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ACCESS OF THE CRIMINAL LAWSUIT PARTIES TO THE CASE FILE AT THE PRELIMINARY INVESTIGATION STAGE IN FRENCH LAW; A NEW STEP TOWARDS BALANCING OF RIGHTS[1]

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Abstract

In spite of the fact that the confidentiality of the preliminary investigation plays a noteworthy role in discerning the truth and supporting the people involved in the criminal proceedings, the legislator has followed a moderate approach in the field of the preliminary investigation by emphasizing the suspect's right to defend himself; in such a way that the Balancing of the criminal lawsuit parties' rights is guaranteed as much as possible. At present, the legislator, to support the efficiency of the preliminary investigation and the rights of the victim and to reduce the possible harmful effects caused by the suspect's knowledge of the details of the criminal case, has used mechanisms such as determining the papers and documents subject to access, postponing access to the case for a certain period, symmetry between the suspect and the complainant in benefiting from the right of access to the file. Likewise in present French law, for special crimes; as with organized and terrorist crimes and in cases of possible pressure on the victims or any other person who intervenes in the investigation, exceptional and distinct provisions have been considered. Since it aroused public opinion and citizens' emotions, it seems that "Outreau case"[2] has played a substantial role in the formation of these reforms. The current research, using the descriptive-analytical method and library sources and internet sites, inspects the degree of compliance with the regulations regarding access to the file with the principle of balancing the criminal lawsuit parties' rights in the preliminary investigation stage in French law and it tries to analyze the relevant regulations to reveal its shortcomings and defects and provide appropriate suggestions.

Keywords: Access to the case file, Balancing of Rights, Right to self-defense, Preliminary

[1] This article is taken from the doctoral thesis entitled "The Challenges of Balancing the Criminal Lawsuit Parties' Rights in Pretrial Stage and the Strategies for Getting out of Them; Comparative Study in Iranian, Syrian and French Law" with the guidance of Dr. Mohammad Jafar Habibzadeh and the advice of Dr. Seyed Doraid Mousavi Mojab at Tarbiat Modares University.

[2] Affaire d'Outreau

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investigation, Adversarial Principle, Suspect, Victim

Introduction

Ever since the French Constitutional Council proposed the idea of "balancing the rights of the parties to a criminal lawsuit" as a constraint to establish fairness and justice in criminal proceedings[3], French criminal law has undergone significant progress and changes. Following the announcement of the opposition and contradiction of some criminal laws and regulations with the constitution based on the concept of balancing the rights of the parties[4], the Minister of Justice at the time "Élisabeth Guigou" decided to review the criminal procedure law. In this way, the "Law on Strengthening the Protection of the Presumption of Innocence and the Rights of Victims" known as the (Guigou) Law was approved in 2000, and several strategic principles were foreseen in the preliminary article of the Criminal Procedure Law and the concept of balancing the rights of the parties is at the top of these principles.[5] Based on the first paragraph (1) of the preliminary article of the criminal procedure law: "Criminal procedures must be fair and adversarial and maintain the balancing of the rights of the parties".[6] Consequently, the adversarial principle to French law, which remained faithful to the Roman and Germanic legal traditions, was accepted in it,[7] but this principle is not absolute, but limited to respecting the balancing of the rights of the parties to a criminal lawsuit. Likewise, to accentuate the role and active participation of the victim in the criminal proceedings, the legislator declared in the same preliminary article: "The judicial authority is obliged to inform the victims and guarantee their rights during the criminal

[3] The Constitutional Council declared in 1989: "[...] respecting defense rights, especially in criminal cases, requires the existence of fair and just procedures; in a way that guarantees the balancing of the rights of the parties [...]". Refer to: Cons. const., Déc. n° 89-260 DC du 28 juillet 1989, JORF du 1er août 1989, p. 9676, [Loi relative à la sécurité et à la transparence du marché financier].

[4] V. par exemple: Cons. const., Déc. n° 95-360 DC du 2 février 1995, JORF du 7 février 1995, p. 2097, [Loi relative à l'organisation des juridictions et à la procédure civile, pénale et administrative].

[5] Also, the French legislator has mentioned and stipulated this concept in paragraph (1) of Article (D.47-6-1) of the Criminal Procedure Law, which is under the title of "appointed judge for victims and head of the compensation commission for victims of crimes". "The appointed judge of the victims, while observing the balancing of the rights of the parties, ensures the observance of the rights recognized by the law for the victims".

[6] Alinéa (1) du (I) de l'article préliminaire du Code de Procédure Pénale créé par la Loi n°2000-516 du 15 juin 2000 - art. (1) JORF 16 juin 2000 et modifié par la Loi n°2021-1729 du 22 décembre 2021 - art. 3.

[7] Bolze, Pierre, «Le droit à la preuve contraire en procédure pénale», Thèse de Doctorat, Université Nancy 2, Faculté de Droit, Sciences économiques et Gestion, 2010, pp. 164-165.

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proceedings".[8]

Essentially, the analysis of the doctrine and judicial procedure in France and Europe indicates that informing the accused and the plaintiff about the details of the case is considered one of the important elements to realize the adversarial principle.[9] Certainly, the confidentiality of the investigation for the parties is conflicted with their access to the file during the initial investigation process.[10] Confidentiality of the investigation supports the efficiency of the actions of the investigating authorities and provides them with the opportunity to start the investigation suddenly, at the same time, it respects the interests of the people involved in the criminal proceedings, in return for access to the case documents, it guarantees the right of private parties to defend themselves. Due to this fact, the legislator in clause (1) of article (11) of the Criminal Procedure Code, the confidentiality of the investigation is adhered to in front of the parties; except, without prejudice to the defense rights, the law has prescribed another arrangement. Accordingly, the confidentiality of investigations should be applied in such a way that the defense rights of private parties are not violated and competing rights and interests are considered. This conflict is usually determined by using balancing capacity; so that the effects and consequences of the confidentiality of the investigation are compared and associated with the effects and consequences of this limitation on the right of the party to investigate and defend himself. Of course, it should be kept in mind that violating the right to self-defense and ignoring access to the file; if it is based on necessity, is considered legal and legitimate. Such an attack can be justified to protect another fundamental right or freedom or another norm and use the method of weighing conflicting interests based on the principle of proportionality.[11]

