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Secrecy does not mean concealment

In today's time when some politicians are tempted to "*use the coffin of a 12-year-old girl as a stepping stone*" to promote their ideas and a deadly hatred, when others buy the domain name corresponding to the first name of the little victim of a heinous murder, when investigations for breach of the secrecy of pre-trial investigations are launched following the interview of a police officer giving details on this horrible news item, it appears essential to recall the importance – beyond the respect normally due to the victim – of a core value of our rule of law: The secrecy of pre-trial investigations and inquiries.

Article authored in collaboration with Victor Trouttet

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The secrecy of pre-trial investigations and inquiries is a very old principle under French law. As early as 1498, the Blois Ordinance specified that the trial should be held "*as diligently and secretly as possible*". The Villers-Cotterêts Ordinance, in 1539, reaffirmed the importance of secrecy in judicial matters and stipulated that witnesses should be questioned "*secretly and separately*". However, it was the Criminal Ordinance of August 26, 1670 which upheld the rule of secrecy of pre-trial investigations and inquiries and prohibited "*the disclosure of information and other trial materials*".

After a short period where the secrecy of pre-trial investigations and inquiries was abolished during the post-revolutionary phase of 1789, the Code of Criminal Investigations of 1808 re-established the secret nature of the preparatory phase of the trial. This principle is now established. But is it still worthy of support?

While it is true that it is a fundamental principle of our rule of law, it turns out that it does not fit well with our

impatient society where transparency is – unfairly – considered as the utmost virtue.

The secrecy of pre-trial investigations and inquiries is a keystone of our inquisitorial system. It has two counterparts that ensure the balance between the public authorities. It allows for the proper conduct of investigations and inquiries on the one hand, and it ensures that respect for the accused's privacy rights and right to be presumed innocent is maintained on the other hand.

Assuredly, secrecy will safeguard the integrity of evidence and testimonies, will allow for the implementation of an investigation strategy and thus be essential to ascertain the truth. Above all, it guarantees the presumption of innocence. It is this secrecy that will prevent a lot of private information about the – sometimes wrongly – accused person from being disclosed publicly.

The secrecy of pre-trial investigations and inquiries is thus fundamental. Unfortunately, it is nowadays undermined by incessant attacks from multiple networks that sometimes inspire news channels which have only one mantra: To win audiences.

The various stakeholders involved in criminal proceedings are not more virtuous and they do not hesitate to breach secrecy more and more frequently, to such an extent that some French legal scholars even evoked "open secrets".

These too frequent breaches can be explained by the fact that the sanctions/penalties that may theoretically apply do not sufficiently act as a deterrent.

However, respecting the secrecy of pre-trial investigations and inquiries – which is not intended to hide the truth – seems essential. Indeed, in our society where the slightest feeling from a tweet can be reused without check by some news channels, where one of the hosts of a show watched by millions of viewers embraces criminal populism and calls for a quick trial, without a lawyer for the one accused of having murdered the little Lola; it is more than necessary to prevent confidential information – normally intended exclusively to criminal justice stakeholders – from being disclosed publicly.

The secrecy of pre-trial investigations and inquiries serve as a safeguard in an information-hungry, impatient society where the immediacy of the contention – of the public accusation – prevails over the ascertainment of truth. It is one of the foundations of our republican pact and prevents, in particular, an irrevocable condemnation by the media from weighing on an individual who may, ultimately, be found to be innocent.

It is therefore understandable that this decaying principle of secrecy of pre-trial investigations and inquiries must be safeguarded.

But safeguarding this principle may require an evolution of the secrecy of pre-trial investigations and inquiries. The French legislator was aware of this need for evolution as early as in 2000 when it authorized the Public Prosecutor to have "*windows of opportunity*" to avoid the spread of fragmentary or inaccurate information or to put an end to a disorderly conduct. Today, should we not, for example, authorize the Public Prosecutor to exercise his/her right to provide information outside of this legal framework, in other words, as

soon as he/she considers that there is a public interest in making a communication? Couldn't we allow investigators to communicate on certain elements of pending investigations after having obtained from a judge the authorization to do so?

Everything is possible but it will then be necessary to strengthen the applicable sanctions/penalties for breach of the secrecy of pre-trial investigations and inquiries – irrespective of whether such breach is committed by a police officer, an expert, a lawyer, or a judge – so that it recovers its meaning, its force and its authority.

This is how we can avoid the return of trials in the public square, forgotten by those who are judgmental but never by those condemned.