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The Democratic Accountability of Prosecutors in England and Wales and France:  
Independence, Discretion and Managerialism

Jacqueline S. Hodgson

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I. Introduction

Across Europe, North and South America, the role of the prosecutor is evolving, acquiring greater powers and responsibilities within existing functions, as well

as changing more fundamentally as a criminal justice actor, increasingly responsible for the disposition as well as the prosecution of cases, and for the development and implementation of criminal justice policy. This raises important issues about the prosecutor's status, accountability and independence. As the state's representative in the prosecution of offences under criminal law, the prosecutor is required to be independent to ensure the fair and consistent application of the law, but also to be accountable in some way to the democratic institutions she so publically represents. Independence and accountability are configured differently, depending on where the prosecutor is located within the legal and political landscape. She may function within an executive line of appointment and accountability, and so might be expected to promote government policy; she may be independent of ministerial hierarchies and so able to develop alternative agendas through the structures of the prosecution service itself; she may be rooted in the infrastructure of local politics, developing criminal responses adapted to local needs; and, she may be elected on a local political platform, with populist rather than centralized accountability.

Understandings of these contrasting forms of accountability as either democratic, or as inappropriately political,<sup>1</sup> are located within broader legal and political cultures. In England and Wales, for example, an important dimension of the judiciary's role in upholding the rule of law is their ability to call politicians to account in the exercise of their legal powers. In France, in contrast, as a republic, the moral and political authority of the state is paramount, understood

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<sup>1</sup> See, for example, Michael Tonry, "Prosecutors Politics in Comparative Perspective," in *Prosecutors and Politics: A Comparative Perspective*, ed. Michael Tonry (Chicago: University of Chicago Press, 2013), 1.

as representing the will of the (sovereign) people. The unelected judiciary remains subordinate to political power within this 'statist' tradition, reflected in the hierarchical accountability of the French prosecution service to the Minister of Justice and in the constitutional status of the judiciary as an authority, rather than a power.<sup>2</sup>

The level at which prosecutors are accountable (as well as to whom they are accountable) is also likely to determine whether or not we consider it a good thing; the implementation of broad prosecution policies disseminated through guidance or internal hierarchies is experienced and understood differently from interventions or instructions in individual cases. The professional status and training of the prosecutor is also important -- whether her role is characterized as a partisan advocate or a more neutral judicial figure, has the potential to shape the prosecutor's work and may color our view of her relationship to those to whom she must account. Central to these debates is the relationship between independence and accountability, and the nature and extent of prosecutorial discretion -- how it is shaped, regulated, and defined within law; how the prosecutor understands the limits of the various roles that she plays; and the structures of political, professional, judicial and constitutional authority within which discretion is exercised.

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<sup>2</sup> In 1958, the judiciary was demoted from a *pouvoir* to an *autorité*, recognizing the fact that the state makes the law, but judges simply apply it. They lack the status of a "power", as this would rival that of the state and so challenge the sovereign will of the people. Although the judicial authority enjoys a degree of autonomy, this is regarded by some as serving to legitimate, rather than to act as any check upon the actions of the state. See Jean-Claude Magendie and Jean-Jacques Gomez, *Justices* (Paris: Atlas Economica, 1986), 18-20; Sudhir Hazareesingh, *Political traditions in modern France* (Oxford: Oxford University Press, 1994), 173.

This paper considers the changing role and power base of the prosecutor, with particular focus on her relationship with the police, on whom she depends for the investigation and evidence gathering that will form the basis of the decision to prosecute. It examines the contrasting ways in which prosecution policy is developed and executed in England and Wales and in France, its relationship to the public and to the executive, and the importance of the professional role and status of the prosecutor in defining her relationship with political hierarchies and so democratic accountability. It also reflects on the importance of the individual prosecutor as an independent professional -- the extent to which she is a cog in the machine of national policy, is driven by bureaucratic and managerialist imperatives, or she enjoys individual discretion rooted in her professional expertise and ideology. This analysis is comparative, but the nature of the prosecution function, including democratic accountability and the exercise of discretion, does not depend simply on the procedural roots of a jurisdiction, but on a range of factors, albeit that some of these may be more strongly associated with the adversarial or inquisitorial tradition.

## II. The Origins of the Police-Prosecutor Relationship

The prosecution function is made up of relationships with, and dependencies on, a range of legal and non-legal actors -- from suspects, witnesses and victims, to judges, police officers and defense lawyers. Perhaps most important among these is the relationship with the police, as the front line gatherers and producers of evidence. Public prosecutors in England and Wales and in France have seen their role expand in a variety of ways. This has changed aspects of their relationship with the police with whom they work and on whom they

depend in different ways to carry out the criminal investigations and evidence gathering that will underpin the prosecution case. France and England and Wales do not share the same historical criminal procedural model and the police-prosecution relationship is structured differently, reflecting different histories and political and procedural values. Aside from the adversarial and inquisitorial roots of the two systems which characterize the prosecutor in England and Wales as a party to the case, and her French counterpart as a more neutral judicial officer whose prosecution role also includes one of investigation, the office of prosecutor in the two jurisdictions has evolved at different points in time and in response to different circumstances.