Because of the prominence of the initial investigation process to discover the truth, the legislator refrained from predicting the possibility of access to the file by the suspect, but under the influence of the destructive effects of the lack of access to the file, in 2016, the suspect's access to the file in the initial investigation process according to "Law "Strengthening the fight against organized crimes, terrorism and their financing and improving the efficiency and guarantees of the

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[8] Alinéa (II) de l'article préliminaire du Code de Procédure Pénale créé par la Loi n°2000-516 du 15 juin 2000 - art. (1) JORF 16 juin 2000 et modifié par la Loi n°2021-1729 du 22 décembre 2021 - art. 3.

[9] Gavalda-Moulenat, Christine, «Comment renforcer le contradictoire dans le procès pénal français?», Archives de politique criminelle, Éditions Pédone, No29, 2007, pp. 20 et suivantes. D'HUART, Angélique, «Le principe du contradictoire et le juge des enfants - A l'épreuve de la pratique», Thèse de Doctorat, Université de Strasbourg, École doctorale de droit, sciences politiques et histoire - Centre de Droit Privé Fondamental, 2019, pp. 77 et suivantes.

[10] Pauline MONTUELLE, (2023), «Le secret de la procédure pénale, une réalité absolue?», disponible sur le site: https://www.lespenalistesenherbe.com/post/le-secret-de-la-proc%C3%A9dure-p%C3%A9nale-une-realite-absolue

[11] Capdepon, Yannick, «Essai d'une théorie générale des droits de la défense», Thèse de Doctorat, Université de Bordeaux 4, École doctorale de droit, 2011, p. 263.

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criminal procedure"[12] and added Article (77-2) to the Criminal Procedure Law.[13] It did not take long that due to the shortcomings of this law and the weakness of the way it was written and its failure to establish the desired balancing, the provisions of this law were revised according to the law dated December 22, 2021, regarding "trust in the judicial institution".[14] To apply this law, the legislator added the article (D.15-6-3) to the criminal procedure law under the title of "Being adversarial in the preliminary investigation process" by issuing an executive regulation on April 13, 2022,[15] and finally, the provisions of paragraph (5) Article (2-77) was revised again according to the amendment law of 2023.[16]

In light of the current laws in France, access to the case file may be subject to considerable discretion by the prosecutor, and in some instances, making the file available to the suspect and the victim becomes mandatory. In this study, the authors try to examine the legal system governing the access of the parties to the criminal case to the case in the preliminary investigation process, to express and explain the mechanisms of French law in the field of overcoming the conflict between the right of self-defense and the efficiency of the preliminary investigation.

Non-Mandatory Access to the Case File

The legislator has anticipated instances of non-mandatory access to the case file in two scenarios. On one hand, the prosecutor has the discretion to allow the suspect and the victim access to the file. On the other hand, the suspect can also request access to the file; however, the latter case is subject to various conditions and limitations.[17]

Access to the Case File by Decision of the Prosecutor

During the initial investigation process, the prosecutor is responsible for directing and

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[12] LOI n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale (1), JORF n°0129 du 4 juin 2016.

[13] Julien Gasbaoui, (2021), «L'article 77-2 C.P.P.: le contradictoire à l'épreuve de la pratique», disponible sur le site: https://gasbaouiavocats.com/PDF/Lexbase_Penal_37_29avril21_Secret_professionnel.pdf

[14] LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire (1), JORF n°0298 du 23 décembre 2021.

[15] Décret n° 2022-546 du 13 avril 2022 portant application de diverses dispositions de procédure pénale de la loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire, JORF n°0088 du 14 avril 2022, inclus dans une section 3 «Du contradictoire au cours de l'enquête préliminaire», complété par l'art. D. 593-2 du C.P.P.

[16] LOI n° 2023-1059 du 20 novembre 2023 d'orientation et de programmation du ministère de la justice 2023-2027 (1), JORF n°0269 du 21 novembre 2023.

[17] Cédric Porteron, (2022), «La nouvelle enquête préliminaire ou l'art de donner et retenir», disponible sur le site: https://www.actu-juridique.fr/penal/la-nouvelle-enquete-preliminaire-ou-lart-de-donner-et-retenir/

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managing the criminal case and can play a significant role in this process. Generally, the discretion to decide on access to the case file lies with the prosecutor. According to the French Code of Criminal Procedure, "At any time during the initial investigation, the prosecutor[18] may, when he determines that this decision does not impair the efficiency of the investigation, inform the accused person, the victim, or their lawyers that a copy of all or part of the file is available to their lawyers or, if they do not have a lawyer, to themselves, and they have the opportunity to present any observations they deem useful."[19]

The legislator has also defined the scope of these observations. Therefore, the **notamment** instances anticipated by the legislator can be divided into two categories: substantive and procedural. Procedural instances pertain to the regulation of formalities, the appropriateness of events that may be influential, and the conditions and criteria for initiating prosecution or attendance for early determination of guilt.[20] On the other hand, substantive instances encompass deficiencies and insufficiencies in the investigations and the necessity of conducting new investigations deemed essential for uncovering the truth.[21]

Some researchers believe that the term "**notamment**"[22] restricts the breadth of the grounds for challenging the evidence from being inclusive and comprehensive, creating a type of limitation for the suspect and the victim. This is because, outside these specified instances, they cannot challenge the presented evidence, otherwise, the principle of legality in proceedings would be compromised. Therefore, according to this viewpoint, the legislator has established a dual limitation for access to the case file by the prosecutor's decision during the initial investigation process. On one hand, the prosecutor may provide only part of the file to the parties. On the other hand, the statements of the parties are limited to specified instances.[23] It seems that this interpretation is not well-founded, as the mention of these instances aims to emphasize the genuine

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[18] Le procureur de la République

[19] Alinéa (1) du (I) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[20] In French law, the "appearance for early detection of guilt" (CRPC), which is also called "pleader coupable", allows the prosecutor to directly and without filing a plea in the criminal proceedings. Or suggest some punishments for the person who admits to committing the attributed events. If the said person disagreed with the attributed events or proposed punishment, the prosecutor can file a lawsuit against him and refer the case to the competent authority for consideration. See: Desprez, François, "La comparution sur reconnaissance préalé de culpabilité: 18 mois d'application à Montpellier (1er octobre 2004 – 1er avril 2006)", Archives de politique criminelle, Éditions Pédone, No 28, 2006, pp. 109 et suivantes.

