Defence in inquisitorial proceedings and the adversarial balance  
(Senat of Chambéry-18th Century)

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**Abstract**

Cet article s'intéresse à l'histoire et aux pratiques de défense auprès du Sénat de Chambéry et qui sont légalisées dans la justice des États de Savoie dès 1723. Il montre la nature contradictoire de la défense qui prend place dans un système inquisitoire.

**Reference**

Attentive to the role of the intermediate jurisdiction, the *jurisdiction-mage*, and its relations with the supreme court of the Senate of Chambéry during the 18th century, this article demonstrates how defence practices allow us to re-examine the place of the defendant in criminal justice. Since the Middle Ages, the legal tradition of the Dukes of Savoy highlighted the special interest that authority manifested with respect to vulnerable groups. Widows, minors, orphans, the destitute and paupers benefited from the provision of counsel and legal assistance, particularly before courts that settled disputes. From the *Royales Constitutions* of 1723, legal assistance was extended to defendants tried in major criminal cases. In the intermediate courts and in the Senate of Chambéry, defence practices appear to have been systematic for non-contumacious defendants. Thus, inquisitorial proceedings took on an adversarial nature and, once the secret investigation had ended, the opinions of the lawyer and prosecutor followed. Defence practices confirm that the legal authorities took into consideration the vulnerability of defendants in the face of the increasing complexity of the proceedings. The defendants' lack of knowledge of the law would require the assistance of a lawyer whose opinions, although subject to legal restrictions, allowed a balance to be achieved in the proceedings.

Michael Breen published an article particularly focusing on Ancien Régime French research into legal matters. He highlighted that recent historiography allows new examination of the premise that had prevailed for many years concerning the link between the consolidation of the absolutist state and the development of law courts. This current of thought was based on the assumption that the power of the judiciary was imposed upon people with little capacity to act within the machinery of the judicial system. However, a recent re-examination of this idea has made it possible to point out to what extent the legal system was a place where a «collaborative project between the king and his subjects» took place. «The state expanded its reach into the lives
of its subjects not by imposing its laws and legal procedures on local populations but by encouraging ordinary French men and women to come to state officials to resolve their disputes, maintain social order and ensure the security of their property and families. This historical shift is based on studies that have looked into the magistrates' role in the low or middle courts, the justice that dealt with commercial or civil cases and that which settled petty offences in ordinary proceedings.

When it comes to the justice that punished serious crimes (classified as major criminal cases), the research finds it difficult not to use as a backdrop perspective of power relationships. This is quite understandable because, to use the words of Michael Breen, how can we combine an image of the major criminal court with one of «social collaboration» or negotiation? Researches that focus on criminality analysis, on the role of regulator and social control of the punitive and political power, and those that examine corporal or capital sentences rely on this idea while also contributing to its perpetuation. However, criminal justice cannot be summed up in the spectacle of public sentences or in the quantification of crime rates. These aspects form part of it, but they do not exhaust the understanding of the subtle link that is woven between the people and justice, of any kind, even in major criminal cases.

As a corollary, major criminal cases question the idea of the monopoly and centralisation of criminal justice. Centralisation of power is perceived de facto as a result of the superimposed institutional structures that existed in most European countries. Nonetheless, we have to look beyond this evidence for several reasons. Generally, in the case of a large territory, criminal cases were referred to the sovereign courts, as was the case with the Senate of Chambery. These legal superimpositions led to a directed perception, a kind of «mirage of centrality». In fact, the crimes dealt with by the jurisdiction-mage of Maurienne, for example, have left behind a wealth of archival material in the Senate of Chambery. The magistrates of Chambery also pronounced the final sentences. However, the middle courts had a real impact on the case and it would be unreasonable not to take this into account. Lower court judges also directed the intensity of the sentence because, depending on the seriousness of the crime, they chose the type of proceedings (petty or major criminal proceedings, for example). Furthermore, the lower court judges left a decisive mark on the legal proceedings due to the investigations they carried out within their jurisdiction. They played a major role in the progress of the proceedings. Rather than centralisation, a process of coming and going or a sort of round trip should be evoked. The cases occurred mainly in rural communities; they were brought before the juge-mage to be processed and then forwarded to the Senate. The Senate confirmed that the proceedings were correct, completed them if necessary and pronounced the definitive sentence. Finally, it sent the case back to the jurisdiction-mage for the sentence to be applied. Centrality characterized the magistrates' work in the jurisdiction-mage from where the proceedings started and to where they returned for execution. The back-and-forth marked out a legal territory that registered human and administrative movements (the case files and the people moved around). Administrative techniques bear witness to movements and change the point of view of the researcher who works on the archives of the Senate. The idea of the centrality of criminal justice based on an approach favouring consideration of the extent of power is, from this point of view, open to discussion. On a wider level, it is a question of encouraging a «decentralised» approach that set aside sanction in favour of an approach based on the proceedings. Such a choice makes it possible to consider the archive as a place of «contacts» 2. The point of view thus evoked, which I partially adopt in this article, also makes it possible to question the administrative techniques for what they are and what they produce: certification and knowledge about movements. As we will see, the traces of mobility of the legal papers also inform us about the care shown by the court officials and magistrates in the management of criminal cases.

It was in this context, somewhat decentralised in terms of a political or social approach, that I carried out this research into defence practices in 18th century Savoy. However, my approach met with initial surprise concerning the scope of defence in Savoy. In fact, an examination of some of the 3,300 criminal cases currently listed at the Senate of Chambery confirms the presence, seemingly systematic, of a solicitor and/or defence lawyer. The surprise that I experienced on finding how generalised defence was comes from experience of quite the opposite concerning defence in the Republic of Geneva during the 18th century. Contrary to what Genevan legislation implied the real activity of defence accounted for around 10% 4. However, in Chambery, the courts' superposed structure could, at first sight, appear to hinder defence practices. Nonetheless, this is the reverse of what I found. The Royales Constitutions of 1723, which inaugurated the right of defence in major criminal trials notably modified legal practices by integrating new players in the trial (the lawyer and the solicitor). They, above all, shaped a specific dynamic, a new «grammar» that modified the traditional form of inquisitorial proceedings (written, secret and non-ad-
versarial). And it is within this reconfiguration that I am going to try to determine the place occupied by the defendant in justice and, as a result, the types of relations that criminal justice maintained with the individuals that it judged.

