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3. Prosecution in adversarial and inquisitorial procedures: the weakening of professional autonomy

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I. INTRODUCTION

This chapter compares the ways in which the prosecution function is evolving in England and Wales and in France as examples of two jurisdictions with contrasting procedural traditions and cultures. Faced with common imperatives around the avoidance of trial and trends in managerialism and the securitization of criminal justice (Hodgson, 2020), prosecutors have seen significant portions of their work now delegated to unqualified associates through standardised and semi-automatic procedures that favour quantitative rather than qualitative measures of success. In France, greater powers of investigation and case disposition appear to strengthen prosecutorial authority, but as in England and Wales, the systematic routinisation of procedures reflects a kind of banalisation of justice, and for the prosecutor, a loss of professional autonomy. These changes sit within a broader shift away from judicial authority in a way that has weakened due process safeguards and impacted prosecutors as central players and gatekeepers to the criminal process.

Arrangements for the prosecution of crime vary across jurisdictions, reflecting not only the differences in legal procedural form and wider criminal justice cultures and practices, but also the status of prosecutors as lawyers or judicial officers; whether they are elected, appointed or career trained; and the ways in which the roles and responsibilities of other legal and political actors are allocated (Tonry, 2012; Langer and Slansky, 2017). In inquisitorially-rooted jurisdictions, the prosecutor is typically career trained, enjoying a quasi-judicial status and a degree of supervisory power over the police investigation. Criminal justice in these more inquisitorial procedures rests on a state-centred, rather than party driven model, with the result that much pre-trial authority is vested in the prosecutor, and the defence role is defined in relatively narrow terms. In England and Wales and much of the common law world, criminal justice is understood to function in a more adversarial way, with the parties, rather than a single individual responsible for the investigation, selection and presentation of evidence. Whilst prosecutors are not defined in wholly partisan terms in these procedures, they generally lack authority over the police, placing greater responsibility on the defence to function as a check on the prosecution case as well as an advocate for the accused.

The practices of inquisitorial and adversarial type procedures are a long way from the ideal-types of judicial investigation or battling courtroom adversaries – in practice, all prosecutors ultimately depend heavily on the police investigation and fully contested trials are a rarity. Similarly, despite differences in professional training and status, and the scope of their role, prosecutors in both jurisdictions share common duties in reviewing evidential sufficiency or presenting the prosecution case at court. However, differences in the structures of criminal justice authority and prosecutorial responsibility are important and continue to have explanatory force, especially in understanding policy shifts and reform, and their impact on core procedural values. In this chapter, I consider the contrasting ways in which common objectives and criminal justice challenges play out through the everyday practices and
organisation of public prosecution in each jurisdiction, and the wider implications for individual rights.

The criminal justice systems of England and Wales and France have both experienced the rise of ‘law and order’ politics in the late 20th century (Loader, 2006; Colson and Field, 2011). This has seen more punitive approaches to sentences as well as wider police powers and a seemingly ever-expanding criminalisation of behaviours (Hodgson and Soubise, 2016a). More recently, trends in prevention and securitisation (Ashworth and Zedner, 2008; Zedner 2009; Hodgson, 2013; Jeanclos, 2016) have underpinned more repressive measures not only in the treatment terrorism, but also in the policing of various forms of anti-social behaviour (Crawford, 2008), and the use of penal measures in the management of risk (Hodgson, 2021: 85-7). Most pervasive of all, however, are the forms of bureaucratic managerialism that privilege the efficient disposal of cases (Hodgson, 2020: 62-79), in what has been described as the McDonaldization of criminal justice (Bohm, 2006). In order to avoid trial or even prosecution, cases are fast tracked, admissions are incentivised, and lawyers are required to assist in managing the accused away from any contesting of the charges.

Sitting at the centre of the criminal process, spanning pre-trial and trial roles, the public prosecutor is implicated in all aspects of this efficiency driven managerialism. Looking at the changing role of the prosecutor close up, the two systems appear to be moving in opposite directions, with French prosecutors gaining new powers once exercised by the investigating judge, the juge d’instruction, while the Crown Prosecutor sees portions of her authority cede to the police. But this reveals only a part of the picture. If we step back and take a broader view, we see similarities in the responses of both jurisdictions to the demands of managerial efficiency: the weakening of due process safeguards in favour of less formal and often more crime control-oriented measures; judicial authority diminished in favour of executive power. Refracted through different procedural lenses and ways of allocating criminal justice responsibility, however, these trends and ambitions play out quite differently.

In both jurisdictions, the drive for efficiency militates against the cost, time and uncertainty of trial. As the centre of gravity shifts further towards the pre-trial, prosecutors are expected to play a key role in case disposition, charged with avoiding contested trials and even prosecution, in favour of alternative modes of case disposal. The greater reliance this places upon prosecutors to satisfy the requirements of due process outside the judicial process might suggest increased power and autonomy as a criminal justice actor, but the experience on the ground, in a climate of decreasing resources, is very different. In different ways, prosecutors in both jurisdictions have experienced increasingly standardised ways of working to facilitate the routine and systematic delegation of the growing number of core tasks. However, rather than freeing up more time for prosecutors to engage with serious and complex investigations and case preparation, the quantitative focus of this efficiency model often favours the processing of minor offences that more easily demonstrate positive results. The prosecutor’s professional autonomy has been eroded and whilst giving the appearance of satisfying due process requirements, we see a facsimile of justice in which the safeguards of prosecutorial review and judicial oversight are increasingly absent. This has implications for the rights of accused persons and for the fairness and independence of the criminal justice system – implications that become more urgent as criminal justice’s preoccupation with agendas of prevention and security continues to grow.
II. THE CONTINGENT NATURE OF PROSECUTION AUTHORITY