[21] Alinéa (2) du (I) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[22] Notamment

[23] Cédric Porteron, op. cit., disponible sur le site: https://www.actu-juridique.fr/penal/la-nouvelle-enquete-preliminaire-ou-lart-de-donner-et-retenir/

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participation of the suspect and the victim in the investigation process, drawing the prosecutor's attention to the necessity of accepting active involvement from the parties. Additionally, the mentioned instances are inclusive, covering all possible scenarios. Therefore, the legislator has merely anticipated a limitation concerning the amount of information obtained from access to the documents and records of the case file.

The prosecutor has the discretion to provide the file or part of it to one of the parties, either the suspect or the victim, without the other party having access to it. The use of the term "victim" implies that filing a complaint to access the file is not necessary for the victim. Consequently, if the prosecutor grants access to the file to the suspect, the victim does not necessarily have this right unless the prosecutor decides to provide the file to the victim as well; because just being a victim is not enough to be equal with the suspect in terms of access to the file. Perhaps the reason is that filing a complaint by the victim is considered a criterion for having equal status with the suspect regarding access to the file.[24] In our opinion, it would be better if the legislator explicitly mandated the equality of the complainant with the suspect in terms of access to the file when the victim files a complaint, thereby preventing this gap and ambiguity.

The legislator, to facilitate access to documents and records of the case for the concerned individual, has envisaged multiple methods in the executive regulation approved in 2022[25]. Accordingly, access to the case file can be achieved through any means, whether by personally visiting the document section at the court or obtaining a digital copy. Regarding digital access to case information, Article 593-2 of the French Code of Criminal Procedure is enforceable.[26] Therefore, digital copying methods may be implemented, including the "autoreproduction" method, but this possibility is specifically anticipated for **lawyers** only.[27]

As soon as the prosecutor issues an access order, the concerned individual has one month to prepare their observations.[28] Once these observations and statements are prepared by the lawyer, according to Article 591 of the French Code of Criminal Procedure, the lawyer can send them securely via "secure telecommunications"[29] to the electronic address of the judicial authority or the competent department.[30] To ensure the effectiveness and efficiency of the right to prepare and

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[24] Guldner, Aline, «L'évolution de l'enquête policière et de l'instruction préparatoire dans la procédure pénale française», Mémoire de Master, Université Paris II Panthéon Sorbonne, Faculté de Droit, 2018, pp. 107 et suivantes.

[25] Art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[26] Alinéa (1) du (III) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art.

[27] Art. (D593-2) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 10.

[28] This is done through a written letter and receipt of confirmation or by notifying the court office with a receipt. Paragraph (1) Clause (3) of Article (D. 15-6-3) of C.C.P. Created in accordance with Article (3) of Regulation No. 546-2022 dated April 13, 2022.

[29] télécommunication sécurisé

[30] Alinéa (1° bis) de l'art. (D591) du C.P.P. modifié par le Décret n°2023-332 du 3 mai 2023 - art

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submit observations during this period, the case is essentially suspended. In other words, the prosecutor cannot decide to continue prosecution and determine the fate of the case, except in cases of conducting supplementary investigations under Article 393 of the Code of Criminal Procedure[31] or utilizing the institution of "attendance for early determination of guilt" as stipulated in Articles 495-7 to 495-13 of the Code of Criminal Procedure.[32]

Despite positive steps taken by the legislator towards access to files in the preliminary investigation process, the approach described earlier has faced criticism from some legal scholars. The prosecutor's decision to access the file undermines the effectiveness of these regulations.[33] While it is currently difficult to provide a precise evaluation of the French legal approach,[34] the existing regulations are characterized by clarity, yet it cannot be expected that this approach will be successful and efficient in advocating for the preliminary investigation process. The prosecutor is an adversary of the suspect and often does not provide them full access to the file, and if access is granted, it is partial without providing justifications for such limited access. Consequently, the prosecutor, who is responsible for proving the guilt of the suspect, sees the suspect as their adversary and takes on the duty to safeguard the efficiency of the preliminary investigations. This situation leaves the future of this approach uncertain and murky. Additionally, the prosecutor can release the file to the suspect at the end of the preliminary investigation process; thus, the legislator explicitly states that "**at any time during the preliminary investigation process**[...]". Therefore, this access will not provide much benefit to the suspect.[35]

Due to the passive role and initiative-taking function of the prosecutor in this scenario, the legislator has granted the suspect the right to request access to the case file if certain conditions are met. If the request is denied, the suspect can object to it. Consequently, the suspect assumes an active role in this regard.

Access to the file upon the suspect's request

Mr. "Yannick Capdepon" has presented a unique analysis of the guarantees of the defense rights of the private parties in the criminal case in his doctoral thesis entitled "A step towards a general theory of defense rights"[36]. He has defined "Defense guarantees" as follows: "what gives the litigant the ability to **support** the claims and demands presented to the judge or oppose them".

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[31] Art. (393) du C.P.P. modifié par la LOI n°2020-1672 du 24 décembre 2020 - art. 26.

[32] Alinéa (2) du (III) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[33] Cédric Porteron, op. cit., disponible sur le site: https://www.actu-juridique.fr/penal/la-nouvelle-enquete-preliminaire-ou-lart-de-donner-et-retenir/

[34] Article (2-77) of C.C.P. Regarding the access to the file, it came into force only in the case of investigations that started from the date of publication of the said law on December 24, 2021.