Prior to a more thorough analysis of defence practices, an initial question to which I can only provide a partial reply arises: what reasons lay at the origin of the legalisation of the lawyer for the poor in major criminal cases? What led to the in-depth overhaul of legislation that was undertaken in the 1720s and that aimed to extend legal aid to those accused of serious crimes, providing the most vulnerable of them with the services of an advocate for the poor? I believe that this point will lead to the formation of an initial response regarding the place given to defendants in criminal cases.

**Tradition of protection of the vulnerable**

The institution of the advocate for the poor, created by a member of the Resident Council in Chambéry, dates to 1375. Legal assistance in favour of the most vulnerable was set up in order for them to stand up to the powerful and defend their legal rights. It had existed since at least the 13th century in other parts of Europe. The distribution of counsel ordered by the judge and legal assistance for those, as stated by the Italian commentator Odofredus, «who are incapable of postulating – such as women, wards of court and madmen – poor people and finally those who are prevented by their opponents» were rapidly adopted, amongst others, in the ecclesiastical and secular courts of southern Europe and in Italian cities (for example the judex pauperum in Bologna, or in Alexandria in the Piedmont region, Modena, Ferrara and Aigues-Mortes). However, the obligation to serve was the subject of debate among canonists during this period. It was a question of knowing whether it was necessary to encourage the gratuitousness of legal assistance, who would be responsible for it and, consequently, who could benefit from it.

However, in Savoy, this question was decided in the late 14th century. Specific attention was paid to the vulnerable, the miserales personae who could take their case before the Resident Council of Chambéry (the forerunner of the Senate). In this case, a «patron» worked free of charge on their behalf. Thus, the duke’s charity was one of the means of compensating for fragility, which especially characterised widows, minors and orphans. Nonetheless, the 1430 Statuta Sabaudiae included clearly in this list the destitute who also benefited from the protection of the advocate for the poor. Those concerned were the poor, considered at the time from the point of view of their resources:

«...for fear that lack of financial resources could prevent poor and destitute people from asserting their rights before our councils, we would like an advocate general of the poor to reside continually in our city of Chambéry and for us to choose for this office a capable man of great honesty. He will defend the cases of people lacking in fortune before our councils, our lower courts and even before the ecclesiastical courts; he will be paid by us and will not ask for any salary from the parties».

Legislative traces of such legal assistance can also be found in a ruling from 1564. Legal assistance, according to Laurent Chevailler, owed to the office of the poor that «was made up of a lawyer for the poor, a solicitor and a bookkeeper or clerk, all provided with a fixed annual salary». In February 1680, on the publication of Stile et Manière de proceder (Style and manner of proceedings), which only concerned criminal justice, there is, however, no mention of legal assistance. This absence would appear to indicate that legal assistance was not envisaged in criminal justice until at least the early 18th century. From 1723, defence of the poor was the subject of legislation that was very liberal. In addition, it was also during this period (in 1717), that a state policy of taking responsibility for charity, based on the model of the charity offices of the South of France, was imported by the Jesuit Guevarre and then adopted by Victor Amadeus II for all of Savoy. This absolutist policy of Victor Amadeus II was part of a long tradition of care for the poor that was concretised in the Royales Constitutions of 1723, which were amended in 1729 and 1770. These three compilations of the laws of Savoy also adopted, in conjunction, an annotation that makes it possible to view the legislative genealogy of the articles. For the code, Victor Amadeus II wished to reconcile the novelty involved in the creation of the legislation with the legitimacy provided by the continuation of the laws enacted by his predecessors. To resolve this paradox, the 1723 legislation annotated the previous laws and anchored the new text of the Royales Constitutions in a dynastic continuation. The articles of the 1770 edition concerning legal assistance were based on the laws from 1430, 1564 and the 1723 edition of the Royales Constitutions. This genealogy of the institution of the advocate for the poor thus confirms continuous care by the Dukes of Savoy for the legal rights of the weakest and poorest members of the population. This protection even went as far as giving widows, wards of court and paupers the privilegium..."
fori (the right to be tried in a particular court): they could bring their case directly before the Senate, which was free to refer them to the lower jurisdiction-mage.

Thus, the institution of the advocate for the poor continued to develop during the Ancien Régime to become a structure in its own right within the legal administration in Savoy. Paid for by the Duke, the lawyer for the poor was first of all a position attached to the ducal authority, before becoming an office of the Senate in 1680. At that time, the Regent Marie-Jeanne Baptiste placed at the head of the institution a senator responsible for «examining the petitions of those who asked for the benefit of assistance and supervising the operation of the office as a whole»13.

The novelty of the 1723 law, confirmed in 1729 and 1770, lay in the fact that from then on criminal cases could also be defended by the lawyer for the poor (they even took priority over civil cases): «The Advocates for the Poor will work gratis in the trials that may take place for them both in civil and criminal matters, with all charity, good faith and diligence, and they may not receive any gift from them on penalty of suspension of their employment and the loss of their salary for one year»16. The local judges and syndics were responsible for certifying the poverty of those subject to trial so that they could benefit from legal assistance free of charge, with the exception of those known to be poor and foreign defendants who did not need this «certificate of poverty»17. If a court did not have an advocate for the poor, the defendant could appoint another who was then obliged to serve him. And when the holder of the office of advocate for the poor was unavailable, the other lawyers had taken an oath to serve the destitute free of charge. A solicitor whose duties were also regulated assisted the advocate for the poor18. Thus, all guarantees were adopted to allow defendants to be advised by a lawyer. In addition to his office as a defence lawyer, the advocate for the poor visited the prisons once a week. He sent the magistrates of the Senate a report that served as a basis for those accused who asked for royal mercy. The judges who inspected the prisons questioned the prisoners about the services provided by the advocate and solicitor for the poor19.

