem highly characteristic of the approach adopted in many civil law systems, and it has a major impact on the scope of law of evidence. In such a system, many of the evidentiary issues that here would be debated in open court simply disappear in the black box of the pre-trial investigation conducted by a judge. And they are then obliterated by the record, the *dossier*, which the *juge de la mise en état* or the *juge d’instruction* will remit to the panel of judges presiding over the trial.¹³

§ 13. A different concept of trials and appeals. Another aspect of French law that is characteristic of a civil law system and which would likely startle many a common lawyer is the manner in which trial and appellate jurisdictions operate. The point can be made succinctly by referring to article 296 of the French *Code de procédure pénale*. This provision states that, in first instance, a *cour d’assises* (effectively, the equivalent of a superior court of criminal jurisdiction) consists of a presiding judge, two assessors (who are also professional judges) and six lay jury members. This article also provides that, when it sits as an appellate jurisdiction, a *cour d’assises* consists of a presiding judge, two assessors and nine lay jury members. Why is this? Well, because an appeal in France is what you would call a trial *de novo* in Canada.

The same goes for civil trials, though there is no jury but only a panel of three judges. And the hearing on appeal only takes place after a *conseiller de la mise en état* (as opposed to the *juge de la mise en état* in the court of first instance) has effectively carried out for a second time the investigation and case-management functions which, below, were the responsibility of the *juge de la mise en état*.¹⁴ In effect, a civil appeal in French law is a trial *de novo* of the original civil action. Appellate jurisdictions are “sovereign deciders of questions of fact” (for there is absolutely nothing comparable in French law to the rule in *Housen v Nikolaisen*,¹⁵ so familiar to all Canadian appellate judges) and appellate courts

¹³ Thus James Beardsley, in “Proof of Fact in French Civil Procedure” (1986) 34 Am J Comp L 459 at 469-70 [Beardsley], writes: “It may also be suggested that French practice corresponds to a settled habit of fact avoidance. The acceptance – tacit, to be sure – of this phenomenon can be justified in a variety of ways ranging from the economizing of judicial resources to the concept of the judicial function already described. By ‘fact avoidance’ I refer mainly to the tendency to prefer written proof of ultimate fact – evidence that can be analyzed on the basis of a writing even though its origin may be an oral testimony or other more difficult-to-appreciate forms of proof.”

¹⁴ On this, see article 907 of the French *Code de procédure civile*, which states “l’affaire est instruite sous le contrôle d’un magistrat de la chambre à laquelle elle est distribuée” and which refers back to articles 763 to 787, dealing with “[i]nstruction devant le juge de la mise en état”.

¹⁵ [2002] 2 SCR 235.

entertain fresh evidence even when it was available at the time of the trial but was not offered in the proceedings below.¹⁶

Such is the procedural framework for major, superior-court level, litigation in French law. And it also bears mention that in France, as in Germany, the deliberations prior to the verdict in a criminal trial do not take place *in camera*, but in the presence of the three professional judges *and* the members of the jury. It should come as no surprise, therefore, that in a civil law system, the law of evidence plays out rather differently from what we observe in a common law system. In our world, many exclusionary rules rooted in intrinsic policy purport to divert from the jury information or evidence which is thought to be generically unsafe or apt to mislead. As we shall see later, what qualifies as unsafe or apt to mislead may itself be a point of major divergence between traditions, but in a civil law system, such undesirable information is usually filtered out during the investigation, or *instruction*, of the case; and if not, professional judges are present with the members of the jury to guide them during their deliberation.

III. The civil law of evidence as it applies in civil/non-criminal matters

§ 14. Scope of the following observations. Given the limited time and space allocated to the topic in the programme, it would be absurd for me to attempt a comprehensive review of the characteristics of a standard or representative civil law system of evidence. I will therefore lay the emphasis on what I consider to be some of the most salient differences with common law rules or devices. Some rules, of course, present obvious similarities in both traditions: for example, the allocation of the burden of proof, standards of proof or the nomenclature of presumptions (including *res judicata*) are almost identical, or not dissimilar in any significant way. It is well beyond the scope of a paper such as this one to deal with the technical workings of these rules but I will try to convey a sense of why the differences on which I focus really matter.

§ 15. The effects of inquisitorial case-management. In a civil trial, what reaches the panel of three judges who will decide the merits of a case

¹⁶ A standard treatise by Serge Guinchard, Cécile Chainais and Frédérique Ferrand, *Procédure civile – Droit interne et droit de l’Union européenne*, 30th ed (Paris: Dalloz, 2010) comments at § 1253 [*Guinchard, et al.*]: “Aux termes de l’article 563, CPC, les parties peuvent produire en appel des *pièces nouvelles* ou proposer des *preuves nouvelles* pour justifier les prétentions qu’elles avaient soumises au premier juge. Cette règle est liée au sens même de l’effet dévolutif de l’appel : le juge d’appel devant reprendre intégralement le litige, en fait et en droit [...], il est normal que les parties puissent lui apporter tous les éléments susceptibles d’éclairer sa décision et d’appuyer leurs prétentions, par la production de nouvelles pièces ou preuves. Ces deux dernières notions ne soulèvent aucune difficulté.”

consists for the most part of written materials filtered by an investigating judge. We must consider how that comes about and to do so we come back to procedure. What can the *juge de la mise en état* do in terms of “instructing” (which almost means “trying the issues of fact”) the case? A great deal more, naturally, than what a judge charged with the management of a civil case can actually do in common law systems. In French law, the powers of the *juge de la mise en état* are set out in Title VII (articles 132 to 322) of the *Code de procédure civile*. They include ordering and controlling the disclosure of documentary evidence in possession of the parties or third parties, and ordering any one or several of a wide range of *mesures d’instruction*: taking a view, questioning the parties, collecting the oral or written depositions of witnesses, conducting a formal investigation in the nature of a mini-trial, commissioning a person of his choice to make findings of fact, appointing an expert who will conduct his own investigation and report his findings to the judge, hearing and deciding any allegation of forgery or contestation of the authenticity of a document, and supervising the administration of judicial oaths.¹⁷