A. The Crown Prosecutor

Whilst prosecutors share many functions in common around the prosecution of criminal cases at court, the precise scope of their role and authority varies across jurisdictions, as does their professional and constitutional status. In England and Wales, the public prosecutor office is a relatively recent creation compared with most European jurisdictions – the Crown Prosecution Service (CPS) being established under the Prosecution of Offences Act 1985, headed up by the Director of Public Prosecutions (DPP). The Crown Prosecutor is a lawyer by training and the rationale in creating the CPS was to establish a national prosecution service independent of the police. Under previous arrangements, prosecuting solicitors were employed by local police forces and the resulting lawyer-client relationship meant that neither the police decision to prosecute, nor the offence prosecuted, could be challenged by prosecuting lawyers acting for the police. This resulted in widespread variations in prosecution practices in different parts of the country and the prosecution of weak cases. The discretion whether to prosecute and with what offence now rests with the independent Crown Prosecutor, working within the Code for Crown Prosecutors alongside a range of policy guidance designed to ensure the uniform treatment of certain types of offences.

In contrast to many European jurisdictions, the separation of the prosecution from the police investigation is a core principle underpinning the independence of each and whilst the police are encouraged, and in some instances required, to seek advice on charging decisions from the CPS, the prosecutor has no supervisory authority over officers or the conduct of the investigation. She may suggest further or alternative lines of enquiry, but the Crown Prosecutor has no power to require this, with the result that it may be difficult to escape the police construction of the case in many instances. In this way, although the police and prosecution are functionally separate and independent of one another’s roles, the Crown Prosecutor remains dependent on the information from the police investigation both in her decision-making and in the assembly and presentation of the prosecution case.

The police also play an important role as gatekeepers controlling the flow of cases to the CPS. Despite the recommendations of reviews and inspectorates to establish the Crown Prosecutor more firmly at the centre of the pre-trial phase (Narey, 1997; Glidewell, 1998; HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, 2015, 2017), power has shifted away from the prosecutor in early decision-making, with charging decisions reverting back to the police in more than three quarters of cases. This has significant consequences for the flow of cases into the criminal process and the extent to which police investigations are subject to prosecution scrutiny and review, as where officers determine not to bring any criminal charge, the file stops there and is never passed to the CPS. Although presented as an efficiency measure to speed up the processing of charging decisions, the politics of this reform, sponsored by the Home Secretary rather than the Justice Minister, show the dominance of executive power within the justice arena. This is important in determining the shape and direction of legal reform, but it also risks a short sightedness around the wider implications of shifts in police power. Impacting directly on the authority of the CPS, this
change undermines repeated recommendations to strengthen the prosecution function as an independent and integral part of the pre-trial process.

The dependency of the CPS on the police construction and presentation of the evidence also has important implications in assessing the strength of the evidence for prosecution, and in the prosecutor’s responsibility around disclosure of material that might assist the defence. Disclosure is a crucial part of ensuring a fair trial in which all relevant evidence is heard and scrutinised, especially in a more adversarially-rooted system where there is no independent pre-trial judicial investigation or scrutiny of evidence. The failure to disclose, and even the deliberate suppression of this material has been the cause of miscarriages of justice over many decades and continues to be so. The defence has neither the resources nor the authority to investigate on the scale of the police, and this imbalance is recognised in England and Wales by the CPS duty to consider all reasonable lines of inquiry – whether pointing towards or away from the suspect’s guilt – and more crucially, to disclose evidence relevant to the defence or which might undermine the prosecution case. Although phrased in neutral terms, this does not equate with the more inquisitorial model, in which investigation is understood to be directed at exculpating as well as inculpating lines of enquiry. The prosecutor’s duty here concerns only the review of evidence already gathered, rather than informing the process of investigation itself. However, the CPS are hampered in their duty to disclose by the police compilation and presentation of evidence schedules in ways that mean that prosecutors are aware of the broad nature, but not the precise content, of the items of evidence listed. This impairs their ability properly to scrutinise evidence, to provide an independent check on police decision-making regarding disclosure, and so to ensure that the defence is provided with all of the material relevant to its case (Quirk, 2006; House of Commons Justice Committee, 2018).

Some 35 years on from the establishment of the CPS, the police-prosecutor relationship is not an easy one. The CPS is a different kind of public prosecution service from that which exists in France and many other European countries. It is headed up by a lawyer rather than a judicial officer, with a role that sits firmly in the post-investigation phase. Crown Prosecutors have been able to assert a degree of independence into the decision to prosecute, while the investigation remains wholly police territory. Furthermore, within the adversarially rooted tradition in England and Wales, it has proved extremely difficult to shift the culture of partisan investigation and prosecution to anything that approaches a more ‘Minister of Justice’ prosecution function. Prosecutors are neither part of the investigation effort, working alongside officers guiding or advising on the collection of evidence; nor have they the authority properly to oversee or direct the work of the police. They sit somewhere in the middle, still dependent on police practices and to an extent, police discretionary decision-making in relation to the degree of evidential oversight they are able to conduct and the decisions they make around prosecution. But even within their own service, Crown Prosecutors are hamstrung by limited resources and organisational mandates, as described further below.

