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Secrecy of pre-trial investigations and inquiries: A fundamental principal undermined by social changes

In today's increasingly information dominated society, the National Assembly's Law Committee has asked MPs Xavier Breton and Didier Paris to carry out a fact-finding mission on the secrecy of pre-trial investigations and inquiries.

In the report[1] examined by the Law Commission in December 2019, they rightly point out the inconsistencies that surround this principle, which is fundamental, but which is undermined by the legitimate need for information. Beyond this observation, the rapporteurs draw up a list of recommendations in order to adapt the secrecy of pre-trial investigations and inquiries to the evolutions of today's society.

The secrecy of pre-trial investigations and inquiries, although regularly breached, deserves to be maintained and better protected, while ensuring citizens' right to information through better communication by the judiciary.

As an old legal principle, the secrecy of pre-trial investigations and inquiries has evolved in line with societal changes, until it was enshrined in the French Code of Criminal Procedure in 1957[2]. Although it is a fundamental principle that applies to all elements of criminal proceedings, secrecy is neither general nor absolute. Thus, only persons who take part in the proceedings are bound by it, with the exception of persons bound by professional secrecy or persons bound by an obligation of confidentiality with respect to the

investigations and inquiries (e.g. lawyers).

In today's society where image and information prevail, citizens have a high demand for transparency, especially from the media: they want to know everything, immediately and with as many details as possible. The development of social networks and 24-hour television news channels is not unconnected with this evolution. As such, protecting information under the secrecy of pre-trial investigations or inquiries may appear to interfere with the right to information.

What interests are protected by the secrecy of pre-trial investigations and inquiries?

The rapporteur MPs of the fact-finding mission argue with interest that the aim of the secrecy of pre-trial investigations and inquiries is above all to protect fundamental rights and to guarantee a fair trial for litigants. The Constitutional Council has in fact recognized the dual purpose of this principle: "*on the one hand, to guarantee the proper conduct of investigations and inquiries, thus pursuing the constitutionally valid objectives of preventing breaches of public order and finding the perpetrators of crimes and offences, (...) and, on the other hand, to protect the persons concerned by an investigation or inquiry, in order to guarantee the right to privacy and the presumption of innocence*"[3].

The secrecy of pre-trial investigations and inquiries is therefore part of a logic that is above all protective of everyone's interests: protecting evidence and witnesses, but also investigative techniques, which, if revealed, could prevent investigators from making certain findings. Yet, it is also a question of insulating witnesses, investigators and judges. The disclosure of information protected by secrecy in a society where public opinion is increasingly important can be dangerous for the required impartiality of those involved in the investigations and judicial process. It should be kept in mind that the ultimate goal of the pre-trial investigations and inquiries is the determination of the truth. However, this avalanche of information and opinions must not be detrimental to the required impartiality of witnesses, investigators and judges.

Ensuring the secrecy of pre-trial investigations and inquiries also means guaranteeing respect for the presumption of innocence in order to make sure that any suspect will not be the victim of a public trial. The presumption of innocence means that any person suspected is presumed innocent until proven guilty. Breaching the secrecy of pre-trial investigations and inquiries is tantamount to depriving the accused of one of the most fundamental rights, which is all too often violated. But it is also a violation of the right of the injured parties to keep secret the crime of which they have been the victims. If the crime is revealed, there is a serious risk that some injured parties will be exposed to physical or psychological harm.

The right to information and the general public's demand for transparency

The public sphere is increasingly demanding transparency. Public opinion, by virtue of a right to information which it considers absolute, expects total transparency from the media. Thus, the rapporteurs, without saying that this right to information is not legitimate, stress that, as a result, the quality of information declines.

This timeliness of information may have harmful consequences for the investigations and possible police

actions. The rapporteurs recall the tragic example of the Hyper Cacher hostage-taking in January 2015, when a reporter from a 24-hour news channel revealed that people were hiding in the cold-storage room, which could have had dramatic consequences.

Sanctions not sufficiently applied

Beyond the limitations to the principle of secrecy of pre-trial investigations and inquiries recalled by the rapporteurs (only persons involved in the proceedings are bound by the secrecy of the pre-trial investigations and inquiries; professional secrecy for persons not considered as involved in the proceedings; dissemination by the public prosecutor of certain objective elements of the proceedings), sanctions and penalties can be applied whenever the secrecy of pre-trial investigations and inquiries is breached but in practice breaches are seldom prosecuted.

Specifically, breach of the secrecy of pre-trial investigations and inquiries by a person involved in the proceedings is punishable by one year's imprisonment and a fine of 15,000 euros. With regard to journalists, punishment is provided for by the Law of July, 29 1881 on freedom of the press, which must also be ensured.

Breach of the secrecy of pre-trial investigations and inquiries may also lead to disciplinary actions.

Despite this range of sanctions and penalties, prosecution is difficult. It is rare for the breach to take place without the intermediary of the press. However, journalists who breach secrecy are not directly responsible, but can be prosecuted for receiving information following a breach of secrecy if the information disclosed could only have come from a person bound by such secrecy. However, the chances of success in tracing the source of such information are rather low, because of the right of journalists not to reveal their sources, a right guaranteed by the European Court of Human Rights ("ECHR")[4].