Most of these *mesures d’instruction* may also be ordered by the panel which will decide the case, in which event it is customary for one of the three judges to perform the task thus delegated. One article of the *Code*, in part by reason of its tone, alerts the reader to the dynamics of the preparatory phase of a civil case. Article 231 states (my translation): “The judge [including, of course, the *juge de la mise en état*] may, in court, in his office or in any other location where he is conducting an investigative measure, hear at once any person whose statement may be of assistance for the discovery of the truth.” Since most of the evidence-taking occurs in advance of the hearing before the full court, and serves primarily to build the *dossier* transmitted to the panel, the hearing in open court is often limited to the presentation of arguments by counsel representing the parties. It should come as no surprise, therefore, that this last phase of the case before judgment in first instance, which would be the actual trial in a common-law system, is known as *les débats* (arguments). Here again, a single article of the *Code* gives the flavour of the whole affair.¹⁸

§ 16. *Quod non est in actis non est in mundo*. This Latin maxim from Roman Law and Canon Law probably captures one recurrent bias in the

¹⁷ On this last possibility, see *ibid* at 472.

¹⁸ Article 440 states (my translation): “The presiding judge directs the debates. He first asks the rapporteur to speak where a report is in order. The plaintiff and the defendant are then each invited to offer their argument. When the court considers itself properly apprised of the case, the presiding judge brings the arguments to a close.” Under normal circumstances, the member of the panel who acts as a rapporteur is also the judge of the court who earlier on acted as the *juge de la mise en état*.

civil law perspective on evidence: a marked preference, wherever possible, for writings, or documentary evidence (instrumental writings and reports written by officials of various kinds). The maxim means, literally, that what is not in the act (or what is not recorded in writing) does not exist in the world. There can be no doubt that, as such, the maxim is an exaggeration – and a marked one at that. Under no conditions, therefore, should it be taken literally. But it remains quite evocative of several features of the civil law’s attitude, and apparent disdain, towards facts. Here are a few examples. Notarial instruments, in civil law, carry considerable weight and are conclusive in ways no private documents could be in a common law system.¹⁹ (I quote in Appendix A, a text available on the website *Notaires de France* and which is suffused with the ideology of “written” or “codified” law as well as the resulting preference for “written” or “pre-constituted” proof).²⁰ In contractual disputes, the requirements for pre-constituted proof – proof in writing and in satisfactory form – exceed by a wide margin what may be required under a *Statute of Frauds*. And written *attestations* by potential witnesses are a common substitute for oral evidence by a witness in person.

The selection and initial weighing of these items of evidence, and the compilation of a *dossier* (therefore, of a bundle of documents) which will go to the panel trying the case, are the responsibility of the *juge de la mise en état*, whose role replicates in civil cases what the *juge d’instruction* does in criminal cases. It is true, of course, that with the collapse of the *Ancien Régime*, free proof became the dominant mode of proof in French courts. But, as an American author familiar with the practice in French courts remarked, “the urge to decide on the basis of a file and, at most, to interpret the words contained in the documents which constitute that file, is a powerful one rooted in both ancient tradition and in modern practice.”²¹ The preference for written proof extends well beyond the rules governing documentary evidence. Testimonies, as I mentioned, are often replaced by *attestations*. But another dimension of this systemic propensity touches on expert evidence. Whenever delicate and technical issues of fact arise, the court will, in effect, delegate to a court-appointed expert the responsibility of sorting things out, and will therefore rely on a written report

¹⁹ Of course, throughout the civil law world, notaries occupy a special position which has no parallel in common law countries. Thus, French notaries are public officials appointed by the State and, economically as well as socially, their status clearly takes precedence over that of mere lawyers (i.e. barristers).

²⁰ Available from <<http://www.notaires.fr/notaires/le-notaire-et-notre-modele-de-droit-ecrit>>. Some readers may think that this vision of the difference between civil and common law systems is at best a caricature. They will have a point. As did those who thought that the LaPorta surveys commissioned by the World Bank also tended to caricature civil law systems. On this, see Jean-François Gaudreault-Desbiens, «La critique économiste de la tradition romano-germanique» [2010] *Revue trimestrielle de droit civil* 683.

²¹ Beardsley, *supra* note 13 at 477.

to determine some thorny factual issues and will dispense with any oral testimony by the expert in open court.²² When one bears all of this in mind, it becomes apparent that documentary evidence or written sources of information take up much more space in the materials before the decision maker, in first instance or on appeal. The maxim quoted above could be rephrased as “what is not in the *dossier* does not exist”. We should therefore look at how the *dossier* is made.

§ 17. **Further misgivings about testimonial evidence.** Quebec considers itself a civil law jurisdiction but not many lawyers practising there are aware of some of the additional limitations that French civil law places on the use of testimonial evidence. One specific and important point here is that parties to a civil case are not competent witnesses;²³ indeed, French law takes the view that what parties may say in the presence of a judge amounts to nothing more than allegations in pleadings.²⁴ It is true that, pursuant to articles 184 and following the French *Code de procédure civile*, the judge may order the parties to appear before him, together or separately, for an examination he will conduct. But what may result from such encounters appears to be limited to admissions against the party appearing in person, or to what is known technically as a commencement of proof in writing²⁵ (a quasi-admission of sorts, which may open the door to additional evidence, for example testimonies, but only if they are *adverse* in nature to the party appearing in person before the judge).