**B. The procureur**

In France, the position is rather different. The French prosecutor, the *procureur*, is a judicial officer (a *magistrat*) rather than a lawyer and far from being separated from the police investigation, she is responsible for its conduct and oversight. The *procureur* and police enjoy the same powers, and the prosecution phase is understood to begin along with the criminal
investigation, through to presenting the case before the court. As a judicial officer, her role is understood to sit within the inquisitorial tradition of judicial investigation and she is considered to be non-partisan, acting in the public interest in the search for the truth. Her role is central to every part of the criminal process from evidence gathering and charge, through to sentence. The most serious cases, such as murder, must be investigated by the juge d'instruction, but this is preceded by a police inquiry under the authority of the procureur. Even the choice of case pathway to instruction is within the control of the procureur: she decides the basis on which an investigation will proceed, ultimately determining whether it passes to the juge d'instruction or remains with the police and so the authority of the procureur.7

Although a judicial officer, the procureur’s status is different from those judges responsible for adjudication and the authorising of investigations that impact on the liberties of individuals – the trial judges and investigating judges known as the juges du siege (Hodgson 2005: 66-8). Organised within a hierarchy headed by the Minister of Justice, the procureur lacks the same guarantees of independence enjoyed by the juges du siege whose selection and career do not depend on political authority. The process of instruction, understood to be a more thorough and less police-dominated enquiry, has become increasingly marginalised over recent decades and it now accounts for less than five percent of criminal investigations. Much of the work that was the responsibility of the juge d'instruction, including intrusive investigation and surveillance measures that previously required the authority of a juge du siege as protector and guarantor of the rights of the individual, can now be carried out on the authority of the procureur.

Removing the guarantees of a more independent judicial investigation would seem to weaken the protection of those under investigation, but the French courts have continued to uphold the prosecutor’s independent status as a judicial officer, and so the legitimacy of the procureur’s growing responsibility in safeguarding the rights of the accused. This has been challenged in part by the European Court of Human Rights (ECtHR). For the purposes of Article 5 of the European Convention on Human Rights (ECHR), the procureur has been held not to be an independent judicial officer able to guarantee the rights of the accused: ‘[t]he judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority.’8 However, while this resulted in a juge du siege being responsible for detention decisions under Article 5 ECHR, the procureur’s overall status as a judicial officer with wide-ranging powers over individuals remains unchanged, and has been re-affirmed by the Conseil constitutionnel.9

In practice, the French prosecutor’s relationship with the police investigation is closer to that of the CPS than first appears. Although responsible for the conduct and oversight of some 95 per cent of investigations, the procureur’s involvement and influence in the majority of police investigations is minimal: supervision is largely retrospective and there is little capacity (or desire) for proactive direction. The nature and volume of the work of the procureur mean that she works very much alongside or after the police, ensuring the investigation produces a dossier of evidence that is legally coherent and ready for court. She is concerned with the form and output of the inquiry, rather than any engagement with the methods by which it is conducted and the impact this might have on the credibility or the scope of the evidence. The growth in the traitement en temps réel procedure (described below) has further accentuated
this dependence on the police. Decisions are made quickly, based on verbal police accounts and with little time for reflection or any testing out of the strength of the evidence. Unable to effect any real check on police power, like that of the Crown Prosecutor, the procureur’s decision inevitably replicates the police view.

In both jurisdictions, the independent oversight of criminal investigations has declined, but while this has been through a loss of prosecutor authority in England and Wales, in France, the reverse is true: the prosecutor has continued to see her powers and areas of responsibility grow. With its dual system of investigation, the move for greater speed and efficiency has resulted in authority and decision-making shifting away from the juge d’instruction, and into the hands of the procureur. This represents a weakening of independent judicial oversight, but the prosecutor’s judicial status as a magistrat and recent changes to the code de procédure pénale (CPP) characterising her role in terms mirroring that of the juge d’instruction, are understood to provide sufficient guarantees in the use of measures affecting the rights and liberties of the individual. But adjusting her role description in the CPP alone seems unlikely to change the nature of the prosecution function and her close alliance with the police. Nor does it provide greater reassurance of her independence when the status of the prosecutor remains under a hierarchy headed by a government minister. This shift also weakens the rights of the accused, which are greater in the instruction process, during which the person under investigation may request that specific acts of investigation be carried out; has access to the case file; and can only be questioned by the juge, in the presence of her lawyer. In procureur-supervised investigations the suspect is questioned by the police – now in the presence of a lawyer, but she has no access to the case file, nor any opportunity to request additional investigations prior to proceeding to trial. The principle of contradictoire,10 enshrined at the start of the code of criminal procedure, finds little expression in these procureur-supervised investigations and, in shifting more investigations away from the juge d’instruction, it is weakened further.