As we have stated, the institutionalization of the advocate for the poor entailed a close link between him and the Senate magistrates. This position conferred the honour on the person appointed to it. In 1723, the office of advocate for the poor was placed on the «same footing as the public prosecutor and the title of advocate for the poor gave the right to the prerogatives attached to the title of Senator»20. This equality of rank can be read in the costume that had to be worn by presidents, senators, advocates general and the lawyer for the poor, who had to wear an overcoat, collar, long breeches and a doublet21. All members of the office of the poor (solicitor, bookkeeper and clerk) benefited from a fixed annual salary: the position of advocate for the poor was remunerated at 1200 pounds per year, which was the same as that received by the members of the Senate of Savoy22. A veritable institution, the office of the advocate for the poor was allocated substitutes in 1770 whose duties were undertaken by young lawyers who were appointed by royal letters patent, and whose remuneration was 200 pounds per year, while that of substitute for the lawyer for the poor was 250 pounds per year23. The office was the place where these young lawyers were trained and it was obligatory to pass through it to be admitted to the board of the order, and it was where candidates for advocacy spent a year in training. The development during the 19th century of the offices of the advocate and solicitor for the poor confirm the scale that this institution had acquired during the century. In fact, supernumerary replacements and trainees would further increase the number of people working in these organisations24.

The advocate for the poor was appointed by royal letters patent after undergoing an assessment of his capacities and honesty. This position paid for by the State undoubtedly limited the lawyer's margin for manoeuvre in the exercising of his duties. This was due to the fact that the lawyers' rules of conduct required moderation in their writing and their statements and banned them from invoking any misleading arguments. Furthermore, the defence of the poor was the opportunity for the lawyer to demonstrate a «conscience» and professional skills before the senator-judges, notably because this position was a possible step up in the cursus honorum that opened up the career of senator, avocat fiscal or president.

In major criminal cases, defence was only authorised in writing. Oral pleadings, although less costly, were now banned: «we will no longer allow in the future, either in Civil Cases or in Criminal Cases, the Pleadings of Lawyers, unless in those held at a public Hearing and for which no more than one hour can be given for the two Parties»25. This ambiguous article from 1729 disappeared from the 1770 version of the Royalees Constitutions. This clause would suggest that prior to 1729 the lawyer could defend orally in criminal trials. Did lawyers speak in favour of defendants during trials judged at hearings, in public scenes and whose practice is confirmed in the records as far back as 1583? After this date, records of hearings no longer exist. Is this related to a problem of conservation or is this disappearance the result, as suggested by Hervé Laly, of a practice that had fallen into disuse? However, Laly specifies that in 1610 an edict recommended once more that «trial hearings
should be removed in order to accelerate justice. Nonetheless, his research into the 16th and 17th centuries does not mention any trace of defence in criminal trials.

However, the method of the lawyer’s intervention had consequences for the cost and speed of justice. Furthermore, this question permeates all justice in Savoy during the 18th century more widely, as the works of S. Cerutti have demonstrated. Thus, for criminal justice, the compilers of the 

*Royales Constitutions* chose written defence, even if orality considered as less costly and faster was clearly banned. Was this relegation motivated by the former representation that saw legal eloquence as the place of misrepresentation of the truth, and the appeal to the emotions therefore postulating that pleadings generated lies? Written defence would thus limit the rhetorical effects that were believed to obscure the truth of the facts. Despite the cost, this method of defence conformed to the traditional written form of the inquisitorial proceedings. Above all, as we will see, it allowed transfer of the written defence from one jurisdiction to another. Orality required a meeting between the judges, the prosecutor and the lawyer, at both levels of jurisdiction (juridiction-mage and Senate). Finally, while writing was costly, the fees for the advocate and solicitor for the poor undoubtedly absorbed a great part of this.

Thus, during the Ancien Régime in Savoy, legal assistance was defined in detail in the 

*Royales Constitutions* from the early 18th century. This policy would then be extended until 1860. It was therefore a tradition in the strong sense of the term, which indicates (according to Mario Dogliano) the survival of a typically communal institution that developed between the end of the Middle Ages and the disappearance of the State of Savoy in the 19th century. It brought into being and guaranteed legal protection for widows, orphans, minors and paupers. They were able to assert their rights in court and also to benefit from the assistance of a professional when they were accused of serious crimes. This role of the State as a protector was possible due to the availability of the resources for bringing legal proceedings.

The combining of legal assistance concerning contentious justice (civil or other matters) with the assistance offered to criminals in the early 18th century invites another hypothesis. The extension of the distribution of legal advice and assistance to defendants tried in major criminal cases would suggest that they were as vulnerable as widows, orphans, minors or paupers. This fragile condition, observed and recognised, would require protection and legal assistance, as had been happening since the 14th century in civil justice, for example. The rights of the defendant would resemble those that for centuries had been recognised for the 

*miserables personne*: an ability to make use of their legal rights and stand up to those in authority. Using similar reasoning we could suggest that the widening of legal assistance to major criminal cases confirmed that 1723 changes in proceedings were stabilised and strong enough to prevent practices of defence from weakening justice. In this respect, legal assistance in favour of defendants highlighted a sort of maturity of procedure. This maturity would be characterised by less flexibility, due to its legal formalisation. Formalisation would have undoubtedly rigidified, but also complicated court processes. Defendants were vulnerable in the face of this technicality that required them to obtain compensatory assistance from a legal professional. Defence would thus be an instrument of protection, the guarantee of asserting the necessarily technical rights that the weakest were unable to produce.

As we will see, this protection was effective, because a balance between the accusation and the defence took place. This balancing transformed an inquisitorial proceeding into an adversarial one in which defence was restricted by internal legal rules.

**Adversarial proceedings**

As I have already mentioned, the main novelty of the 1723 laws concerned defence, which was authorised both in the 

*juridictions-mages* and before the Senate. The defence lawyer only intervened in the information phase, which collected testimonies, and the questioning. This was a stage classified as secret during which the defendants questioned were to answer alone during a face-to-face interview with the 

*juge-mage*. At this time, as throughout the proceedings, the words of the defence lawyer did not replace those of the defendant.