[35] François Molins, «Le secret dans l'investigation et l'instruction», Titre VII, Éditions Conseil constitutionnel, N° 10, avril 2023, p. 48.

[36] «Essai d'une théorie générale sur les droits de la défense»

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He adds: "Garanties de défense aim at empowering the private parties of the criminal case to support or oppose the claims and demands of the subject of the proceedings." According to Mr. "Capdepon", the active participation of the private litigants in the course of criminal proceedings through mediation provides the optimal protection of their defense rights and leads to the establishment of a balancing.[37]

In French law, the legislator has given importance to the empowerment of the suspect and the complainant during the initial investigation process, but to establish a balancing between the effectiveness of the investigation and guaranteeing the defense rights of private parties, it has followed a middle approach. Clause (2) of Article (77-2) of C.C.P. provided that: "If at least one of the following conditions is met, any person against whom there is one or more reasonable grounds[38] to be suspected of committing or starting to commit a crime as an author or accomplice of a crime punishable by imprisonment,[39] can receive confirmation from the prosecutor through a written letter or by announcing to the court office, upon receiving the receipt,[40] can request information about the case to adjust his observations:

1. If the person was interrogated within the framework of an open hearing or while under observation and more than one year has passed since the interrogation;
2. If the inspection has been carried out at the person's place and more than one year has passed since the inspection;
3. If the presumption of innocence has been violated through mass media. This paragraph when the information has been disclosed directly or indirectly by the person or his lawyer or when the investigation is related to the events that are included in the articles (706-73) or (706-73-1) or in the jurisdiction of the combat prosecutor. with terrorism, it cannot be applied.[41]

Cases of access to the file upon the suspect's request

After the announcement of the end of the "Outreau case" and the acquittal of many of the defendants who were prosecuted, the weakness of guaranteeing the defendant's right to self-defense and the increase in judicial errors have been revealed. Consequently, the legislator had to revise the regulations regarding access to the file. As can be seen from the above provisions, the legislator has established a dual condition in the first and second cases, which includes the performance of certain actions and the passing of a certain period. Preliminary measurement is

[37] Capdepon, Yannick, op. cit., pp. 120-123.

[38] Plausible reason

[39] Crimes of the opposite type are not included in these regulations.

[40] "Lettre recommandée avec demande d'avis de réception ou par déclaration au greffe contre récépissé"

[41] Alinéa (1) du (II) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

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limited to two modes; Interrogation and inspection.[42] The interrogation must be done in the framework of an open hearing[43] or while being under observation. Though, the period that makes it possible for the suspect to submit a request for access to the file, must be more than one year from the date of the aforementioned actions. Therefore, failure to use the aforementioned measures or delay in using them means a delay at the beginning of the one year, and accordingly, the possibility of accessing the file is delayed.

In the third case, the legislator has provided special support for the presumption of innocence and has foreseen the necessity of setting up arbitration in case of violation of the presumption of innocence using mass communication. It seems that the legislator has paid attention to the fact that the violation of the presumption of innocence affects the rights of the suspect, and to strengthen these rights, the case should be provided to the suspect so that he can prove the falsehood of mass media claims. Having said that, the legislator has foreseen two restrictions for this case. The first limitation is on the source disclosure of information and the second limitation depends on the nature of the alleged crime. Therefore, if the information disclosed by the person or his lawyer was published directly or indirectly, or the criminalité organisée was related to organized crime or within the jurisdiction of the anti-terrorism prosecutor, the presumption of innocence is not important and the possibility of accessing the file is lost.

Undoubtedly, it is difficult to prove the release of information by a person or his lawyer; because the possibility of self-harm[44] to access the file is unthinkable. Nevertheless, the designers of these regulations have considered the possibility of disclosure of information by a person or his lawyer as possible, but they have considered it difficult to prove it.[45] This desire to neutralize the exemption from these regulations is also reflected in the regulations approved in 2022.[46]

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[42] The purpose of this text is to carry out these actions; without being useful and efficient for discovering the crime and the truth. In other words, even though no reason has been discovered and suspicions have not been confirmed after conducting the interrogation and inspection, these measures are considered valid for the beginning of the deadline. What is important is that the initial investigation should last more than one year from the date of carrying out the aforementioned actions.

[43] The purpose of this text is to carry out these actions; without being useful and efficient for discovering the crime and the truth. In other words, even though no reason has been discovered and suspicions have not been confirmed after conducting the interrogation and inspection, these measures are considered valid for the beginning of the deadline. What is important is that the initial investigation lasts more than one year from the date of the aforementioned actions.

[44] auto-atteinte

[45] Lardet, Florence, «Enquête préliminaire : une réforme peu adaptée aux investigations financières», AJ pénal 2022, pp. 14 et s.

[46] The legislator has provided this condition in order to prevent abuse of these regulations. In our opinion, the approach of French law is admirable from this point of view.

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Therefore, it is stipulated that the submitted application[47] must contain all the documents; especially - and if possible - a copy of audio or audio-visual works that prove the violation of the presumption of innocence using public communication. Of course, the prosecutor can ask the applicant for additional documents that prove this violation.[48] It seems that the prosecutor has the authority to determine the connection of a person or his lawyer with the disclosure of information and even though the competitor is considered a suspect, he makes a judgment in this case.