The measures put in place under France’s state of emergency following the 2015 Paris attacks weakened the pre-trial judicial role yet further by introducing new coercive police powers to search individuals and their homes without the need for any reasonable suspicion of criminal activity, just weak justificatory grounds based on vague concepts of dangerousness. These extensions of police power were exercised without the need for any judicial authority or oversight – not even that of the procureur.11 This arrangement is possible because of the two distinct authorities under which the French police operate, corresponding to their dual functions as judicial or administrative police (Hodgson, 2005:93-9). When investigating a crime and carrying out investigations that may infringe the liberties of individuals, officers operate as the police judiciaire under the judicial authority of a magistrat. But they also have an administrative role working in crime prevention and the maintenance of public order under the authority of the préfet, who is the head of the local political administration.12 Characterised as measures for the prevention rather than the investigation of terrorism, the powers put in place under the emergency regime were exercised by officers in their administrative rather than their criminal judicial function, avoiding the constitutional requirement for judicial authorisation or oversight for the protection of individual liberties. The only control to be exercised was that of the local political administration and there were widespread reports of the police abusing their authority: independent oversight bodies reported that police and gendarmes exercised their
powers in discriminatory and disproportionate ways, including for purposes unconnected to the
state of emergency (Amnesty International, 2016; Défenseur des droits, 2016). The procureur’s relationship with politics is another manifestation of her evolving role
and one that has put her at odds with judicial colleagues. Although separate from the local political administration, the procureur participates in the formulation of local criminal justice
policy through various forms of inter-agency co-operation. Her status as a magistrat is key, representing the justice arm of the state in the formulation of policies and strategies adapted to
local conditions. Formerly, such a role would have been frowned upon more deeply as compromising the independence of the parquet (the collective term for procureurs) by working alongside the préfet, but through a kind of secularisation of justice her part in local policy
making is more accepted. It does create some ambiguity in the professional identity of the procureur however, particularly in the eyes of the magistrature du siège who see this proximity
to executive power as the préfectoralisation of the prosecution function (Milburn et al, 2010: 137; Beaume, 2014: 27-30). This taps directly into procureur insecurities around the
weakening of her judicial status as a magistrat, a feature core to her independence and understanding of her own role. The recent strengthening of due process rights in response to ECtHR jurisprudence and European Union measures has contributed further to this insecurity
around professional identity. The promotion of more accusatorial values, it is feared, will
strengthen the defence role and correspondingly narrow the prosecution function to one of
accusation alone – reducing the procureur from public-interest-oriented judicial officer to
simple party in the case.

Comparing the two jurisdictions, the police are in some ways the net beneficiaries of
changes inspired by managerialist concerns in England and Wales, removing greater scrutiny
of investigations and decision-making around charge and prosecution from the CPS. In France
the shift in authority is towards, rather than away from, the prosecutor. But this is not a mirror
image of the position in England and Wales: in both jurisdictions, these changes are part of a
wider trend around pre-trial efficiency measures and a weakening of safeguards. In France this
means that the focus is on weakening the instruction and the authority of the juges du siège in
favour of the speedier processes overseen by the procureur. This also means a weakening of
due process protections, both procedurally and because judicial protection depends on the
procureur who is less independent as a judicial officer and works more closely with police. In
this way, the police authority in and conduct of the investigation is at the centre of the pre-trial
phase in England and Wales, and in France, despite the differences in procedural tradition, in
the prosecutor’s professional role and status, and in the structuring of the police-prosecutor relationship.

III. WEAKENING INDEPENDENT OVERSIGHT THROUGH DE-
PROFESSIONALISATION AND DELEGATION

In both jurisdictions, criminal procedure practices and processes are not so much characterised
by the maintenance of fair trial rights, of adversarial or inquisitorial values, or even of ensuring
the coherence of criminal justice systems that are the subject of constant reform. Instead, through a lens of ‘law and order’ politics, there has been a growing emphasis on prevention, securitisation and the controlling of risk, and in order to convince the electorate that
governments are serious about tackling crime, on measures to increase the efficient
management of criminalisation through a form of productivity-driven managerialism. This managerialist approach to efficiency is characterised by greater discretionary powers vested in criminal justice actors;\textsuperscript{15} a focus on admissions and the avoidance of trial; the rapid disposal of cases through fast-track procedures both in and outside the courtroom; and by the move away from those judicial procedures providing the greatest protections for accused persons: trial by jury in the English Crown Court, and in France, the process of instruction and the resulting trial in the cour d’assises.\textsuperscript{16} This centrally driven shift to a productivity-focused model has also required prosecution authorities to adapt their procedures as their role has changed and in some instances been enlarged – either through increased responsibility and authority as in the case of France, or greater accountability and segmented work tasks, as in the case in England and Wales. Without additional resources, they have responded (perhaps rationally) by creating simplified and routinised mechanisms through which to dispose of cases and significant portions of work are delegated to Associate Prosecutors in England and Wales, and in France, to délégués procureurs.

\textless{}c\textgreater{} A. England and Wales

In England and Wales, the majority of cases that reach court are dealt with in the magistrates’ court by way of a guilty plea and there are a range of institutional incentives to encourage this, such as sentence discounting, or the possibility to have an agreed version of the facts presented through the ‘basis of plea’ procedure. The criminal justice process is structured around the expectation that accused persons will make an admission, with the possibility of a contested trial coming to represent an increasingly unattainable luxury. Cautions and alternatives to prosecution and trial save the time, cost and formalities of a court hearing, and for those cases that do reach court, prosecutors and defence lawyers alike are encouraged to persuade defendants of the benefits of swift disposal through a guilty plea. This incentivisation is seen not only in legislative and procedural rules, but also in the changing behaviour of the judiciary. No longer the passive umpireal arbitrator of evidence at trial as traditionally portrayed in adversarial systems, the judicial role has become more proactive and even managerial. There are case management hearings to narrow the scope of contested issues; pointed reminders of the sentence discount to defence counsel in open court; and even imposed short adjournments as counsel is directed to speak again to the accused about the possibility of a guilty plea (McConville and Marsh, 2014; Horne, 2017).

In many instances, the court hearing itself is no longer attended by a Crown Prosecutor. Instead, the presentation of the prosecution case is assigned to Associate Prosecutors, who are empowered to carry out bail hearings, guilty plea hearings and even contested cases provided they are summary only and do not carry a sentence of imprisonment. Formerly known as designated case workers, the Criminal Justice and Immigration Act 2008 extended their powers and renamed them Associate Prosecutors. Yet, although acting as prosecutors in court, they lack a proper legal training, receiving just a few weeks instruction in criminal law and procedure.