In cases where the crime had been duly established and/or the defendant had confessed in detail, then he was questioned a second time (had his « confession » confirmed). It was only after this time that the adversarial phase was opened, during which the solicitor and defence lawyer were called, as confirmed, for example, by a case of rebellion against justice. In 1771, during a revolt in the Village of Collomban des Villards, under the 

*juridiction-mage* of Maurienne, the population attacked three *gardes des gabelles* (salt tax guards) in order to free a man from the region, suspected of smuggling. One of the guards was killed and the alleged smuggler escaped. Many individuals were implicated in this rebellion and were questioned. This was the case of a woman
called Claude Quessel who was questioned at a hearing in the Royal
prison of the town. She denied any involvement in the revolt and then
the juge-mage asked her to confirm her questioning:

We gave the aforesaid defendant to understand that despite her denials,
the State finds her guilty of having, on the third day of March, last Sunday,
during the celebration of high mass in the parish, worked together with the
mob of people to help evade the hands of the salt tax soldiers the man known
as Marcel Martin La tour from St Collomban des Villards publicly acknow-
ledged as a scoundrel and arrested by the salt tax soldiers in the cemetery
by order and under the authority of justice, with her having contributed
inasmuch as possible to the popular revolt that took place in this matter.10

The words used (the State finds her guilty of the crime of which she
is accused) confirm that the charges derived from the testimonies were
sufficient to establish a «pre-judgement» of guilt. The secret informa-
tion was complete, and it produced and fixed a truth about the crime
that was complete enough to make it possible to stop looking for new
facts.11 The evidence produced by witnesses and by the defendant was
sufficient, even though they had not yet been assessed by the prosecutor
or evaluated by the defence. The next phase, during which the opposing
opinions were compiled, was not scheduled as a time for contributing
evidence about guilt or innocence. This was a time when opposition
within the law was opening up.

During a second round of questioning, the juge-mage questioned
Claude Quessel to find out whether she continued to deny her involve-
ment in the revolt. She «replied I do not wish to change anything, add
or take away anything and I stand by everything that I have said»12.
Then, as provided for by law, the juge-mage ordered her «to choose
a lawyer and a solicitor to defend her case and to say why she should
not suffer the penalty deserved by her crime of complicity in the popular
uprising and revolt, which is an attack on the authority and justice».13
This formula «to say why she should not suffer the penalty deserved by
her crime» was confirmed in all of the criminal trials consulted. At this
stage of the trial, the defendants were considered guilty even before the
judges issued the sentence. And the role of the lawyer was not to provide
items of evidence or new facts about the crime but was based on the
law so that the defendant could escape the legal penalty. However, the
law of 1723 limited the judges in terms of the sources of law on which
they were authorised to base their decisions. They had to use the Loix
et Constitutions, the local statutes (as long as they did not contravene
the laws and they were in use) and the ius commune. The 1729 edition
brought in an innovation by ranking the sources differently. The judges
were subject to the Loix et Constitutions, the local statutes, the decisions
of the magistrates of the sovereign courts (reasoned judgements) and
finally to ius commune. Above all, the judges and the lawyers were not
authorised to quote in their rulings and notices, the opinion «of any
doctor in legal matters»14. In 1770, the Royales Constitutions provided
«that no Magistrate or Court, even supreme, may not, in any case what-
soever, give any interpretation to (the Royales Constitutions)».15 Ar-
bitrariery was highly regulated by the laws of the kingdom because
legislation also provided the penalties for many crimes (theft, insult,
homicide, blasphemy, etc.). The balance between the lawyer and the
prosecutor is also attested by the common legal knowledge they shared
in their legal opinions. The conflicting arguments that the defence put
up against the prosecutor were based more on the law than on fact.
This is why the role of the defence was considered a legal technique
regarding evidences of the crime.16

In the jurisdiction-mage, it was after the second questioning that the
adversarial phase per se was opened. This was when the defendant ob-
tained the assistance of a defence lawyer. The archives indicate that
few lawyers intervened in favour of defendants. Generally as noticed in
records, only the bailiff solicitors acted as defence lawyers. This is un-
doubtedly explained by the scarcity of lawyers in rural areas. They were
concentrated in the urban area of Chambéry. From the 1720s, obliged
go to Turin to obtain a doctorate where they were better trained
than in Valence, the number of lawyers in the Senate of Chambéry
decreased. Alongside their duties as lawyers in the city, they officiated as
judges in rural areas. This would explain why their numbers were so
scarce in the jurisdictions-mages. Generaly, 64 lawyers were registered
in 1729, a number that varied from 60 to 40 lawyers between 1730 and
1760. It was this scarcity of lawyers available in the jurisdictions-mages
that would oblige solicitors to assist defendants in lower courts.

Since defendants often did not appoint a defence lawyer, perhaps
due to not knowing the name of one of them: the juge-mage designated
an solicitor who was obliged to serve the defendant, unless he could
invoke reasonable grounds for refusing this responsibility. Generally,
the solicitor was responsible for helping all the other defendants im-
plicated in the case. The juge-mage then «summoned the accused to
declare whether she wanted to accept the witnesses that had made a
statement against her as having been duly examined or to carry out
further questioning on which they should be heard».17 At this time, the
defendant and his solicitor were isolated in order to decide whether
they wished to hear the witnesses on new points. And the defendant
after a «brief and secret conference with the [solicitor] Mr. Rostaing, said and declared I accept the witnesses as having been duly examined and I do not have any questions to put to them. I reserve the right to make complaints against the witnesses and to all my defence and to the supporting investigative procedure that will fall upon me and to choose such a lawyer as my solicitor thinks fit»80. Very few of the criminal cases consulted showed the defendant immediately asking to question the witnesses on specific points or offering criticism. The judge declared «this formality opened and published» with respect to the defendant81. The published proceedings were made public and the search for evidence ended. The judge then read out the repetitions from the questioning to the defendant. He asked him again if he still stood by what he had said and finally informed him that he had eight days «to make his complaints against the witnesses», followed by «a period […] of fifteen days to prove these complaints and the facts deduced and that had happened, no longer being permitted to do so after these periods had ended»82. This time gave the defendant the possibility of providing proof of the case he was putting forward. Then, «within a period of five days»83, a copy of the proceedings was sent to the defendant and his lawyer: «When the trial is be declared open and published, it shall be ordered at the choice of the defendant for him to be sent a copy or for it to be forwarded to his Lawyer or Solicitors»84. In the case where there were contumacious accomplices, then the solicitor was obliged to swear an oath to keep the proceedings secret:

We, the judge of Maurienne, undersigned, have received from Mr Rostaing, solicitor appointed by the prisoners involved in these proceedings, the oath by which he has sworn by the Holy Scriptures held in our hands not to communicate and to keep completely secret the contents of these criminal proceedings with respect to the offenders who are not imprisoned and who are named in these proceedings and everything that concerns them in the city of Saint Jean85.