The very status of testimonial evidence in a civil trial conducted in France is different from what we are used to – so much so, for example, that the index of the manual Aynès and Vuitton published in 2013 contains not a single entry on witnesses (*témoins*) or testimonial evidence (*témoignage*).²⁶ In

²² *Ibid* at 484: “Questions that arise because legal and factual issues, and relevant evidence, are complicated (or, sometimes, just voluminous) are frequently referred to an *expert* who then does what is accomplished by the parties and the court in common law procedure and his report becomes the basis of a judicial decision which in practice relies upon and adopts the conclusions of the *expert* who has seen, sometimes searched for, and evaluated the evidence in ways which the court does not undertake. [...] While the law permits a “counter-expertise” where the court is not satisfied with the *expert*’s work and authorizes the parties to point out the deficiencies in the *expert*’s conclusions, this is rarely done, and even more rarely done successfully. The *expert* is seen as a representative of the court who must be convinced by the successful party.”

²³ Thus, Guinchard et al., *supra* note 16, writes (at § 630): “Le droit français considère généralement que les parties ne peuvent être entendues comme témoins dans leur propre cause.” On this point, see Luc-Marie Augagneur, « De la preuve et des systèmes judiciaires en France et au Québec » (2003), 63 *Revue du Barreau* 401, particularly at 407 and 408.

²⁴ Aynès & Vuitton, *supra* note 10, write (at § 181): “... c’est la même chose pour le demandeur de prétendre dans ses écritures [the pleadings] qu’un contrat existe ou d’établir un témoignage en ce sens. Autrement dit, la preuve consistant en un témoignage du demandeur équivaut à une absence de preuve.”

²⁵ On this notion, see *ibid* at §§ 433 and fol., particularly 450.

²⁶ *Ibid* at 309-312.

addition, there are limits to admissibility that extend far beyond what is customary in a common-law system. We are all familiar with the legal professional privilege, and the modern common law of evidence recognizes privileges for a few other professions (e.g. physicians) as well as a generic rule of exclusion based on particular relationships.²⁷ Things look very different in the civil law.

To continue with the French example (but German law, on this point, is fairly similar²⁸), the functional equivalent of a privilege, known as the *secret professionnel*, is governed by a criminal provision, article 226-14 of the *Code pénal*. It is a criminal offence, and a serious one, to divulge, even in court, matters protected by the cloak of professional secrecy.²⁹ This rule, in France, applies *inter alia* to physicians, nurses, medical and paramedical personnel, lawyers, notaries, bailiffs, priests and all other ministers of religion, journalists, accountants and bankers.³⁰ Since no information so received would be regarded as permissible (read: admissible) by a *juge de la mise en état*, the risk that it should emerge during a civil trial is next to non-existent. I mentioned above, in § 8, that this is a point on which Quebec law tends to follow the French example. It does so with a vengeance, as can be seen by consulting section 9 of the Quebec *Charter of Human Rights and Freedom*³¹ and article 2858 of the *Civil Code of Québec*. There are 44 regulated professions in Quebec, all of which come under the purview of the *Professional Code*³² of Quebec. Every single one of these 44 professional orders³³ is governed by a separate *Code of Ethics* which must regulate professional secrecy. This duty translates in every case into an evidentiary privilege which, under article 2858, every court and tribunal is bound to enforce *ex officio*. How's that for a real difference?

Finally, it should also be noted that the civil law (French or German, but not in Quebec where the marital privilege is patterned after the common law rule) is much more inclined to extend immunities to certain witnesses, that is,

²⁷ It is the rule in *Slavutych v Baker*, [1976] 1 SCR 254.

²⁸ See Murray and Stürner, *op. cit.*, *supra*, note 3 at 298-306.

²⁹ On this point and its implications, see my « Bref retour sur la tension entre vérité, vérité judiciaire et secret professionnel » in *Mélanges Jean-Louis Baudouin*, Benoît Moore, ed (Cowansville: Éditions Yvon Blais, 2012) at 1239.

³⁰ For a rather spectacular illustration of the reach of this rule in French law, see my account of what happened to Dr Claude Gubler, President François Mitterrand's personal physician, when he divulged after Mitterrand's death the extent of his illness while he was in office: *ibid.*

³¹ RSQ, c C-12.

³² RSQ, c C-26.

³³ They include acupuncturists, agronomists, bailiffs, certified management consultants, chemists, dieticians, geologists, opticians, psycho-educators, midwives, professional technologists, real estate appraisers, social workers, translators, veterinarians and all sorts of occupations related to human health.

to make uncompellable spouses or ex-spouses and relatives of a party, or persons allied to a party through marriage.³⁴

IV. The civil law of evidence as it applies in criminal matters

§ 18. **Scope of the following observations.** Here again, it is impossible to do real justice to the topic, for there are significant and revealing differences between the French, German or Italian legal systems. I will emphasize what I would call the core institutions of criminal evidence (the *tronc commun*), though I will occasionally mention some salient differences between these systems. This is an area where comparativists have been active for a long time and quite a few interesting sources are available in English. Let me mention a few. Even though it is dated, a comprehensive and eminently readable source is Professor John H. Langbein's *Comparative criminal procedure: Germany*.³⁵ But there are also several lengthy law review articles that thoroughly document the process by which civil and criminal jurisdictions in civil law countries receive or collect and assess evidence. Some of these focus on specific aspects of this process, some minutely describe particular trials from A to Z, others have more theoretical ambitions.³⁶ But there is no shortage of good legal literature on the subject.