As cases are dealt with increasingly quickly and with little or no opportunity for court scrutiny, the role of the independent public prosecutor is vital in ensuring that evidential thresholds are met, that all reasonable lines of enquiry have been followed and that it is in the public interest to prosecute. Yet, the systematic delegation of court work to other staff
undermines the public prosecutor role and the proper scrutiny of police evidence in order to avoid the prosecution of weak cases – a function that is of even greater importance in guilty plea cases where the prosecution version of events is accepted at face value by the court. Although Associate Prosecutors are under the authority of the Crown Prosecutor, the nature of court work is such that decisions as to plea or the factual basis of the prosecution often have to be taken quickly and the court will not wish to wait while the Associate Prosecutor telephones the office to gain authorisation. This means that paralegals are determining the charges to bring and whether to accept a plea of guilty. At the same time that independent oversight of the court is diminishing through the prevalence of guilty pleas, the Crown Prosecutor’s role is also receding from the heart of the case, leaving responsibility for case preparation and presentation, as well as what plea to accept and charge to bring, to non-legally qualified staff. This de-skilling of the prosecution function reflects the extent to which summary justice has become, or is understood to be, routinised (Soubise, 2017).

Rapid and admission-based court procedures are the result of centrally driven policy to avoid the contested trial, but the CPS has also developed procedures designed to increase the efficiency of the pre-trial processing of cases. Pre-charge advice, case preparation and the decision to prosecute are increasingly centralised, with a Code for Crown Prosecutors; extensive prosecution guidance from the DPP; and national rather than local systems of prosecutorial pre-charge advice. Beyond this centralised policy guidance and in order to process cases as quickly as possible, procedures are also standardised and case tasks segmented in order to facilitate delegation of discrete phases of case preparation. It is interesting that policing priorities and practices have retained an important local dimension – reflecting the fact that while we often speak of ‘the police’, there are in fact 43 police forces organised geographically across England and Wales. The introduction of Police and Crime Commissioners in England and Wales sought to strengthen further police connections with communities and help set local policing priorities, but this approach did not extend to prosecution, which has remained steadfastly national in its orientation and structure. This preference for uniformity over any adaptation to local priorities is in stark contrast to the French approach, which, in addition to the immediate court hierarchy, situates the procureur within structures of local inter-agency cooperation to determine local priorities and how best to address them.

**B. France**

In France too, as well as the longstanding procedure of correctionalisation by which offences are downgraded by the procureur in order that they can be dealt with by the tribunal correctionnel rather than the cour d’assises (thus also avoiding the slower procedure of instruction), a range of other procedures are designed to ensure the accelerated disposition of cases. In the middle-ranking tribunal correctionnel, the process of comparution immédiate is a rapid trial procedure through which cases that are deemed by the prosecutor as ready for trial are brought immediately to court. The procureur’s view of the case carries much weight – being ready for trial signifying that there is sufficient evidence of guilt – and denials of responsibility are unlikely to be upheld. The rapid nature of this procedure leaves little time for any meaningful defence engagement, with the result that defendants are sentenced, and frequently imprisoned, within 48 hours of arrest and detention.
Some procedures go further still, avoiding altogether the formal trial process and the opportunity for any public legal challenge. The **comparation sur reconnaissance préalable de culpabilité** (CRPC) is a form of guilty plea through which the accused is offered a reduced sentence by the **procureur** if they agree to forego any trial. This is a meeting rather than a hearing and takes place in advance of any possible trial. The accused is assisted by a lawyer and if the sentence is agreed, it is simply ratified by the court without any further enquiry. Assurance that the evidential burden is met rests with the **procureur**. In this way, the facts of the case, the outcome and even the sanction are agreed in advance, undercutting the judicial role in examining and determining the case, and in ensuring the protection of the rights of the accused. The traditionally non-party based nature of French criminal justice makes this a radical departure from the trial, as it is prosecution and defence who determine the outcome of the case in effect, not the judge. However, the absence of the judge creates, potentially, a kind of due process deficit that cannot be filled either by the defence lawyer – whose role is extremely limited – or the **procureur**, who while a judicial officer, works alongside and is highly dependent on the police and lacks the independence of the trial judge.

There are also a range of other procedures, known as ‘third-way’ measures, carried out under the authority of the **procureur** and designed to provide a criminal justice response to greater numbers of cases, reducing the proportion that are dismissed with no further action. Key to these is the **traitement en temps réel** (TTR), a procedure developed by the prosecution service to produce case decisions in real time, based on the reports of investigating police – avoiding the earlier procedure of sending case files for review and further direction, which often took many months. Officers report to the **procureur** by telephone, providing a verbal account of the evidence gathered and an overview of the case. This has the potential to increase **procureur** influence and oversight of the case by working contemporaneously on the investigation, but the dependence on oral police accounts rather than written statements increases prosecutors’ dependence on the nature of the information provided to them by officers – including whether the seriousness of the case is emphasised or downplayed. Other third way measures concern the disposition of cases more directly, such as the **composition pénale**, a form of prosecutorial sanction that can be administered where the prosecutor considers that guilt is proven, even though no formal admission is required. These prosecution adjudications of guilt are made on the basis of the case papers, with no input from either defence or victim, representing a major departure from the fair trial principles of a court hearing.