In this case, the access request is submitted to the prosecutor under whose supervision the preliminary investigation is conducted, and if this information is not known to the person, it can be sent to the prosecutor of the court in whose jurisdiction, one of the interrogation measures in the framework of the open hearing or in when he was under observation or the inspection was carried out by a person. The said prosecutor without delay refers it to the prosecutor who supervises the preliminary investigation.[49]

Therefore, if the person being prosecuted makes a request to the prosecutor based on one of the aforementioned three cases, and the prosecutor has one or more reasonable grounds for suspecting the applicant of committing or starting to commit a crime as an auteur or complice whose punishment is deprivation of liberty, if he recognizes that it is deprivation of liberty and decides to accept this request, this person or his lawyer will inform him that the case is in the possession of a lawyer,[50] and if he does not have a lawyer, he will provide a copy of the case to the person to consider the observations according to the conditions and prepare the conditions mentioned in the first subparagraph of the second paragraph of the article (2-77) of PPC.[51] It is worth mentioning that in the new French regulations if the request for access to the file is submitted by a lawyer, he can send it to the electronic address of the judicial body or its competent

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[47] This request will not be accepted until the preliminary investigation is completed and the meeting minutes are sent to the prosecutor according to Article (19) of the Criminal Code. France is included in the case by the prosecutor. Sub-paragraph (3) of paragraph (1) of Article (D.15-6-3) of C.P.P. Created in accordance with Article (3) of Regulation No. 546-2022 dated April 13, 2022.

[48] Alinéa (2) du (I) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[49] Art. (77-3) du C.P.P. modifié par la LOI n°2021-1729 du 22 décembre 2021 - art. 2.

[50] As mentioned earlier, according to sub-paragraph (1) of paragraph (3) of Article (D. 15-6-3) of the Criminal Code, access to the file can be done by any means; Either visiting the documents department at the courthouse, or getting a digital copy. In this last case, the provisions of the article (D. 593-2) of C.P.P. is applicable. Therefore, this version may be prepared only by lawyers using the "automatic copying" method.

[51] Alinéa (2) du (II) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

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department using the "safe remote communication" method.[52]

To increase the effectiveness of these regulations, the legislator has obliged the prosecutor to decide within one month after receiving the request or receiving additional documents,[53] with the justifications included in the file,[54] otherwise, silence means the rejection of the access request. Of course, the requesting person can object to the decision to reject the request before the public prosecutor[55], and the public prosecutor is obliged to decide within one month from the date of referral with justified reasons that are reflected in the file.[56] It seems that it would have been better if the legislator did not consider the silence as a rejection of the request. It is surprising that the legislator, by predicting such a sentence, has removed the duty of citing justifications by the prosecutor. According to these regulations, the prosecutor can ignore the access request and thus challenge the objection to this decision before the public prosecutor. Mentioning justifications in all appointments related to the person being prosecuted and communicating them is considered one of the most important elements of arbitration, but in this regard, the legislator has exempted the prosecutor from mentioning justifications. An issue that harms adversarial principle in general and file access in particular.

During this period of one month after receiving the request, the prosecutor cannot decide to continue the prosecution and determine the fate of the case; except in the case of conducting supplementary investigations, the subject of Article (393) of the CPP or adopting the institution of "presence for early detection of guilt" prescribed in articles (495-7) to (495-13).[57] Of course, it should be noted that the legislator has not determined the assignment of the case in the period between the request to submit additional documents and the submission of these documents.[58]

Objection to the prosecutor's orders[59] can be done through a written letter and receiving confirmation, or by announcing to the court office with a receipt, or, if it is sent by a lawyer, it can be sent to the electronic address of the judicial body or its competent department, using the "safe

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[52] Alinéa (1° bis) de l'art. (D591) du C.P.P. modifié par le Décret n°2023-332 du 3 mai 2023 - art. 5. Avi Bitton, (2022), «La reproduction du dossier pénal», disponible sur le site: https://www.village-justice.com/articles/reproduction-dossier-penal-decret-avril-2022,42536.html

[53] Alinéa (II) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[54] This appointment must be in writing and communicated to the suspect by any means. Clause (2) of Article (D. 15-6-3) of CPP created in accordance with Article (3) of Regulation No. 546-2022 dated April 13, 2022.

[55] Le procureur général

[56] Alinéa (3) du (II) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[57] Alinéa (4) du (II) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[58] In fact, this period may take several months. Therefore, the legislator should have paid attention to this issue, since the request to provide these documents is subject to the access request.

[59] All objections stipulated in Article (77-2) of CPP is done according to this method.

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remote communication" method, according to the provisions of Article (D. 591) of the C.P.P.[60] When a person complains to the public prosecutor due to the prosecutor's failure to respond within one month, he informs the public prosecutor by the same means immediately after the expiration of this period.[61] If the prosecutor accepts the request for access to the file or the request to perform some actions, this objection will be dismissed.[62]

It should be noted that the criminal case is always progressing, but the legislator has not specified the number of access to the case. Does the mere issuance of a one-time access permit enable access to the file for the entire initial investigation process? Or should the person in question submit a new request if the case progresses?[63] In our opinion, establishing the adversarial principle in a better way requires information about the progress of the case. Therefore, the legislator should pay attention to this issue and anticipate the causes of information about the progress of the case as much as possible, and at the same time, the efficiency of the preliminary investigation should not be harmed. Consequently, access to the file can be granted in light crimes and crimes made it easier

Conditions and limitations of access to the file upon the suspect's request

Generally, requesting access to the file by the suspect does not mean the actual fulfillment of this request or having the right to object to its rejection; because providing the file is subject to the evaluation of the prosecutor, who can postpone its acceptance or, if agreed, limit the scope and framework of access.[64] The legislature has given this authority to the prosecutor to gather enough evidence to support the efficiency of the initial investigation. Consequently, the legislator has stipulated that for a maximum period of **six months** from the date of receipt of the request, the prosecutor can refuse to place all or part of the file if the preliminary investigation is still ongoing or if access to the file involves the risk of reducing the effectiveness and efficiency of this investigation. In the initial investigations related to crimes or misdemeanors organized or within the jurisdiction of the anti-terrorism prosecutor, the period of six months is increased to **one year**.[65] Of course, the prosecutor's decision must have justifications; Without these reasons revealing the

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[60] Alinéa (1° bis) de l'art. (D591) du C.P.P. modifié par le Décret n°2023-332 du 3 mai 2023 - art. 5.

[61] Either in connection with accessing the file, or in connection with performing some actions.