Usually, eight days after these formalities, the defence document, made up of several pages, was sent to the court registry. Despite the fact that at this stage of the trial the State considered the defendant as convicted of the crime of which he was accused, it was usually their innocence that was invoked by the defence lawyer. In 1779, a brawl broke out between several men, at in Saint-Jean in Maurienne. One of the men was stabbed. The lawyer Mr. Salamon wrote the defence, jointly presented for two defendants. The defence solicitor asserted the innocence of the prisoners, the absence of the «least suspicion» and accused the victim, who was supposedly drunk, of trying to «disguise or rather to hush up the truth»86. Extracts from the words of the witnesses, comparisons between the oral evidence and the questioning of the defendants constituted the usual foundation on which the solicitor deconstructed the evidentiary process. Thus, as we have said, only the evidence compiled during the investigation served as a basis for the defence. The trials consulted do not present any «counter-investigation» from the defence putting forward new elements of the facts. The clerk of the court then transmitted the documents containing the information and the defence document to the local prosecutor (the avocat fiscal). The avocat fiscal drafted a notice entitled «Contents of the Submissions», in which he assessed the evidence that attested to the crime and proposed the sentence provided by law. During this stage of the proceeding, the opinion of the defence, then that of the prosecutor followed according to a process of dialogue: the defence was sent to the prosecutor who ruled on the submissions made by the defence lawyer. Possibly, the defence could give his opinion about that of the State before everything was brought before the Senate. The proceedings then operated in the form of a coming and going of written documents, in a similar way to how proceedings operated in civil matters.

However, although rare, in the juridiction-mage, the defence document could require a veritable «defence investigation»87. Based on a questionnaire prepared in advance by the defendant and his solicitor, the court officials once again examined the witnesses who risked a penalty for perjury if their statements varied88. An example of such a defence investigation – which corresponded to a search for exculpatory evidence – was undertaken in a case of theft where François Ville was accused of having stolen a purse in a market. After the witnesses had been heard, and he had been questioned, and the witnesses had been cross-examined, François Ville was subject to a second round of questioning. He persisted in denying the theft and, as we saw with Claude Quesnel previously, the State told him that «despite his denial, the State found him guilty of the crime of which he was accused»89 and officially appointed the lawyer Joseph Bertrand as his defence lawyer and Mr Jean Antoine Salomon as his solicitor, with whom «he had a brief and secret conference»90. He then declared that he did not want to hear the witnesses. Here again, the archives show a stereotypical language that confirms a process constantly in use. Refusing to hear the witnesses after his second round of questioning, de Ville asked in his defence document to have the innkeeper and his wife at whose inn he had slept questioned. He claimed that they could confirm that the prisoner, while he was at the tavern on the day before the market, did indeed
have the different coins with which he was arrested. The judge called for additional information, summoned the witnesses and questioned them. This defence investigation was a kind of additional information initiated by the defendant’s lawyer. Unfortunately, the innkeepers did not provide any acceptable proof of the possession of these coins, only raising the problems of the false identity under which the defendant had come to the inn.

As we have said, after the lawyer had drafted the defence documents, the provincial avocat fiscal received this document, on which he gave his opinion. Usually, as the defence claimed an acquittal due to lack of evidence or invoked nullities in the proceedings, either the provincial avocat fiscal took the objections raised into consideration or he refused to go into the matter and insisted on the penalty that he had claimed in his previous submissions. Most of the cases consulted show that the avocat fiscal did not change his point of view and persisted with his submissions. The submissions could be passed again to the defendant’s solicitor, who would challenge or accept them: «The undersigned solicitor of the two prisoners [...] having seen the submissions presented by the his honour the avocat fiscal of this province dated today which have just been forwarded to him, declares that he has no rejoinder to make to them, only using for all defence the contents of his defence document of the 16th of this month»31. He ended by stating once more: «... he has every reason to expect the two prisoners to be declared innocent of the alleged stab wound of which the aforesaid Bonnel has complained and as a result they will be released from the said prisons and acquitted [...] without costs»32. The archives show that a sort of adversarial argument was established between the defence and the prosecutor of the juridiction-mage: one presented his submissions, the other presented his submissions, the former replied, the latter did the same. A dialectic was constructed in which the parties asked one another questions and answered them, creating a form of adversarial equality of speech. Accusation alone, which was customary in criminal trials, did not exist for Savoy. There was no affirmative, sententious and unambiguous opinion about the crime. What mainly characterised this adversarial phase was the accumulation of points of view about the crime and the criminal. This dynamic is surprising in view of the situation found in the Republic of Geneva during the same period where the opinions of the defence and the prosecutor came one after another without any dialogue33.

Furthermore, the influence of civil proceedings appears to be perceptible, particularly through the terminology used by the main players. For example, in the case of the revolt, the juge-mage issued an ordinance in which he used terms that were usually found in the formulations that the parties used to confront each other in lawsuits:

Between his honour the avocat fiscal of the province of Maurienne, plaintiff [demandeur] in the case of abuse and popular revolt, on the one hand.

And the brothers Baltazard and Etienne Martin Latour, Jean Favre Nicolin and Claudine Quessel [...] all of the parish of Saint Collomban des Villard, accused, held in custody and defendants [défendeurs], on the other hand44.