On the face of it, these various procedures look to be an expansion of prosecutorial power, but in practice, like the Crown Prosecutor in England and Wales, large portions of the **procureur**’s work relating to third-way measures are assigned to the **délégués du procureur**, who typically are retired public servants such as police officers or **gendarmes**. The work of these **délégués** is in turn underpinned by local policies and procedures determining the pathway and outcome of different categories of case. In theory, the greater use of standardised responses and the delegation of tasks should free up prosecutor time for more serious and complex cases, but in practice, as discussed below, the growing bureaucracy and accountability requirements tend to reduce, rather than enhance, the professional autonomy of prosecutors. There is a certain irony in that these various alternatives to trial and prosecution shift power away from the **juges du siège** and depend on the judicial status of the **procureur** to guarantee independence of decision-making, whilst simultaneously reducing the prosecutor’s professional autonomy.
IV. THE PROSECUTOR AS MANAGER – MORE RESPONSIBILITY, LESS POWER

In both jurisdictions, as well as requirements to process cases more quickly, prosecutors face increased demands for accountability on everything from the time taken to provide the police with pre-charge advice, to the proportion of reported cases that receive some form of criminal justice response. Crime and security have become issues of major electoral importance for parties across the political spectrum, with politicians eager to take a tough stance on criminal offending. Anxious to demonstrate how seriously they take the needs of victims, success is measured by governments and ministries through a range of metrics. This increased accountability creates a greater workload for prosecutors and a sense of declining professional autonomy in which prosecutors feel it is their own performance that is being audited, rather than the effectiveness or efficiency of criminal process systems (Milburn et al, 2010: 94-99). Together with the explosion of criminal justice legislation, policy guidelines and directives seen in both jurisdictions, there is an increasing sense of regulation and of bureaucratic forms of prosecutorial accountability. Prosecutors in England and Wales are subject to multiple targets, reviews, audits and inspectorates, producing prosecution guidelines, recommendations and case pathways. The parquet is not subject to this same degree of scrutiny, but statistics are nevertheless important, in particular the taux de réponse, which measures the number of cases that go to court or are dealt with through some alternative to prosecution, as a proportion of the number of cases where sufficient evidence to prosecute exists. This shift towards the prosecutor in terms of responsibility and of reporting has been managed through the systematic delegation of tasks to actors whose ability to carry out these prosecution functions depends on the standardisation of procedures, and the segmentation of tasks.

A. England and Wales

In England and Wales, like France, prosecution work is characterised by delegation and standardisation in order to smooth the progress of cases towards disposition. But in contrast to France where decision-making is firmly located within the authority of the procureur – albeit that this authority is effectively exercised in a quasi-automatic way – and within local policy, the trend in England and Wales has been towards the centralisation of policies and guidelines, decision-making and actions. The power of individual prosecutors to charge suspects has reverted to the police in most cases, as discussed above, and in the more serious cases, where a prosecutor decision is required, charging advice is not provided by the local prosecution office, but through a centralised service, CPS Direct. This means that there are few local police-prosecutor relationships or local policies that take account, for example, of the profile of criminality in a town or a city and strategic prosecution responses. Prosecution policy and legal guidelines are set at the national level by the DPP through the Code for Crown Prosecutors. Guidelines around broader public interest policy issues are often preceded by a period of public consultation, something that would not be countenanced in France, where the public interest is something to be determined by the judiciary, not the public (Soubise, 2016: 131). While some might regard this as a form of democratic input into prosecution policy around issues of public concern (Daw and Solomon, 2010), others see this as a way of masking political choices. Consultation gives the appearance of transparency, but the reasons for accepting some views over others remains hidden (Sanders, 2016).
Despite the more obvious hierarchical organisation and structure of authority of the French parquet, and the apparent lack of prosecutorial discretion understood to characterise more inquisitorial procedures, the CPS is in many ways more constrained in its action. Crown Prosecutors are subjected to close regulation requiring compliance with centrally determined procedures and priorities, as well as the reporting and measuring of results in the time taken to process cases, and in case outcomes. National inspectorates scrutinise all aspects of the prosecutor function and local managers monitor individual performance. Like their French counterparts, Crown Prosecutors have seen their professional discretion and autonomy limited as they are bound to comply with detailed guidelines on everything from the time spent discussing a case with the police, to decisions around offence classification. Decisions must be justified and accounted for through detailed record keeping that is subject to later review.

The other way in which the CPS experience is comparable to that of the parquet is in the segmentation of casework tasks to facilitate the systematic delegation of work. This is a means of ensuring discrete areas of work, compartmentalising tasks so that those carrying them out are limited in what they are expected to know.\(^2\) This is how defence lawyers managed to outsource the provision of police station advice work for many years (McConville and Hodgson, 1993; McConville et al, 1994). As with criminal defence work, this mode of organising work means that cases pass through several pairs of hands producing a fragmentation of tasks with no case ownership and no single point of responsibility where one person has a proper knowledge and overview of the case (Leveson, 2015; Judiciary of England and Wales, 2018). Work is not so much delegated as assigned systematically without any significant oversight – a kind of internal outsourcing. Associate Prosecutors effectively determine the degree of supervision to which they are subjected, as they determine whether a case needs the attention of a Crown Prosecutor and provide the written account on which any case review is likely to be based (Soubise, 2017). As discussed above, these are not minor tasks, but case preparation, bail hearings and even contested trials. This trend looks set to increase as growing the number of cases dealt with by Associate Prosecutors is a CPS target (Soubise, 2017).