[62] Alinéa (V) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[63] Jean-Baptiste Thierry, (2019), «L'information des droits de la défense dans le procès pénal», disponible sur le site: https://www.actu-juridique.fr/civil/linformation-des-droits-de-la-defense-dans-le-proces-penal/

[64] Emmanuel Daoud et autres, (2022), «La loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire a été publiée au Journal officiel du 23 décembre. Elle porte notamment des dispositions relatives aux grands principes de la procédure pénale», disponible sur le site: https://www.dalloz-actualite.fr/flash/loi-pour-confiance-dans-l-institution-judiciaire-dispositions-relatives-aux-grands-principes-d#.ZCNx_3aZNPZ

[65] Alinéa (3) du (II) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

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factors affecting the effectiveness of research.[66]

In addition, the legislator has given the authority to the prosecutor to withhold some of the case documents due to the possibility of putting pressure on the victims, other related persons, their lawyers, witnesses, investigators, experts, or any other person who intervenes in the proceedings, do not provide it to the applicant.[67] In this case, the list and nature of the mentioned documents will not be known to the person.[68] Though this approach may have a negative effect on the quality of observations and make it difficult to prepare it in a certain time, with these words, this admirable approach that considers the effects and consequences and possible risks of this access is an indicator of the foresight of the legislator. For this reason, in some ambiguous and complex crimes such as serial murder, discovering the truth may be prioritized over the possibility of accessing the file.

The significant point is that if the initial investigation is related to several suspects and the prosecutor accepts the request for access to the file submitted by one of them, he is not obligated to grant similar rights to other suspects; unless the possibility of accessing the file is deemed possible and appropriate[69] by the decision of the prosecutor.[70] Consequently, the prosecutor will be able to provide the case to some suspects and not to other applicants. Likewise, the prosecutor is not required to inform other suspects who have not been granted access. Of course, these provisions do not prevent the possibility of making the case available with the authority and permission of the prosecutor. In other words, the prosecutor can use the capacity of paragraph (1) of the article (2-77) to provide the case to other suspects; even though they have not submitted a request or their request has not been accepted; provided that the legal conditions are met.[71]

Lastly, the plaintiff's access to the file is secondary and subject to the suspect's access. In other words, when the suspect submits a request for access and the competent authority accepts it, the complainant will also gain access to the file, but if the suspect has not submitted a request for access or his request has not been agreed to, the complainant cannot independently submit an

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[66] Alinéa (3) du (II) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[67] Alinéa (5) du (II) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[68] Alinéa (3) du (II) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[69] possible et opportun

[70] Alinéa (VI) de l'art. (D15-6-3) du C.P.P. créé par le Décret n°2022-546 du 13 avril 2022 - art. 3.

[71] It is pointed out that sub-paragraph (1) of paragraph (1) of article (2-77) of C.P.P. provides: "At any time during the preliminary investigation, the prosecutor may, when he determines that this decision does not harm the efficiency of the investigation, inform the accused person, the victim or their lawyers that a copy of all or part of the case is available to their lawyers. Or if they don't have a lawyer, it will be given to them, and they have the opportunity to provide observations that they consider useful."

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access request. Therefore, the plaintiff has a passive role in this process,[72] unlike the role of the suspect, whose role is active. Therefore, according to French law, when access to the file is made upon the request of the suspect, the victim, if he has filed a complaint, is informed by the prosecutor of the rights provided for in the case of access to the file by the decision of the prosecutor - according to the same conditions that the requesting person (main) is entitled.[73] Therefore, if the victim of the plan has not filed a complaint, he will not be included in this mode of access.[74] Undoubtedly, the symmetry between the suspect and the plaintiff in enjoying the rights and guarantees by observing their position plays a significant role in establishing the balancing of the rights of the parties.

Mandatory access to the file

If the initial investigation - as it can be seen from its initial nature - is short-term and does not include coercive measures and deprivation of freedom, the issue of access to the file will not be raised. In other words, if the preliminary investigation process does not lead to the extension of the fundamental rights and freedoms of individuals and the fate of this process is determined within a reasonable period, it may be postponed to the preliminary investigation process; until the initial investigation process is not delayed and the parties involved in unnecessary and documented negotiations are not weakened,[75] but because the detention under surveillance, which infringes on the suspect's freedom of movement, takes place at this stage and also the investigation stages may take too long; regardless of the conditions for closing or referring the case, the legislator has given importance to guaranteeing the suspect's right to defend himself through access to the file.[76]

Access to the file due to the prolongation of the initial investigation process

Handling charges within a reasonable period is foreseen as a strategic principle in French law.[77] In French law, the period of preliminary investigation; Even if it has been done in the context of Enquête de flagrance crimes,[78] cannot exceed two years from the first free hearing, keeping

[72] But in the case of access by the decision of the prosecutor, both the role of the suspect and the role of the victim are passive.

[73] Alinéa (III) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[74] The prosecutor can use the capacity of paragraph (1) of article (2-77) and provide the case to the victim; Although the complaint was not accepted by the victim.

[75] Frédéric Debove, François Falletti, Iris Pons, Précis de droit pénal et de procédure pénale, 9 éd., PUF, 2022, p. 812.

[76] Alain Bollé, (2021), «L'inégalité des armes dans l'enquête préliminaire», disponible sur le site: https://www.village-justice.com/articles/inegalite-des-armes-dans-enquete-preliminaire,38704.html

[77] Alinéa (5) du (III) de l'art. préliminaire du C.P.P. créé par la Loi n°2000-516 du 15 juin 2000 - art. (1) JORF 16 juin 2000 et modifié par la Loi n°2021-1729 du 22 décembre 2021 - art. 3.