In a case of a fire in 1732, the formulation of the sentence confirms the same influence:

Contents of the sentence.

Between his honour the provincial avocat fiscal of Maurienne, plaintiff [demandeur] in the case of a fire deliberately and maliciously started in the Barn of Mr Sallamon near the village of Aypierre and François Villard, Catherine Lemaz, Jeanne Marie Borger, married, and also Jean Baptiste Lemazson, all of the parish of Aypierre, accused as defendants [défendeurs] and held in custody55.

The form that adversarial proceedings took placed the defence and the prosecution in opposition to one another on an equal footing; and this face-to-face encounter can even be noted in the terminology used.

However, according to the hypothesis that I am defending of a re-balancing of the rights present in inquisitorial-adversarial proceedings, what was happening with torture? Sentences to torture (only possible for crimes that merited the death sentence or the galleys) called for by the juge-mage were subject to automatic appeal before the Senate. In a case of a fire in 1731, the judge ordered torture against the two of the defendants (the mother and the son). According to the Royales Constitutions, this sentence was then automatically brought before the Senate. However, in the procedure that forwarded the confirmation of the torture to the Senate, the lawyer was consulted. The submissions of the avocat fiscal of the juridiction-mage that had called for the torture were transmitted to the advocate for the poor of the Senate of Chambery so that the latter could put forward legal arguments. In this case, due to lack of sufficient evidence against the defendants, the advocate for the poor asked for the torture sentence to be «remedied». Thanks to the arguments of the defence, the mother escaped torture, but on the other hand, the son was subjected to it for a quarter of an hour, a period during which he did not confess56. Recently, an article stigmatised «the archaism» of the Royales Constitutions, due to «the absence of a guar-
antee for the defendant and the use of torture. While it is true that torture had not yet been abolished, it was the subject of a significant amount of legislation: 23 articles codified it. Furthermore, it was not applied on a large scale during the 18th century. A rapid estimate, made on the basis of the inventory drafted by the archivist C. Townley, allows us to make some quantification, although this is a very rough estimate. The inventory does not list all of the cases conserved, but it serves as a relevant sample. The number of criminal cases inventoried for the 18th century (which corresponds to 85% of all cases in the inventory made by C. Townley) comes to 3282 criminal trials, from which I have counted (for the entire Ancien Régime) 114 torture sentences. Therefore, in 3.5% of cases defendants were tortured in criminal proceedings. As shown in the case mentioned above, the defence lawyer had a moderating effect on the torture sentences because the mother sentenced to be tortured by the lower court escaped torture after the Senate lawyer had drafted his opinion.

Thus, once the investigation at the first jurisdictional level had been completed, the case was finally sent to the Senate. The procedural method was similar to what had been carried out in the lower court. However, unlike previous approaches, the submissions of the avocat fiscal général, who used as a basis the whole of the file drafted by the jurisdiction-mage, initiated the succession of opinions. It was filed at the criminal registry, which then forwarded it to the defendant’s solicitor or lawyer attached to the Senate:

The submissions concerning proceedings that are carried out with due hearing of the parties will be sent to the clerk of the criminal court, if it is a criminal case, so that he can send a copy of it as soon as possible or communicate it to the defendant’s Lawyer or Solicitor so that they can present their defence submissions; [...] but when the submissions are sent to the above-mentioned Secretary or Clerk of the Court, they will always be obliged, as above, to acknowledge receipt of it and to record it in a register as well as the sending of the copy or its communication.

Based on the previous procedures of the jurisdiction-mage and the opinions issued, the submissions proposed a penalty. The advocate for the poor then presented his defence based on the combined analysis of the file made up in the lower jurisdiction. Generally, the advocate and the solicitor for the poor acted for defendant, unless he appointed another lawyer. In order to benefit free of charge from the services of the advocate for the poor, some defendants had to produce a poverty certificate. In the 1771 case between the rioters and the soldiers, some of those involved had asked to benefit from the advocate for the poor help. In the archives there is a statement from the notary of the place of residence of the defendants, which guaranteed the poverty of a girl who was requesting legal assistance:

The royal notary, [...] certifies that Josephine the daughter of Claude Sallier [...] held in the royal prison of the town of St Jean de Maurienne accused of having taken part in the revolt against the salt tax soldiers on 3rd March 1771, the day on which they were trying to arrest Marcel Martin, [...] is truly poor as she does not possess any goods and is also an orphan, which means that she is entitled to enjoy the privileges granted to the poor by the Royales Constitutions and other Edicts from His Majesty [...]60.

The solicitor validated the poverty certificate, allowing the girl to benefit from legal defence. Then, with a further opinion overlapping this, the submissions of the avocat fiscal général would propose a penalty. Finally, the senators would pronounce the sentence. It would be transmitted to the parties present (avocat fiscal général and defence lawyer), then sent to the lower court which would be responsible for executing the sentence.

An analysis of the submissions of the prosecutor and the defence highlights the importance and the place given to evidence from witnesses in criminal justice. However, while the conditions of admissibility of testimony changed during the century, the archives confirm that testimony carried increasingly important weight in the proceedings. Based on a body of evidence which was largely made up of the testimony of those who maintained relations of kinship, friendship, enmity, profession or neighbourhood with the defendant, the proof of the crime was built up. The seriousness of the crime then emerged, embedded in a narrative of the fama of the defendant (life, habits, propensity for debauchery, work and violence). Nonetheless, the majority of the offenders judged were individuals who were well-established in local communities. They faced court proceedings following brawls, blows and injuries, personal revenge (fires), homicides, etc. However, the inhabitants and neighbourhoods they frequented knew most of them. Thus, the witnesses’ declarations made it possible to build a detailed picture of the individual charged: alongside the usual information required during the questioning (name, age, profession), the witness testimony gave information about the social relationships that the defendant maintained, for example with the victim. An entire network of local affiliation was outlined and used to establish the guilt of the defendant, which was fixed, as we have seen, at the time of the information. It was therefore
his involvement in local life and how the defendant usually behaved that constructed the proof of the crime. In his submissions, a provincial avocat fiscal from Bonneville made submissions against in the case of a brawl where the victim had had his leg broken. Despite criticism from the defence, the provincial avocat fiscal chose to retain the evidence provided by witnesses although they were relatives of the victim: «In vain we object again that the 17th, 19th, 20th and 21st witnesses are all relatives of the aforesaid Rouoe, and consequently they may not testify.» A social picture emerged from testimonies. Thus, the sentence was based on how the individual fitted in with the community to which he belonged. The absence of such an association also informed the judges, as is shown in the case of pick pocketing in the market where the defendant, who was a migrant, could not rely on any favourable testimony situating him in the local community.