#### A. France

In France, the current role of the public prosecutor (the *procureur*) developed during the twentieth century alongside a practice of official police enquiries that later became known as the *garde à vue*.<sup>3</sup> Existing outside any formal legal regulation, this procedure often resulted in the arbitrary detention of individuals and it was only formally legally regulated in 1958. Defense lawyers had been permitted access to the case dossier and to be present during the interrogation of the accused by the *juge d'instruction* (the investigating judge) during the *instruction* investigation from 1897. This was not well received by many who feared this would undermine the effectiveness of the *instruction* as a search for the truth.

[B]y obliging the *juge* to warn the accused at his first formal questioning that he is free to say nothing, by imposing the presence of a lawyer at all

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<sup>3</sup> The role has existed in different guises for centuries.

following interrogations, by, above all, constraining the *juge* to give the case file to the defence lawyer the day before every interrogation, this law paralyzes the action of the judge who can barely hope, even himself, to discover the truth.<sup>4</sup>

In response, in order to avoid the *instruction*, the police and the *procureur* developed an alternative procedure for the detention and questioning of suspects in order to bypass any involvement of the defense lawyer in the investigation.<sup>5</sup> This proved to be an effective strategy: the procedure became formalized into the *garde à vue* in 1958, but lawyers remained absent until 1993, a century after their arrival in the *instruction*.<sup>6</sup>

This is in many ways a familiar story of how the strengthening of what we would now think of as due process or fair trial rights within one part of the

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<sup>4</sup> Herbert Halton, "Etude sur la procédure criminelle en Angleterre et en France" (Thèse, Faculté de Droit de Paris, 1898), 69 cited by Denis Salas, "Note sur l'histoire de l'instruction préparatoire en France," in *La mise en état des affaires pénales: Rapport de la Commission Justice Pénale et Droits de l'homme*, Annexe 2, ed. Mireille Delmas-Marty (Paris: La Documentation Française, 1991), 248.

<sup>5</sup> Jacqueline S. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Oxford: Hart Publishing, 2005), 117.

<sup>6</sup> Suspects were permitted to see a lawyer for 30 minutes, after 20 hours of detention in *garde à vue* from 1993. In 2000, access was permitted from the start of the *garde à vue* and finally, after the Grand Chamber judgment of the European Court of Human Rights in *Salduz v Turkey*, Application No. 36391/02 November 27, 2008, suspects now have access to a lawyer for a 30 minute consultation during the police interrogation -- though the lawyer's role is greatly restricted to that of passive observer. See Jacqueline S. Hodgson, "Making custodial legal advice more effective in France: explores the challenges in accessing a lawyer when in police custody," *Criminal Justice Matters* 92, no. 1 (2013): 14; Jodie Blackstock, et al., *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Antwerp: Intersentia, 2014); Jacqueline S. Hodgson, and Ed Cape, "The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice," *New Journal of European Criminal Law* 5, no. 4 (2014):450.

criminal process, leads to the removal or the undermining of protections in another. In England and Wales, for example, the suspect's right to custodial legal advice following section 58 of the Police and Criminal Evidence Act 1984 was then used as justification for the removal or weakening of other defense safeguards, such as the attenuation of the right to silence.<sup>7</sup> In Scotland, at the same time that suspects were granted access to custodial legal advice following the decision in *Cadder*,<sup>8</sup> which held Scotland to be in breach of Article 6 of the European Convention on Human Rights (ECHR) by preventing suspects in police custody from accessing legal counsel, the period of police detention was doubled from six to 12 hours.<sup>9</sup>

It is also significant as a redistribution of judicial and political power within the criminal justice process, as the *procureur* and the *juge d'instruction* are both judicial officers, but sit within different structures of accountability and so, at different points within the constitutional separation of powers. The *juge d'instruction* is independent of the executive, cannot be moved to a different office and cannot be given either oral or written instructions. Her independence is guaranteed by the constitution and she is not subject to the authority of the Minister of Justice. The *procureur* belongs to a different branch of the judiciary (the so-called standing, rather than the sitting judiciary) and is hierarchically

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<sup>7</sup> Adverse inferences may be drawn from silence in some circumstances under s.34 of the Criminal Justice and Public Order Act 1994. By attaching a penalty to the exercise of the right, its value is significantly undermined.

<sup>8</sup> *Cadder v HM Advocate* [2010] UKSC 43, which followed the European Court of Human Rights case of *Salduz v Turkey*, Application No. 36391/02, Grand Chamber judgment, November 27, 2008.