Under French law, the secrecy of sources is guaranteed by the Law of July 29, 1881 on the freedom of the press: only an overriding imperative of public interest can justify measures that undermine the secrecy of sources, provided that they are necessary and proportionate to the aim pursued. However, the *Cour de Cassation* (French Supreme Court) adopted a restrictive interpretation, holding that even if "*the conduct of the investigations had been seriously disrupted*", the confidentiality of the sources could not be undermined in order to find the perpetrators of the breach of the secrecy of pre-trial investigations and inquiries "*without demonstrating that the interferences in question were based on an overriding imperative of public interest*" [5]. While the ECHR accepts that there exists a legitimate interest in informing the public, an interest that is higher than respect for the secrecy of pre-trial investigations and inquiries[6], this protection is not absolute: the condition rests on the good faith of the journalists, the accuracy of the facts making it possible to provide reliable and precise information in accordance with journalistic ethics[7].

The rapporteurs particularly emphasize a decision of the ECHR which defines six criteria for assessing the excessive nature of the infringement of freedom of expression:

- how the applicant(s) came into possession of the information at issue,

- the content of the impugned article,
- the contribution of the article to a public-interest debate,
- the article's influence on the criminal proceedings,
- any breach of the defendant's privacy, and
- the proportionality of the sanction imposed.

Recommendations for a new balance between the right to information and the secrecy of pre-trial investigations and inquiries as a condition for improving confidence in the judicial system

In this context, the rapporteurs drew up 18 recommendations based on a new balance "*which should improve confidence in the judicial system and in the press by establishing the principle of the general interest in information and the objectives, of equal value, which the secrecy of pre-trial investigations and inquiries must pursue*".

Recommendation No. 1	Maintain the secrecy of pre-trial investigations and inquiries.
Recommendation No. 2	Include in the French Code of Criminal Procedure that the right to information is an overriding imperative of public interest, which must be strictly necessary and proportionate to the aim pursued.
Recommendation No. 3	Include in Article 11 of the French Code of Criminal Procedure the public and private interests that must be protected: the authority and impartiality of the judiciary;the effectiveness of criminal investigations;the protection of persons;the right of every person to be presumed innocent;the right of every person to privacy;the right of every person to dignity.
Recommendation No. 4	Prepare, in the field of professional secrecy, the transposition of the European Directive on whistleblowers.
Recommendation No. 5	Authorize the public prosecutor to exercise his/her right to information in a timely manner, whenever he/she considers that there is a public interest in doing so.
Recommendation No. 6	Authorize police and gendarmerie services to communicate on pending flagrante delicto or preliminary investigations, with the approval and under the supervision of the public prosecutor.
Recommendation No. 7	Facilitate the sharing of information, in accordance with Article 11 of the French Code of Criminal Procedure, between the judicial authority and the administrative authorities bound by an obligation of professional secrecy.

Recommendation No. 8	Strengthen the penalty applicable in case of breach of Article 11 of the French Code of Criminal Procedure by increasing it to three years' imprisonment and a fine of 30,000 euros.
Recommendation No. 9	Include the punishment of breaches of professional secrecy in Book IV of the French Criminal Code which deals with offences against the State and public property.
Recommendation No. 10	Set the penalty for (i) the unlawful transmission of documents contained in the case file by parties to third parties, or (ii) the unlawful publication of documents at the same level as the penalty for the violation of the secrecy of pre-trial investigations and inquiries.
Recommendation No. 11	Standardize the principles of communication by public prosecutor departments.
Recommendation No. 12	Continue the deployment of judges in charge of communication.
Recommendation No. 13	Improve the training of police officers and gendarmes on issues relating to the secrecy of pre-trial investigations and inquiries and generalize administrative instructions on this subject.
Recommendation No. 14	Better traceability of the elements contained in procedural files and stricter control for granting access to such files.
Recommendation No. 15	Consider, for the most serious cases and for the benefit of associations of victims, windows of information by the public prosecutor during the investigations.
Recommendation No. 16	Systematically entrust the announcement of casualty reports to the public prosecutor.
Recommendation No. 17	Facilitate media access to the judicial world through educational measures.
Recommendation No. 18 A	Encourage the retention of mediators in editorial boards.
Recommendation No. 18 B	Support the creation of a Journalistic Ethics Council with no power to impose sanctions but responsible for issuing opinions.

[1] http://www.assemblee-nationale.fr/15/rap-info/i2540.asp

[2] Article 11 of the French Code of Criminal Procedure.

[3] Constitutional Council, decision n° 2017-693 QPC of March 2, 2018, *Association de la presse judiciaire*.

[4] ECHR, March 27, 1996, *Goodwin v. Royaume-Uni*, n° 17488/90.

[5] Criminal Chamber of the *Cour de Cassation*, February 25, 2014, n° 13-84.761.

[6] ECHR, June 7, 2007, *Dupuis and Others v. France*, n° 1914/02.

[7] ECHR, December 17, 2014, *Pedersen and Baadsgaard v. Danemark*, n° 49017/99.