\(<c> \text{B. France}\)

The prosecutor is responsible for the disposition of half of all criminal cases, but while decisions are made in her name, in practice, her power and discretion are limited through forms of standardisation and routinisation, locally and nationally defined policy, and by the availability of resources. The work of the court is reduced both in time and in significance, as it is required only to validate some measures such as the CRPC, but the parquet has more of its time taken up with processing minor offences. The approach to efficiency is narrowly quantitative, underpinned by a form of bureaucratic managerialism, but the result is a system characterised by minor offending, leaving prosecutors with less time to focus on major and complex crime.

Introduced in 2001 as a performance indicator in order to reduce the number of cases dismissed with no further action, the taux de réponse requires prosecutors to give reasons for discontinuing a case, creating an expectation of prosecution. This has reduced the rate of dismissals significantly from more than 30 per cent to around 7 per cent, but whether or not this represents a more efficient or effective response is contested. Rather than having their time
freed up to deal with more serious or complex matters, prosecution work is now more heavily
dominated by the treatment of minor crime. Furthermore, with pressures around response times
and disincentives to dismiss minor offences, prosecutors report that it is often easier to refer
cases for some form of alternative to prosecution than simply to discontinue it. This has a net
widening effect, expanding criminalisation by bringing greater numbers of minor offences into
the criminal justice process. This in turn increases punitiveness by creating greater numbers of
recidivists who are then dealt with more harshly if they come back into the system at a later
date, even though their offences remain trivial. Lenoir and Gautron (2014) found that rates of
recidivism tripled between 2000 and 2009, but in place of offenders who might be seen as
career criminals, these were typically people with several convictions for traffic offences.

Central to the success in raising the level of the *taux de réponse* is the *traitement en
temps 13eel* (TTR) procedure. This forces the *procureur* to ensure a criminal justice response
to a greater proportion of reports of offences by using one of several ‘third way’ measures – a
range of alternatives to prosecution, including restorative and therapeutic measures – triggered
through standardised procedures that rely on basic offence and offender characteristics and
thresholds of gravity.\(^22\) These fixed procedures are determined by a series of permanent
directives issued by the local *parquet* on matters such as driving with excess alcohol,
shoplifting or possession of drugs, cross referenced with basic case features such as the value
of the property, the quantity of drugs or the criminal history of the offender (Soubise, 2018).
In this way, cases can be routed directly from the police to be handled by the *délégués
procureurs* without any intervention by the *procureur*. This process is able to manage the flux
of cases away from trial, thus reducing the court’s docket. But while this appears to vest a large
amount of power and discretion in the office of the prosecutor, making her responsible for the
disposal as well as the investigation and prosecution of cases, in practice the reverse is true.
The fixed nature of the policies triggering these procedures mean that prosecutors enjoy very
little individual discretion in how cases are dealt with. This is not a system of individual or
structured delegation, but a mass allocation of work to non-judicial officers. Furthermore, by
removing the individual consideration of the prosecutor from the equation, the procedural
safeguard of prosecutorial oversight (understood as judicial oversight) is removed. No single
prosecutor has overall responsibility or case ownership and prosecutorial power is experienced
as greater responsibility rather than as greater authority. Rather than enjoying greater freedom
of action, prosecutors find their discretion constrained by the standardised policies and
procedures that allow for the delegation of large portions of work and which produce forms of
auto-prosecution.

The relatively fixed nature of these policy directives might be thought at least to have
the virtue of providing a degree of uniformity of response. However, research suggests that
there are significant local differences in how these policies are applied. While Aubert (2010)
found that third way measures rose significantly in Paris (46.5 per cent) and in Bordeaux (30
per cent) in the period 1999-2003, the decline in prosecutions was only 1.7 per cent in Bordeaux
compared with 9.1 per cent in Paris. While *délégués* in Paris dealt with more serious offences,
including those that should have been out of scope such as sexual assault, those in Bordeaux
dealt with matters that would otherwise have been dismissed. In this way, cases were clearly
removed from prosecution in Paris, saving court time, while in Bordeaux *délégués* provided a
sanction in matters that would otherwise have been dropped – having little impact on prosecution numbers and instead, widening the net of criminal liability.

These procedures have changed the procureur’s relationship with police, placing them at a greater distance from officers, with less scope for advice, direction and interactions with specific officers. The parquet’s work is characterised instead by standardised procedures, designed to ensure the rapid disposal of cases. Prosecutors experience this change in the nature of their work as a form of de-skilling; decisions are more formulaic with a greater emphasis on minor offending. This produces an overall feeling of less autonomy and independence, undermining the prosecutor’s professional identity as a magistrat. Police officers too, resent the prosecutor’s involvement in minor offences through the TTR procedure and officers’ corresponding loss of investigative autonomy (Beaume, 2014: 28). It is hard to see these third way measures as efficiency gains. Rather, they appear to inflate both the rate of offending as well as the response to crime through a focus on numerical measures that take no account of the type or gravity of offence and which alter prosecutor behaviour by incentivising ‘easy wins’. For the procureur, it is simpler and faster to direct a case for a minor sanction (and so pass the work to the délégué), rather than to drop it entirely, which would require them to write to the victim and record a reason for not prosecuting (Beaume, 2014: 28).

V. CONCLUSION
In England and Wales and in France, the delegation of core prosecution tasks and dispositive powers to police and prosecution associates and assistants of various kinds, occurs on a large scale, enabled by standardised procedures that mandate action and ultimately, restrict the professional discretion of the prosecutor. Driven through the local hierarchy in France and nationally in England and Wales, the constant requirements to report on outcomes and produce statistics to monitor performance and demonstrate compliance with guidelines and directives, also undercut the prosecutor’s autonomy and sense of professional identity as an independent prosecutor. For the procureur, this strikes at the heart of her identity as an independent judicial officer – a magistrat – in which she understands herself to be acting in the public interest, providing judicial assurance of individual rights, and the guarantees of a fair trial.