[78] Enquête de flagrance

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under observation or inspection of the person.[79] Having said that, the duration of preliminary investigations related to crimes or misdemeanors organized or within the jurisdiction of the anti-terrorism prosecutor will be increased from two years to three years.[80] In some circumstances, these deadlines can be extended for a certain period.[81] Of course, any research action after the expiration of these deadlines is considered null and void.[82]

Under the influence of some criminal proceedings; including "The Outreau case", which dragged on for many years and aroused public opinion, the legislator has paid attention to this matter and has used the Adversarial Principle to prevent the destructive effects of prolonging the initial investigation process without determining the fate of the case. Because people who have been accused for a long time and the prosecutor has failed to prove their guilt, have the right to prove their innocence through checking the authenticity of the evidence. For this reason, the legislator has predicted a deadline after which access to the file will not be optional, but will become a binding action. Therefore, preliminary investigations on people who have been subjected to interrogation measures for more than two years in the framework of an open hearing or during surveillance or inspection, and against whom one or more reasonable grounds for being suspected of committing or starting the commission of a crime as a steward or deputy of the crime, without the prosecutor providing the case to them and the plaintiff, it cannot continue; if the initial investigation related to crimes or misdemeanors organized or within the jurisdiction of the anti-

[79] Alinéa (1) de l'art. (75-3) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[80] Alinéa (5) de l'art. (75-3) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[81] Paragraphs (2, 4, and 5) of Article (75-3) of C.P.P. France stipulates as follows: 2- Nevertheless, after the expiration of the two-year period mentioned in the first paragraph, with the written permission of the prosecutor and the justified reasons included in the file, the preliminary investigation can be extended once for a maximum of one year. 4- Exceptionally After the expiration of the three-year period mentioned in the third paragraph, the prosecutor can decide to extend the investigation according to the criteria stipulated in paragraph (5) of Article (77-2) for a period of one year, which can be extended once. This decision must be in writing 5- If the initial investigation is related to the crimes or misdemeanors mentioned in articles 706-73 or 706-73 or within the jurisdiction of the anti-terrorism prosecutor, the period of two years and one year. In this article, it is increased to three years and two years respectively.

[82] Alinéa (3) de l'art. (75-3) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

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terrorism prosecutor,[83] the period of two years will be increased to three years.[84] In these cases, the entire file must be provided to the beneficiaries and the lawyer must be called at least five working days before each hearing.[85]

According to what was said, after a two-year or three-year period, as the case may be, from the date of carrying out these actions,[86] the preliminary investigation can only be continued against the suspect and for the plaintiff in a adversarial manner; although they have not submitted a request.

In this regard, three points should be noted: First. The legislator has limited mandatory access to two cases but has excluded the violation of the presumption of innocence from the scope of mandatory access. Second. The legislator has not ignored the symmetry of the plaintiff with the suspect in enjoying the right of access to the file and has considered the necessity of the plaintiff's access to the file. Third. The entire case must be provided to the beneficiaries, and the prosecutor cannot in any way provide them with some papers and documents of the case.

However, it seems that these regulations are not without difficulties; because it is possible to get rid of them and prevent access to the file; such as carrying out peripheral research measures and outside the scope of the mentioned cases; in order not to start the two years with delay, and also to delay the implementation of the aforementioned measures to start the two-year or three-year period - as the case may be. All these cases cause delays and proceedings until finally, access to the file is not possible. The time factor that causes reconciliation provides the opportunity to get rid of this principle. Similarly, the lack of a real mechanism to respect the right of access to the file can challenge the effectiveness and efficiency of the newly granted rights.[87] In this context, the legislator should postpone the starting point of the deadline to the beginning of the initial investigation process or any action that is not in the hands of the prosecutor.

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[83] It is worth noting that in the light of the amendment law approved in 2021, the legislator has waived the provision of a special period for organized crimes and terrorism crimes, as well as determining the papers and documents of the case subject to this access. Therefore, the legislator revised this law in 2023 and fixed the shortcomings of the previous law.

[84] According to Article (2) of Article (60) of the Amendment Law No. 1059-2023 dated November 20, 2023, these regulations will be applied from the time of publication of the said law for the preliminary investigations that started on December 23, 2021.

[85] Alinéa (V) de l'art. (77-2) du C.P.P. modifié par la LOI n°2023-1059 du 20 novembre 2023 - art. 6 (V).

[86] If the period of one year has passed, the provisions of clauses (2, 3, 4) of article (2-77) of C.P.P. France applies and access to the file falls under the mode of “access to the file at the request of the suspect”.

[87] Cédric Porteron, op. cit., disponible sur le site: https://www.actu-juridique.fr/penal/la-nouvelle-enquete-preliminaire-ou-lart-de-donner-et-retenir/

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Access to the file in the process of keeping under observation

The institution of custody under observation in French law was created by bailiffs at the end of the 19th century in an informal way to ensure the presence of suspects before the competent judicial authorities. At that time, the judicial bailiffs used to observe the suspects without a judicial order, to ensure their presence before the competent judicial authority, and this authority was not documented by the law. Due to the weak efficiency of investigating judges and under the influence of the teachings of the investigative judicial system, in 1897, the legislator recognized the observation by judicial officers without providing the limits of this legal institution or guarantees for defense rights.[88] With the approval of the Criminal Procedure Law approved in 1957 and predicting a certain period for this institution, its position was established. Under the pressure of the European Court of Human Rights and condemning France for violating rights and freedoms in the process of keeping under observation,[89] the legislator has made several amendments to the law to guarantee the defense rights of the person under observation. To monitor the observance of the suspect's defense rights and to challenge the arguments of the opposing party, one of the most important of these guarantees is the study of some case documents in the custody process.[90]

Based on the current French regulations, custody under observation can be used for delit non-flagrant crimes[91] and misdemeanors as well as flagrant offenses and misdemeanors.[92] Regarding access to the file in this process, the legislator has indicated that the lawyer can, upon his request, from the minutes of the meeting in which the notification of the order to be kept under observation and the notification of the rights related to keeping under observation and the medical certificate is inserted, as well as the report of the hearing from his client. However, the lawyer cannot request to receive the minutes of the meeting or make a copy of it and can only express his opinion. If hearings and confrontations have been held according to the second paragraph of Article 63-4-2 or Article 63-4-2-1, the lawyer can also read the minutes of these meetings and confrontations.[93] Likewise, the person under observation can be informed of the mentioned documents or their copies.[94]

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[88] Loi du 8 décembre 1897 ayant pour objet de modifier certaines règles de l'instruction préalable en matière de crimes et de délits, JORF du 10 décembre 1897, p.6907.