Perhaps the two most representative models are the French and the German codes of criminal procedure (apart from some statutory presumptions, there is virtually nothing about evidence in the criminal codes of these countries and, needless to say, there is nothing remotely similar to the *Canada Evidence Act* in these legal systems). But let me begin with one of those significant systemic differences: there are no investigating magistrates in Germany, whereas in France, of course, the *juge d'instruction* plays a central role in criminal justice, from the earliest steps of an investigation right through to the trial. In fact, it is possible to say that, while the French civil law system of criminal evidence is quite different from what we, here, are familiar with, the

³⁴ See article 206 of the *Code de procédure civile*; Guinchard *et al.*, *supra* note 16 at § 633 and Murray & Stürner, *supra* note 3 at 299.

³⁵ (St. Louis, Minn: West Publishing Co, 1977) [Langbein, *Comparative criminal procedure*].

³⁶ Thus, see Stefano Maffei & David Sonenshein, "The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary rule in the Gäfgen Case" (2012-2013) 19 Colum J Eur L 21 [Maffei & Sonenshein]; Mar Jimeno-Bulnes, "American Criminal Procedure in a European Context" (2012-2013) 21 *Cardozo J Int'l & Comp L* 409; Michael C Wutz, "Evidentiary Barriers to Conviction in Cases of Domestic Violence: A Comparative Analysis of Scottish and German Criminal Procedure" (2011) 2 *Aberdeen Student L Rev* 76; Thomas Weigend, "Should We Search for the Truth, and Who Should Do It?" (2010-2011) 36 *NCJ Int'l L & Com Reg* 389; Kent Roach, "Wrongful Convictions: Adversarial and Inquisitorial Themes" (2009-2010) 35 *NCJ Int'l L & Com Reg* 387; Renée Letto Lerner, "The Intersection of Two Systems: An American on Trial for An American Murder in the French *Cour d'Assises*" (2001) *U Ill L Rev* 791 [Lerner]; Bron McKillop, "Anatomy of a French Murder Case" (1997) 45 *Am J Comp L* 527 [McKillop]; James Beardsley, "Proof of Fact in French Civil Procedure" (1986) 34 *Am J Comp L* 459.

German system is less different in the preparatory phase of the case: the police and the prosecutor's office fulfill many of the functions which in France are at the initiative of the *juge d'instruction*. This said, if one looks at the trial itself, some of the defining characteristics that are observable in civil trials re-appear in a slightly modified form in a criminal trial. And other features that may seem strange to a North American lawyer are shared by many civil law systems: for example, guilty pleas (formal admission of guilt in court) were an impossibility for quite a long time and they remain regulated in a way which makes plea bargaining more or less impossible.³⁷

§ 19. A truly pivotal role for the presiding judge. Detailed descriptions of criminal trials for major crimes in civil-law systems can be found in several sources, including a casebook by Langbein³⁸ and two articles by McKillop and Lerner.³⁹ I should begin by saying that, unlike civil proceedings, criminal trials do take place entirely in open court,⁴⁰ and that they are conducted orally in a single session (which sometimes extends over several days) requiring the presentation of a substantial amount of testimonial evidence. These authors emphasize in their descriptions the procedural and evidentiary aspects of the trials they attended, as opposed to the substantive aspects of the cases thus tried. Their accounts make for a fascinating read, as they underscore the extent to which things are different in a civil law jurisdiction. The first major difference is the manner in which the proceedings are conducted. I have already mentioned in § 13, above, what is the composition of a French *cour d'assises*. The situation is similar in Germany. In both countries, civil claimants may take part in the case as *partie civile* and press their claim for damages from the accused. But it is the role of the presiding judge which is particularly distinctive, for his powers are very broad.⁴¹

³⁷ They became possible in France in 2004, but only under strict conditions, and they remain controversial: see Coralie Ambroise-Casterot & Philippe Bonfils, *Procédure pénale* (Paris: Presses Universitaires de France, 2011) at § 138 and fol [Ambroise-Casterot & Bonfils]. The rules are even more restrictive in Germany: see Regina E Rauxloh, "Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?" (2010-2011) 34 *Fordham Int'l L J* 296. See also Stefano Maffei, "Negotiations 'on Evidence' and Negotiations 'on Sentence'" (2004) 2 *J Int'l J* 1050.

³⁸ Langbein, *Comparative criminal procedure*, *supra* note 35.

³⁹ Lerner, *supra* note 36; McKillop, *supra* note 36.

⁴⁰ I mean, of course, the trial *proper*, conducted pursuant to what Langbein, *Comparative criminal procedure*, *supra* note 35 at 62, calls the principle of "orality and immediacy". The preparatory phase of the case will have taken place over months or even years prior to the hearing in open court. In France, the *juge d'instruction*, with the assistance of the *police judiciaire*, will have thoroughly investigated the case and compiled a voluminous *dossier* containing, *inter alia*, all forensic reports on the basis of which expert witnesses will be called to testify and the minutes of every interrogation of witnesses, suspects or accused person met by the *juge d'instruction*. This is the *dossier* on the basis of which the presiding judge and the assessors will have prepared for the trial.