The inquisitorial-adversarial proceedings adopted in the courts of Savoy during the 18th century thus evolved in three stages. The first one took place in the local jurisdiction gathering of evidence of the criminal act (testimonies, confession) which placed the defendant in his local community and provided information about the relationships he had there. This evidence laid the foundations of his guilt. A period for opinions from both parties was then opened up between the accusation and the defence. Finally, this phase was repeated, practically redundantly, at the higher level of the Senate. However, in this structure, it is worth emphasizing the major role played by the juridiction-mage in the search for evidence that constituted the base on which successive opinions would be rendered. This was because the Senate did not usually require any additional information. Its activity was more to do with checking and validating the evidence compiled, which was completed by the opinions of the defence and the prosecution. The act of validation operated as a process of legitimisation of what had taken place in the lower courts. Nonetheless, these procedural methods showed to what extent the lower court was central to the correct running of the process and allowed the case to be brought to its conclusion. It was a process of legitimisation by procedure that was taking place and is found here in a superimposed procedure.

One final comment is necessary, which is the result of this superimposed institutional structure. Once the stages in the juridiction-mage were completed, the documents and the defendants were sent to Chambéry. In the majority of the trials consulted, only one copy of the proceedings travelled between the province and the Senate. The proceedings were transcribed in a bound book in a homogeneous format, which presented consistent writing and had sometimes been produced by several different hands. This bound book stated, in a continuous chronological order the «Contents of the new examination of the defendant», the «Contents of the defence document», the «Contents of the submissions», etc. In view of this terminology, only a partial copy of the documents was transcribed in these books intended for the Senate. Sometimes, some proceedings show material indications proving that the original documents travelled from the lower court to the Senate. In these cases, the original documents containing the information were bound with string to avoid one of them becoming lost. However, the various written documents were produced on different sizes of paper; there was a lot of different writing on them and each of these documents was drafted on stamped paper.

Did the copied books merely give a summary of the cases judged or were they transcripts in extenso of the documents drafted by the juges-mages? We find that the summaries represented the introductory elements of the documents, such as a list of the actors involved. They gave basic information about the procedural progress of the criminal case concerned. They confirmed the questioning of the non-contumacious defendant, the statements from witnesses, the second round of questioning of the defendant, the confrontations, any expert witnesses, the defence, the submissions from the prosecutor, etc. However, the copy sent to the Senate did not necessarily reduce the content of the original documents. The information was not cut or mutilated. In fact, there were administrative tools that confirmed and tracked the movement and circulation of the documents. In these records, the movements of papers and transmissions of documents were indicated and attested by the signature of the person holding the documents. In addition to this record of movements the volume of what was exchanged was registered.

In the inventory «regarding the proceedings brought against Philippe Aucourt Alias Mathieux Beaulieu and Antoine Perret en 1781», which were taken before the Chambéry Senate, there is a list of more than thirty documents that made up the trial. The list starts with:

The first book of the information containing 340 written sheets starting with the indictment [...] then, N.1. Plus another book containing the continuation of this information starting with sheet 341. And the statement of Joseph Rouge and ending with sheet 645 and marked; N.2: Plus the personal replies from Philippe Amoud on 114 written sheets and marked, N.3. Plus the personal replies from Claude Donche known as Baron, the submissions from His Honour the avocat général, the defence documents and statements.
from the Senate finally on 7 September 1781, all contained on 119 written sheets and marked.

As was the case for each of the people to whom the documents were delivered, the solicitor of the defendants confirmed receipt of the documents with his signature «I have in communication for Philippe Aucour, all documents and proceedings above, Chambery, 22 December 1781. Signed Jourdan, then returned by Mr Jourdan».64

The superimposition of jurisdictions as well as the number of actors involved in trials led to the development of administrative techniques to govern the many transfers. In the case of Savoy, the circulation of documents, and particularly the inventory discussed above, indicates that while some documents could be transcribed in part, they were not summarised arbitrarily or distorted by an incorrect selection. Indeed, the volume of documents exchanged reflects the attention that was paid to the contents of the documents. While some formal elements that used stereotyped language and address were shortened, the content copied seemed to respect the content of the original writings. The widespread use of defence lawyers thus required the development of complex administrative techniques to keep track of the movements of the documents. And these techniques tell us about the importance and the careful attention that was paid to the defence in the proceedings.

In conclusion, since 1723 in criminal justice, we find a systematisation of defence practices for non-contumacious defendants. Written defence had not existed in the previous centuries. The inquisitorial-adversarial proceedings in Savoy manifested an adversarial aspect marked in terms of form and content. There was a type of discussion that puts both sides on an equal footing (defence and prosecution). These characteristics were all signs of an internal rebalancing of justice. As we have seen, the criminal justice system operated on an accumulation of information, testimonies, questioning, opinions and submissions. This cumulative aspect is particularly difficult to manage from an administrative point of view, but the attention paid to it demonstrates the scale of the care taken with criminal cases in general and defence in particular. Defence is involved in this cumulative process: it contributes to producing technical knowledge of the crime. To do this, it relies on an argument that can be called «persuasion by subtraction». In the defence documents, there is a reassessment of the evidence mainly made up of witness testimonies. The lawyer tends to destroy the initial base of the pyramid to break the evidential edifice, using his legal skills. According to an inverse dynamic, the work of the prosecutor at both levels of jurisdiction seeks to counteract this process of subtraction, in order to build and then maintain the edifice that will be used to pronounce the sentence. This overlap also shows the extent to which inquisitorial proceedings were complex. The inquisitorial-adversarial proceedings instituted in Savoy in the 18th century took into account the vulnerability of the defendants facing procedural complexity. And responding to an increasing sophistication of the proceedings, the defence mitigated the vulnerability of defendants. The defendants' lack of knowledge of the law required the assistance of a professional, who had the job of striking an internal balance in the proceedings, because this also lent legitimacy to the whole system of justice. It was at this specific point that the reciprocal relationship between the people and the judiciary was established. In this interpretation, defence would be an attempt to achieve the ideal of balance symbolised by the scales of justice.