These changes in the prosecution role and function also have implications across the wider criminal justice processes of both jurisdictions. In France, power has been shifting from the juge d’instruction to the procureur for several decades, shifting power away from the judiciary to the executive, but the independence of the criminal justice process has been weakened further by the delegation of work from the prosecutor to administrative personnel, where decisions around case outcomes are made without proper judicial oversight. It has also placed police officers at a greater distance from the parquet, diluting the working relationship that is central to the prosecutor’s role in the investigation and prosecution of crime. The diminishing of what is understood to be an important pre-trial judicial function by the prosecution also impacts the defence role, which is already at its weakest in procureur-supervised cases, removing what little judicial oversight exists as casework passes into the hands of non-judicial officers.

In England and Wales too, although a broadly adversarial criminal process, the role of an independent prosecutor ensures fairness and adherence to legal and procedural standards, as well as bringing independent professional judgment to the public interest decision-making in
prosecution. The very benefits the CPS was established to bring are undercut by the structural changes to its operations. The prevalence of the guilty plea and the widescale delegation of case preparation and hearing work to non-Crown Prosecutors means that even those legally represented are unlikely to have the strength of the case against them tested robustly.

In the changing contours of these prosecution functions, we do not see a convergence of procedures or a reflection of adversarial or inquisitorial values, but rather, processes driven by cost-saving and the avoidance of trial. The independence of prosecutors and their value as guarantors of a fair process is weakened, as predetermined policies and procedures replace the exercise of professional discretion and decision-making. Managerialist approaches to efficiency and cost saving in criminal justice seem unlikely to recede, suggesting that, whilst manifesting in slightly different forms in the two jurisdictions, these trajectories will continue to drive the evolution of the prosecutor away from a culture of independence and professional autonomy and towards the relative certainty of pre-trial case disposition.
ENDNOTES

1 In France, in a minority of cases, the juge d’instruction (investigating judge), is responsible for conducting or supervising the investigation, representing a greater degree of independence than the prosecutor.

2 Bohm (2006) uses Ritzer’s (2004) concept of the McDonaldization of society in discussing US criminal justice. Essentially, the argument is that same principles govern society and the justice process, as the fast food industry – efficiency through forms of managerialism; quantitative over qualitative measures; predictability and standardization, often through routinization; and control.


4 Theresa May, then Home Secretary, announced in 2011 that the decision to charge in around 80 per cent of cases would no longer be that of the CPS, but the police.

5 See, eg, the recent overturning of the convictions for theft and false accounting of more than 40 sub-postmasters in England and Wales (Hamilton and others [2021] EWCA Crim. 577). The Court of Appeal found the Post Office’s dishonesty in not disclosing or investigating the known computer system failures that were in fact the cause of the financial discrepancies, to be an abuse of process. The deliberate and systematic nature of police behaviour in manipulating the disclosure rules was also revealed when a Freedom of Information Act request showed that officers have been able to avoid the disclosure of material to the defence by deliberately and incorrectly listing evidence items in the sensitive unused material schedule. The request was made by the Centre for Criminal Appeals. See http://appeal.org.uk/news/2018/4/3/documents-obtained-by-centre-reveal-extent-of-disclosure-crisis

6 The prosecution function developed through the separation of the processes of investigation, prosecution and trial that were originally vested in a single figure, the lieutenant criminel, under the grande ordonnance of 1670.

7 For example, proceeding on the basis of sexual assault rather than rape removes the case from the mandatory jurisdiction of the instruction process.


9 Conseil constitutionnel decision No. 2011-125 QPC, 6 May 2011.

10 This represents the right to be heard and to challenge the evidence against you.

11 For an account of these powers in English see: https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights

12 The préfet is the direct representative of the prime minister and is responsible for public order and other matters such as organising elections, issuing identity cards and driver’s licenses, and managing the emergency services.
Those subject to searches were treated violently, their property damaged and many were targeted simply as muslims, rather than on any legal basis.

For broader discussion around the ambivalence of the procureur’s role see also Hodgson and Soubise (2016b).

As discussed below, the exercise of this discretion is in practice often constrained.

The cour d’assises hears the most serious cases and trial is by a mixed jury of six lay members and three professional judges (magistrats).

As a result, prosecution levels increased according to Bastard and Mouhanna (2007).

Although the Justice Minister heads up the parquet and so issues circulars concerning practices and the treatment of specific types of cases and offences, these are increasingly accompanied by circulars from the Interior Minister, signalling the growing influence of security politics in the work of the procureur.

French prosecutors reported that the position had become unworkable with 80 per cent of their work apparently now falling within so-called ‘priority areas’. Milburn et al. (2010: 90-92).

This is not a strong working relationship and police case allocations have been criticised for retaining cases when they should be passed to the CPS and passing on minor cases that do not require CPS attention. HMCPSI and HMIC (2015: para 1.12).

For an example of case pathways see Soubise (2016:142-5).

These are termed ‘third way’ measures as they are neither dismissals nor convictions, but something in between. They include rappel à la loi (a kind of prosecutorial reprimand); mediation pénale (mediation); injunction thérapeutique (treatment order) and composition pénale (a form of prosecution sanction, though not termed as such as only the court can issue a sanction or punishment).
REFERENCES