⁴¹ Ambroise-Casterot and Bonfils, *supra* note 37 at § 533, point to article 310 of the *Code de procédure pénale* and note, "Ce pouvoir général et discrétionnaire du président est laissé à sa libre disposition. Il peut ainsi prendre toutes mesures qu'il croit utile à la manifestation de la vérité. Il peut entre autres ordonner une expertise,

There is no “course of evidence” in these proceedings; instead, it is the presiding judge who decides what evidence⁴² will be presented in open court or, subject to one qualification I mention below, in what order witnesses will be called. In other words, there is no “case for the prosecution” followed by a “case for the defence”. It is also this judge who questions both the accused and the witnesses, often by means of open questions (“Can you tell us what you know about the events for which the accused is tried?”). In the first few lines of her article (which lines I reproduce in Appendix B), Lerner describes in arresting terms how the presiding judge opened the trial of one Thierry Gaitaud on a charge of double murder. Once the assessors and the members of the jury have asked their questions (which they can do directly but very rarely do), the prosecutor and the defence counsel are invited to ask theirs, but here again the practice bears no comparison with what happens in our courts.⁴³ Nothing remotely like cross-examination occurs during the trial and there is no audio or stenographic record of the trial. As a result, the tone of the proceedings differs considerably from what is customary in a criminal trial in Canada. Describing a murder trial in the *cour d’assises*, Lerner writes:⁴⁴

Introduction of each witness was minimal. [The presiding judge] rattled off a list of questions-“name, age, occupation, address”-and then asked each witness: “What do you have to tell us?” There was no direct or cross-examination as we know it. The witness started off testifying in narrative form, usually for several minutes without interruption, assuming the witness was reasonably coherent. When the witness finished his or her story or the testimony got murky, [the presiding judge] began asking questions, directing the witness’s attention to key points. He often read the former statements of a witness from the dossier in framing his questions. When he was done, he turned to the *assesseurs* and the jurors to see if they had any questions, then to the prosecutor, then to defense counsel. [The prosecutor] and defense counsel usually asked between one and three questions each. Their tone was almost never dramatic or hostile but rather matter-of-fact. In answer to these questions, the witness was permitted to give a full explanation and was not

communiquer aux jurés et aux assesseurs des photographies contenues dans le dossier de l’information, lire les dépositions des témoins défaillants, verser aux débats de documents relatifs aux antécédents judiciaires de l’accusé, entendre des témoins malgré l’opposition de la défense, ou encore, par exemple, précéder à l’audition du juge d’instruction.”

⁴² ... most of which is already reduced to writing in summaries contained in the *dossier* and already in the hands of the presiding judge.

⁴³ Until relatively recently, and in accordance with article 312 of the *Code de procédure pénale*, the prosecutor and defence counsel were not at liberty to ask questions directly to a witness: they were required to state their question to the presiding judge who could then decide not to ask it to the witness; see McKillop, *supra* note 36 at 551-2. This article was amended in 2001 and they may now ask direct questions, but the accused and the *partie civile* must still proceed through the presiding judge.

⁴⁴ Lerner, *supra* note 36 at 817-8.

limited to the sharp "yes" or no" of American cross-examination. One result was that the witnesses were relatively relaxed and often more forthcoming with information.

This general impression is confirmed by other writers, such as Langbein.⁴⁵ The accused is under no compulsion to answer questions, and that is true also during the preparatory phase of the case. Thus, Ambroise-Casterot and Bonfils write:⁴⁶ “Effectivement, [la personne mise en examen] bénéficie d’un droit au silence”. But as Langbein explains:⁴⁷ “By comparison with the American counterpart, the privilege against self-incrimination plays a relatively insignificant role in the German and other Continental legal systems. In those foreign systems where the court is permitted to draw adverse inferences from the accused's refusal to speak, it is easy to understand why the privilege is not highly valued.”

Lastly, on the role of the presiding judge, it must not be forgotten that he (or she, of course) and his assessors will retire *with* the jury to deliberate on the verdict. It is therefore arguable that this additional factor reduces the risk of improper inferences being drawn from the evidence by the members of the jury – or at any rate, that such inferences be *explicitly* drawn by them during their deliberation.

§ 20. Little or no emphasis on admissibility. Given this institutional and procedural configuration, there is no place left for adversarial debates on issues of admissibility and there is very little room left for any discussion at all on the same topic. To be sure, there are rules of extrinsic policy in these systems (such as the professional and other “privileges”), but most operate in such a way that, whatever evidence may be obtained in breach of these rules will be intercepted before the trial and will never reach the inside of the courtroom. It is possible, of course, to consider criminal evidence in a civil-law

⁴⁵ Langbein, *Comparative criminal procedure*, *supra* note 35, relies extensively on the account of a German trial (the trial of Dr. Brach) published by Sybille Bedford, *The Faces of Justice: a Traveller's Report* (New York: Simon & Schuster, 1961). Langbein writes, p. 75: “The presiding judge uses the dossier to guide his questioning of witnesses. (Important witnesses will normally have been examined by the police or prosecution before the trial, and the record of these examinations is in the dossier.) The tone of examination is crisp and business-like, but not hostile. Witnesses seldom emerge from a trial feeling mishandled, as is so often the case in adversary procedure. [...] The examinations in the Brach case were especially delicate, but most Anglo-American observers would share Mrs. Bedford's high regard for the skill, thoroughness and humanity with which the German judges examine witnesses.”

⁴⁶ Ambroise-Casterot & Bonfils, *supra* note 37 at § 454.