Note al testo

2 R. BERTRAND, L'histoire à parts égales. Récit d'une rencontre Orient-Occident (XVIF - XVIII siècle), Paris 2011, p. 16.
3 Regarding the number of criminal process in 16th and 17th centuries, see H. LALY, Crime and justice in Savoy 1519-1750. L'élaboration du pacte social, Reznes 2011, p. 128.
8 M. DOGLIANINI, La avvocatura dei poveri cit. p. 277.
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15 CHEVAILLER, Essai sur le souverain Sénat de Savoie cit., p. 66.
16 Lois et Constitutions de sa Majesté le Roi de Sardaigne publiées en 1770, 2 voll., Paris 1771, t. 1, Livre II, Titre XIII, chap. XVII, art. 1.
17 Ibidem, Livre II, Titre III, Chap. XVII, art. 2.
18 Ibidem, art. 7 et Titre XI, art. 8. This clause is quoted in the «Arrêt du 8 juillet 1564».
20 CHEVAILLER, Essai sur le souverain Sénat de Savoie cit., p. 66.
21 BORNIER, Histoire du sénat de Savoie cit., t. 1, p. 337.
22 J. NICOLAS, La Savoie au XVIIIe siècle. Noblesse et Bourgeoisie, Montmélian 1999, p. 612. The wages of the Avocat fiscal général were 2000 livres, the second President: 3000 livres and the first President of the Senat: 3000 livres.
23 J. DUBOURVIEUX, Les avocats des pauvres Chambéry au XVIIIe siècle, mémoire de master I, Université de Savoie, 2009, dir. Frédéric Meyer, p. 56. My thanks to Alain Becchia for letting me consult it.
25 Lois et Constitutions de sa Majesté, 1729, Livre III, Titre XXII, De la distribution des Actes, des Avvis en droit des Avocats, du rapport des Procès, de la suppression des Plaidoyers, et de celle des Sances extraordinaires, et particulières, art. 10. This article is no more effective in the 1770 edition.
27 S. CERUTTI, Giustizia sommaria: pratiche e ideali di giustizia in una società di Ancien Régime (Torino XVIII secolo), Milano 2003; For the justice’s fees impact on evidence, see EAD., Faisi et «faits judiciaires» cit.
28 DOGLIANI, La avocatura dei poveri cit., p. 276.
29 Lois et Constitutions de sa Majesté le Roi de Sardaigne publiées en 1770, Livre IV, Titre XI, art. 7.
33 Ibidem.
35 Lois et Constitutions de sa Majesté le Roi de Sardaigne publiées en 1770, «Prélambule» art. 1.
36 See also CERUTTI, Faits et «faits judiciaires» cit.

37 NICOLAS, La Savoie au XVIIIe siècle. Noblesse et Bourgeoisie cit., p. 83. Around 1740, 59 lawyers who were active in the Sénat of Chambéry also cumulated judge function in 296 lower local courts.
38 Ibidem, p. 81.
48 Lois et Constitutions de sa Majesté le Roi de Sardaigne, op. cit., Livre IV, Titre XII, art. 3.
52 Ibidem.
53 BREGEEL, Négocier la défense cit., chap. 4, «Les pratiques. Négocier la défense».
55 ADS, Procédure criminelle, 2B 10107, 1732 «Ténu de Sentence, du 28 août 1731», fol. 65.
58 LALY, Crime et justice en Savoie cit., pp. 127-128. I would like to thank the generosity of the archivist in the Archives départementale in Chambéry, Mrs. Corine Townley.
59 La Savoie et Constitutions de sa Majesté le Roi de Sardaigne publiées en 1770, Livre II, Titre III, chap. XV, Des Conclusions de l’Avocat général et de l’Avocat Fiscal général Conclusion de l’avocat fiscal général, art. 4, 1 underlining.
DEFENDING THE INDEFENSIBLE
ATROCIOUS CRIMES AND MISCARRIAGES OF JUSTICE
IN FRANCE DURING THE AGE OF ENLIGHTENMENT

This article examines the arguments used in the 18th century by the defence lawyers of those who had been convicted of atrocious crimes but were victims of a miscarriage of justice. These extreme cases, which appeared indefensible until the final recognition of innocence, make it possible to examine the complexity of the pleadings printed in the public arena and addressed to the Privy Council of the King of France. However, these publications, which deconstructed the incriminating evidence, were far from being limited to a strictly legal dimension. They rebuilt the integrity of those convicted and confirmed that these atrocious crimes had no precedent in history and, above all, went against nature. The defence lawyers thus ended by blocking the ontological possibility of the atrocious crimes - which could not be committed or thought of - in order to confirm the obvious innocence of those convicted. These arguments thus fuelled 18th century debates on philanthropy and the demand for justice.

While the second half of the 18th century in France was marked by several legal scandals, the exceptional media attention paid to the Calas case (1762-1765), thanks to Voltaire, should not, however, mask the more global phenomenon of the criminal judicial error whose scale is only just beginning to be grasped. A methodical analysis of the archives of the Privy Council of the King of France, the only body competent for overturning the verdicts of the sovereign courts of the kingdom and ordering a review of the trial, reveals dozens of criminal cases until then unknown1. It thus appears that a number of them concern so-called atrocious crimes (crimes atroces). This correlation, little highlighted in historical works2, raises some questions. These crimes, which were enormous - in the sense that they were not within the norm - by their nature and/or circumstances, violated social, religious and political conventions3 and were, like the example of the crime of paedophilia in our contemporary society4, often taboo. For these reasons, most of the time