[89] C.E.D.H., affaire TOMASI c. France, 27 Août 1992, n°12850/87.

[90] GELATO, Cynthia, «L'équilibre procédural lors de la phase préparatoire du procès pénal», Thèse de Doctorat, Aix-Marseille Univesité, École Doctorale Sciences Juridques et Politiques, Facukté de Droir et des Science Politique, 2019, pp. 115-120.

[91] Art. (77) du C.P.P. modifié par la LOI n°2014-535 du 27 mai 2014 - art. 3.

[92] Art. (62-2) du C.P.P. créé par la LOI n°2011-392 du 14 avril 2011 - art. 2.

[93] According to paragraph (4) of article (63-4-2) of the C.P.P. "If the prosecutor or the judge of liberties and detention has allowed the postponement of the lawyer's presence in the hearings or confrontations, he can also decide that the lawyer cannot be informed of the minutes of the hearing in the same period of time."

[94] Art. (63-4-1) du C.P.P. modifié par la LOI n°2024-364 du 22 avril 2024 - art. 32.

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Of course, the accessible papers and documents are mentioned exclusively. Furthermore, the legislator has not foreseen the possibility of access to these papers and documents for the victim or the plaintiff.[95] Unless the victim has faced the person under surveillance, in which case the victim's lawyer can be informed of the minutes of the hearing according to the aforementioned provisions.[96] Therefore, in French law, during the custody process; whether in flagrant offenses or non-flagrant offenses, the person under observation or the lawyer can have access to certain documents according to the above explanations.[97]

The question that is raised in this context is whether the prosecutor in the custody process can refer to paragraph (1) of article (2-77) of the Criminal Procedure Code, which authorizes the prosecutor to provide all or part of the case to the suspect or his lawyer; in such a way that the suspect or his lawyer, in addition to reading the minutes of the meeting, is ordered to keep under observation the minutes of the hearing and the medical certificate, giving access to other documents and papers of the case?

It seems that in **delit non-flagrant**, the legislator has not determined the task. Nevertheless, in our opinion, mandatory access cases do not preclude the application of non-mandatory access cases. In other words, in delit non-flagrant, the prosecutor can use clause (1) of article (77-2) of the Criminal Procedure Code to apply to the suspect even if he is under surveillance. It may be possible to go further and stipulate that to comply with the requirements of Article (5) of the European Convention on Human Rights, the prosecutor must provide the case to the suspect as much as possible; to have a reasonable opportunity to present his statements. In **flagrant offense**, the legislator has stipulated that if a person is released after the end of the period of keeping under observation without a decision by the prosecutor regarding the determination of the fate of the public lawsuit, the provisions of Article (2-77) will be given to him.[98] Consequently, the mandatory and non-mandatory access cases of Article (2-77) can also be applied in the flagrant offense; provided that the suspect has been kept under observation his release order has been issued and the fate of the case has not been determined.[99]

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[95] François Molins, op. cit., p. 47.

[96] Alinéa (3-4) de l'art. (63-4-5) du C.P.P. créé par la LOI n°2011-392 du 14 avril 2011 - art. 9.

[97] It is worth mentioning that in organized crimes, Article (105-706) of the Criminal Procedure Code (C.P.C.) France has stipulated: “Every person who was detained in connection with organized crime has the right to be informed after six months of this action and if the prosecutor has decided to continue the investigation.” In this case, the person's lawyer can read and review the case before each new session; without receiving a copy of it.
Art. (706-105) du C.P.P. modified by Ordonnance n°2019-964 du 18 septembre 2019 - art. 35 (VD).

[98] Alinéa (2) de l'art. (63-8) du C.P.P. créé par la LOI n°2011-392 du 14 avril 2011 - art. 11.

[99] It should be noted that the article (6-803) of Criminal Procedure Code (C.P.C.) of France stipulates: “Any suspect or wanted person who is subject to deprivation of liberty pursuant to the provisions of this law shall, when informed of this action, be presented with a document in which, in simple and easy terms and in understandable language, the rights to mention the following that he will benefit

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Conclusion

The legislator has followed a logical approach to uphold a balancing between the right to self-defense and the rights and interests of the other parties; in such a way that, while highlighting the need to observe the confidentiality of investigations, he has also paid attention to the guarantee of defense rights. To offer maximum protection for conflicting rights and interests, it has foreseen various cases for access to the file, which sometimes depends on the freedom of action of the prosecutor and sometimes has a mandatory aspect.

In the current French law, in special crimes and in cases of possible pressure on people involved in the initial investigation, the mechanisms of delaying access to the file for a certain period and access to the file are used partially. The legislator has not ignored the symmetry and contrast between the plaintiff and the suspect in benefiting from the right to access the file according to their position and situation. These mechanisms pave the way to attain the balancing of the rights of the parties in criminal litigation.

If the initial investigation process is prolonged and after two years have passed in ordinary crimes and three years in organized crimes and misdemeanors or terrorism, from the date of carrying out these interrogation measures in the framework of an open hearing or during surveillance or inspection in person, the preliminary investigation can only be continued against the suspect and for the complainant if the entire file has been provided to them; although they have not submitted a request.

In the case of access to the file in the custody process, the lawyer can, upon his request, s/he should be informed about the minutes of the meeting in which the notification of the order to be placed under observation and the notification of the rights related to the observation and the medical certificate, as well as the minutes of the hearing from his or her client.

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from during the proceedings **according to the provisions of this law**: [...] 5- The right to access the documents in the file [...] if the document is in a language that the person understands, is not available, he must be informed orally of the rights stipulated in this article in the language he understands. The notification is recorded in a meeting report. Then a copy of the document in the language he understands is provided to the person without delay.”

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