⁴⁷ Langbein, *Comparative criminal procedure*, *supra* note 35 at 72. Commenting on the procedural safeguards which are said by some to reinforce a “right to silence” in French law, McKillop, *supra* note 36 at 578, writes, “These provisions are not likely to subvert the culture of response rather than silence nor impede the drawing of adverse inferences from silence”.

system with the eyes of a common lawyer and from the angle of admissibility.⁴⁸ Karl H. Kunert, an experienced German judge quite familiar with American law, did just that: he once wrote a most informative article in which he adopts this perspective.⁴⁹ But, even so, he quickly concedes that it is the virtual absence of rules of intrinsic policy (such as the hearsay rule, the opinion rule, the best evidence rule and the character rule) which differentiates the substantive law of evidence: “It is these rules that distinguish Anglo-American evidence law from its Continental counterpart, not the “rules of extrinsic policy”, comprising , e.g., [...] the rules excluding illegally obtained evidence, irrespective of its probative value.”⁵⁰

All Continental systems have functioned with Free Proof since the collapse of the *Ancien Régime* and they incorporate very few rules of intrinsic policy. It is probably fair to say that the law of (criminal) evidence is as I described it in § 9 above, and remains in a state of benign neglect. Not so for the science of forensic evidence, which decades ago had already grown into a major discipline; but that is another story.⁵¹ As a result, there are no self-standing conventional doctrinal sources on the law of evidence: the subject is usually dealt with in manual or treatises on criminal procedure. One well-known such source⁵² devotes a total of ten pages to the topic, a single chapter in a book of over 500 pages, divided into five sections entitled (i) *l’aven*, (ii) *le témoignage*, (iii) *les constatations matérielles*, (iv) *les présomptions ou indices*, (v) *les écrits*. Another source,⁵³ more modern in outlook, devotes 31 pages to the subject. Apart from the foregoing and traditional five-part division, these authors consider several rules of extrinsic policy which place restrictions on the use by prosecutors of evidence obtained through illegal wiretapping, invasions of privacy by different forms of entrapment, in addition to forbidding the use of penthotal, hypnosis or polygraph during interrogations. Private parties face fewer constraints and there is no clear obstacle to relying on evidence obtained through a breach of privacy.

There are signs of change, however, and these changes are attributable in some measure to the influential European *Convention for the Protection of Human*

⁴⁸ *Ibid* at 66 and fol., devotes several pages to the topic.

⁴⁹ “Some Observations on the Origin of Evidence Rules Under the Common Law System and the Civil Law System of “Free Proof” in the German Code of Criminal Procedure” (1966-67) 16 *Buff L Rev* 122.

⁵⁰ *Ibid* at 127.

⁵¹ It fascinated Henry Wigmore who dedicated his most bizarre book, *The Science of Judicial Proof as Given by Logic, Psychology and General Experience, and as Illustrated in Judicial Trials*, 3d ed (Boston: Little, Brown and Co, 1937), to Dr. Hans Gross, an Austrian criminologist and jurist.

⁵² Jean-claude Soyer, *Droit pénal et procédure pénale*, 21st ed (Paris : Librairie générale de droit et de jurisprudence, 2012) at 317 and fol.

⁵³ Ambroise-Casterot & Bonfils, *supra* note 37 at § 281 and fol.

Rights and Fundamental Freedoms. One recent instance is the judgment of the *Assemblée plénière* of the *Cour de cassation* rendered on January 7, 2011, in two sister cases, *Société Philips France c. Ministre de l'économie, de l'industrie et de l'emploi* and *Société Sony France c. Ministre de l'économie, de l'industrie et de l'emploi*.⁵⁴ This is the highest civil and criminal jurisdiction in France; an *Assemblée plénière* is the equivalent of an *en banc* sitting. Basing itself on article 6 of the *Convention*, the *Cour de cassation* concludes that (my translation) “the surreptitious tape-recording of a telephone conversation unbeknownst to one party is unfair (*déloyal*) and renders the recording inadmissible (*irrecevable*) in evidence.” The context was one where Avantage TVHA, a small supplier of electronic products, had lodged a complaint against Philips, Sony and Panasonic with the French anti-trust authority (the *Conseil de la concurrence*). The *Conseil*, confirmed by the *Cour d'appel de Paris*, had fined the defendant for illegal price-fixing, and done so on the basis of telephone conversation recorded surreptitiously by Avantage TVHA. The *Cour de cassation* reversed and remanded for the reason already quoted. This said, the law now having been announced in this fashion, it is difficult to imagine how henceforth a *juge d'instruction* or a *président de cour d'assises* could allow into the *dossier*, let alone in open court, evidence of this nature. One cannot stop progress, eh?

§ 21. A radically different approach to evidence of propensity. One final series of remarks addresses what is probably the single most striking difference, in precise terms of principles of criminal evidence, between civil-law systems and common-law systems. Not only is there no “similar fact” rule in the former, but the personality of the accused is the very first object of investigation in the pre-trial process as well as during trial. This part of the trial, which Lerner calls “The Personality Phase”, focuses entirely on the person of the accused, his education, his professional and family situation, as well as, naturally, his criminal record if he has one. The accused is thus the first person questioned by the presiding judge, and specifically on the topic of his own “*personnalité*”, but the interrogation is not under oath so as to remove any risk that the accused might perjure himself. This interrogation may be followed by the testimonies of relatives, employers, neighbors, a court appointed psychologist, or any person capable of shedding more light on the personality and motives of the accused. Lerner writes:⁵⁵

The first phase of a trial in the *Cour d'assises* reflects the French interest in the psychology and personal circumstances of the defendant, and is called the “personality” (*personnalité*). The defendant's life history and personality are

⁵⁴ Arrêt n° 587 du 7 janvier 2011 (pourvois n° 09-14.316 et 09-14.667).

⁵⁵ Lerner, *supra* note 36 at 822-3 (footnotes omitted).

explored over the course of a day or two. (In the *Tribunal correctionnel*, this phase comes at the end and lasts a much shorter period of time, perhaps an hour or so.) The French do not share American concerns about character evidence and poisoning the well, reflected in the United States' elaborate rules of evidence. Rather, they want to get as full an understanding as possible of the person on trial. In part, the French may be less concerned about poisoning the well because the information is not entrusted to a lay jury alone, but to a mixed panel with professional judges who can warn lay jurors about the danger. This information is relevant to the fact-finders at sentencing; in France there is no separate sentencing hearing as in a typical American court. Jean Pradel, a leading French writer about the personality phase, notes that the information it gives "is very useful at the moment of fixing the sentence."

The practice is somewhat less intense in a German criminal trial: the German code of criminal procedure provides (article 243 (IV) that “[p]rior convictions of the accused shall be brought out only to the extent that they are important for the decision,” criminal records are kept for a shorter period of time and the practice is for the presiding judge to disclose prior convictions only towards the end of the trial. Still, writes Langbein,⁵⁶ “[t]his is a striking difference from Anglo-American practice, where the general rule – subject to significant exceptions – is to withhold prior conviction evidence from the trier for fear of its prejudiciality.”

V. Conclusion: Fact-finding practices are necessarily situated in time and space

§ 22. A slow convergence on ends, sharp divergences on means. Back in the days when I was teaching Evidence at McGill, I used to tell my students that the essential aims or ends of Evidence, certainly as far as intrinsic policy is concerned, are neatly captured by one of Blaise Pascal’s aphorisms: “We have an incapacity of proof insurmountable by all dogmatism; we have an idea of truth invincible to all scepticism.” The law of evidence is all about the resolution of factual disputes as they arise in contemplation or in the course of litigation. It is the branch of law which most courageously confronts the devilishly complicated world of facts. And it tells us who must proffer proof, of which facts, what sense data is sufficiently or insufficiently probative to make fact-finding effective (intrinsic policy),⁵⁷ and what otherwise probative evidence

⁵⁶ Langbein, *Comparative criminal procedure*, *supra* note 35 at 77.

⁵⁷ I am aware, of course, that there are several more sophisticated ways of expressing the *raison d'être* of intrinsic rationales. Alex Stein, for example, in the third chapter of his *Foundations of Evidence Law* (Oxford: Oxford University Press, 2005), takes the view that the overarching purpose of the law of evidence is to apportion the risk of error under conditions of uncertainty, not to “facilitate the discovery of the truth”.

must be ruled out for reasons unrelated to the effectiveness of the fact-finding process (extrinsic policy). Such issues are universal, they arise wherever disputes occur about facts, and they are therefore transversal throughout legal systems. All applications of most rules of law require a factual foundation. When facts are disputed, the application of a rule must be predicated on the determination that certain facts exist or do not exist. The ways in which different legal traditions, and different legal systems within these traditions, go about performing this fundamental task diverge broadly. The emergence of international *fora*, such as international criminal courts or international arbitration, in which these questions are approached simultaneously but from sharply divergent perspectives, appears to have enhanced theoretical thinking about the problem.⁵⁸ But no clear consensus, let alone common codification, is yet in sight.

§ 23. The deep cultural and political roots of evidentiary practices. Lately, however, some thoughtful scholarship has appeared⁵⁹ which builds on the comparative work of the last few decades and which factors into the analysis the commitments to particular political and cultural “values” characteristic of each legal tradition or, more specifically, each legal system. Comparing rules, or their ultimate effects, can be a superficial exercise. New or inexperienced practitioners of comparisons, out of distrust or ignorance, tend to dismiss devices used in “other” legal systems with derogatory comments that turn out to be ill-informed or baseless (see for example Appendix A, to which one might be inclined to respond that the system extolled here simply provides a better access to a more imperfect form of justice). A broader aperture and a better understanding of the deep underlying causes of these “value” commitments can improve our grasp of what is ultimately at stake in the law of evidence here or elsewhere. Lawyers who are used to working within a common law system can be perplexed by what they observe in civil law systems: investigating magistrates or judges, who manage almost single-handedly all evidentiary issues, except perhaps the ultimate issue of guilt or

⁵⁸ This is not to say that there are no clashes. On the different approaches of the Supreme Court of the United Kingdom and the European Court of Human Rights, see André L-T Choo, “Criminal Hearsay in England and Wales: Pragmatism, Comparativism, and Human Rights” (2013) 13 *Can Crim L Rev* 227 at 237 and fol. The literature is growing on these questions: see John Jackson & Sarah Summers, “Confrontation with Strasbourg: UK and Swiss Approaches to criminal Evidence” (2013) *Crim L Rev* 114 and by the same authors *The Internationalisation of Criminal Evidence* (Cambridge: Cambridge University Press, 2012).

⁵⁹ Here are two recent examples: Stewart Field, “State, Citizen, and Character in French Criminal Process” (2006) 33 *JL & Soc’y* 522, and James Q Whitman, “Equality in Criminal Law: The Two Divergent Western Roads” (2009) 1 *J Legal Analysis* 109. A trailblazer along this path is, of course, Mirjan Damaska, whose *Evidence Law Adrift* (New Haven & London: Yale University Press, 1997) inspired much original research. In a lighter mode, see Regina E Rauxloh, “Goodies and Baddies: The Presentation of German Police and Criminals in East and West Television Drama” (2005) 5 *German LJ* 981.

liability. And yes, there is something vaguely mysterious about these institutions: as I said earlier, they function largely like black boxes. But these institutions appear to be perfectly well adjusted to their political and cultural environment. No revolution is about to occur in Quebec, France or Germany because of the manner in which courts go about making findings of fact. And so, let us not assume that, because we do not fully understand these foreign institutions, it necessarily follows that they are dysfunctional. And let us not be prompt to question the wisdom of solutions that seem really odd to us because they are less familiar than what we already happen to be accustomed to.⁶⁰ The world out there is not that simple.

⁶⁰ In that sense, for example, the critique levelled by Maffei and Sonenshein against the European Court of Human Rights approach to a particular evidentiary issue, Maffei & Sonenshein, *supra* note 36, strikes me as an instance of cultural inflexibility, not of analytical open-mindedness.

Appendix A

Le Droit est un élément déterminant de la culture. Il a une profonde influence sur la société et le comportement des individus. Il accompagne toute évolution politique, économique et sociale. Deux grands systèmes juridiques dominent dans le monde : notre modèle de droit écrit, sur lequel repose le notariat, et le système anglo-saxon.

En tant que membre fondateur de la Fondation pour le droit continental, le Conseil supérieur du notariat est particulièrement impliqué pour faire connaître les vertus de la justice préventive de par le monde, y compris auprès de la Banque Mondiale.

Aujourd'hui, 83 pays, représentant plus des 2/3 de la population mondiale, connaissent le notariat. Au sein de l'Union Européenne (UE), les notaires sont présents dans 21 des 27 Etats membres.

Notre modèle de droit écrit

Dans ce système, le notaire établit des actes incontestables. Professionnel du droit et officier public, il est nommé par l'Etat pour conférer l'authenticité aux conventions intervenues entre les parties et pour agir comme conseiller impartial auprès d'elles. Il est fondé sur la loi qui fixe des cadres juridiques pour régir les rapports contractuels. La preuve repose sur la prééminence de l'écrit. La loi est la source principale du Droit. L'Etat délègue à un professionnel qualifié, le notaire, la mission d'assurer la sécurité des contrats en authentifiant les actes qu'il rédige. Le formalisme est protecteur de la volonté de l'individu. Il garantit son libre consentement. Le "consommateur" de droit s'engage ainsi en toute connaissance de cause. Le conseil impartial d'un professionnel qualifié, missionné par l'Etat pour authentifier les contrats et assurer la sécurité juridique, est protecteur des personnes qui contractent.

Le système anglo-saxon

Dans ce système, la jurisprudence est une source essentielle du droit privé. Les cas d'espèce jugés par les tribunaux deviennent des "précédents" qui s'imposent comme règles de droit, sauf disposition législative contraire. Il n'existe pas de tradition de codification. Les contrats expriment la volonté des contractants après une confrontation de leurs conseils respectifs. Lorsqu'il y a litige, le juge tranche le plus souvent, par référence aux "précédents" susceptibles de s'appliquer au cas litigieux.

Ses inconvénients

Les contrats sont volumineux, car il faut envisager toutes les hypothèses pour ne laisser aucune place à l'oubli ou à la mauvaise foi. La conclusion des accords contractuels relève plus d'un rapport de force entre les parties et leurs conseils, que d'un souci d'aboutir à une solution équilibrée et équitable. Le plus expérimenté, le plus habile ou le plus riche apparaît ainsi comme étant le plus à même d'imposer son point de vue. Le service juridique est conçu et traité comme un "produit" soumis aux règles du marché économique qui s'imposent aux professionnels du droit. Ceux-ci sont donc tout naturellement conduits à privilégier la conquête de nouvelles parts de marché à un objectif d'équilibre du contrat et de justice. De telles conceptions multiplient les contentieux.

Leur coût grève les budgets des entreprises : délais de la justice, frais et honoraires de procédure souvent élevés. Il pèse également sur les compagnies d'assurance à raison des sommes réglées. Ce sont finalement les consommateurs qui en subissent les conséquences car les primes d'assurance ne cessent d'augmenter. La connaissance du Droit résulte de "précédents" auxquels les tribunaux se réfèrent. Ils ne sont pas nécessairement les mêmes pour tous, d'où une disparité dans les solutions judiciaires.

Appendix B

Monsieur le président (the presiding judge), resplendent in a red robe with ermine trim, was running through a chronology from the dossier in a monotone. As he finished, he took off his glasses and looked searchingly at the defendant. "Monsieur Gaitaud," he intoned, "you can have any defense you want, but there is a price. If we think you are guilty and you say you are not, we're going to think you're a liar and not capable of taking responsibility for your actions — that you're dangerous. You're now facing the grandmother of Malinda [one of the victims]. You've also been living with the spirits of the young woman, Susan, who was twenty-four years old, and the little girl, Malinda, three years old, and also the little baby in Susan's womb, who was only about fifteen days from being born — the baby who would have been your son. I've seen pictures of the fetus, and it was a real baby, with hands and fingers — Monsieur Gaitaud, now is the time for truth."

"Yes," said Thierry Gaitaud.

"Did you kill Susan and Malinda?"

Around the courtroom, everyone was listening with rapt attention. No one seemed the least bit surprised.

"Non, Monsieur le président." Gaitaud said this in his usual flat tone, with only slightly flushed cheeks to suggest indignation.

Monsieur le président took a deep breath and asked Gaitaud to describe what happened.

Appendix C

Professor John Langbein's noted casebook, *Comparative Criminal Procedure: Germany*, is an extremely readable and informative book. It is possible to download the casebook in full-text and PDF format from the following website:

http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.law.yale.edu%2Fdocuments%2Fpdf%2FFaculty%2FLangbein_ComparativeCriminalProcedure.pdf&ei=NbAoUsyaK4W84APb2IG4Aw&usq=AFQjCNEVE4qv0gabJaPXrzq0rQzCdMqgJg&sig2=BeQMSnhbNni_ePzIiYYnag&bvm=bv.51773540,d.dmg

Dr Antje du Bois-Pedain, a University Lecturer at the University of Cambridge (UK) who is qualified as a German lawyer, posted on the Web a paper which provides a useful overview of the history and present state of German criminal procedure:

<http://www.law.cam.ac.uk/faculty-resources/download/german-criminal-procedure/6368/pdf>

Another well documented website on sources, in French and in English, about German criminal procedure is maintained by a member of the Quebec Bar:

<http://www.lareau-law.ca/codification-Germany.html>