<sup>9</sup> Section 14 of the Criminal Appeal (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The custody officer may extend detention for a second 12-hour period.

accountable to the Minister of Justice, a political appointee of the government. She is responsible for delivering the government's criminal justice policy and must act within the guidelines set by her superiors and the Ministry circulars. Her accountability to a democratically elected Minister is seen as an important guarantor of her independence -- she may not pursue her own policies, but must act within the law. Severing the "umbilical cord" between the *parquet* and the Minister of Justice has been the subject of decades of discussion and whilst lobbied for by the *parquet* (the collective term for *procureurs*) and made the subject of a parliamentary Bill, recent reform attempts seem unlikely to attract the necessary political support.<sup>10</sup>

For North American scholars, this may seem unremarkable, to have independence guaranteed directly, or indirectly, through the electorate. At the federal level, the Attorney General and district US Attorneys are political appointees of the President's party and the 2,300 state prosecutors are elected mostly at county level and operate a wide variety of policies and practices, according to local political conditions. In France, complete independence from the executive is understood to risk unfettered power and the *gouvernement des juges*, where judicial power exceeds that of the elected state.<sup>11</sup> To the English lawyer, however, accountability to the executive does not guarantee independence, but risks political interference. This concern is not without merit as we have seen countless French scandals in which the executive, often under

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<sup>10</sup> The proposal also failed in 1998. To succeed, it requires a three fifths majority in the Congress (the union of both parliamentary chambers, the *Assemblée* and the *Sénat*), which seems unlikely as the current government has only a slim majority in the former and is in the minority in the latter.

<sup>11</sup> Hodgson, *French Criminal Justice*, 77.

the direction of the President, has exerted pressure on the judicial system to protect its own patrons and supporters.<sup>12</sup>

The trajectory of the development of the *garde à vue* procedure as a means of supplanting the *instruction* has continued, and investigation under the supervision of the *procureur* now overshadows completely the *instruction*; less than two per cent of cases are dealt with in this way. The *procureur's* growth in investigative power in the face of an increasingly due process *instruction* model is also significant as a shift away from an independent judicial investigation, to one which is ultimately accountable to the executive, including until recently, the power of the Justice Minister to issue written orders to *procureurs*. The hierarchy of the *parquet* and the culture of instruction and subordination are part of the prosecutor's career as well as her daily practice. Promotion is based on an evaluation of the *procureur* that includes her "capacity to implement penal policies" and "to be part of the hierarchical relationship"; loyalty and conformity are rewarded, whilst independence is penalized.<sup>13</sup> The structure of the *parquet* has also ensured that the President and the Minister of Justice have a key role in the selection and promotion of *procureurs*, cultivating a culture of patronage and dependence that, even with the removal of written orders, has been hard to break.<sup>14</sup>

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<sup>12</sup> Hodgson, *French Criminal Justice*; Jacqueline S. Hodgson,, "The French Prosecutor in Question," *Washington & Lee Law Review* 67, no. 4 (2010): 1361-411.

<sup>13</sup> Mathilde Cohen, "The Carpenter's Mistake? The Prosecutor as Judge in France" (this volume).

<sup>14</sup> See the observations in Pierre Truche, *Rapport de la commission de réflexion sur la Justice* (Paris: La documentation Française, 1997).

This tension between the two models of investigation and loci of power is reflected in government reform agendas that seek to bolster the power of the *procureur* (and so the executive) to the detriment of the more politically independent *juge d'instruction*. The most recent enquiry to recommend the effective abolition of the *juge d'instruction* in her current role, placing the *procureur* in charge of all criminal investigations, was the Léger Commission, reporting in 2009.<sup>15</sup> The recommendation (reflecting then President Sarkozy's premature announcement some nine months before the Commission reported in September 2009, of his intention to abolish the office of *juge d'instruction*) was undercut, however, by the decision of the European Court of Human Rights in *Medvedyev v France*<sup>16</sup> and then *Moulin v France*,<sup>17</sup> in which it was held that the *procureur* was not a judge for the purpose of Article 5 of the ECHR because she is a party to the case as a prosecutor and she is not independent of the executive.

Recent legislation reducing police accountability and increasing the *procureur's* power to authorize certain investigative measures has also been controversial. Following the terrorist attacks in Paris in November 2015, emergency measures were put in place, which lacked the usual safeguards of judicial guarantees in the exercise of intrusive powers. Although intended to be time limited and exceptional, the government has now sought to place these measures on a statutory footing. The proposed legislation includes greater powers for the *procureur* to authorize wire taps and electronic data capture, investigations that may currently be authorized only by the more independent

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<sup>15</sup> Philippe Léger, *Comité de réflexion sur la justice pénale* (Paris: La documentation Française, 2009).

<sup>16</sup> Application No. 3394/03, Grand Chamber Judgment, March 29, 2010.

<sup>17</sup> Application No. 37104/06, November 23, 2010.

sitting judiciary.<sup>18</sup> In this way, greater power to authorize measures that infringe on the liberties of the individual is being assigned to the public prosecutor, whose line of accountability ends with the Minister of Justice. At the same time, the Bill sets out the professional orientation of the *procureur* in more strongly "judicial" terms, with a new addition to Article 39 of the *code de procédure pénale*, requiring that the *procureur*:

checks the legality of the means implemented by [police officers], the proportionality of investigative acts with regards to the nature and gravity of the offence, the opportunity to carry out the investigation in this or that direction, as well as the quality of its content. He ensures that investigations are aimed towards the determination of the truth and that both inculpatory and exculpatory evidence are collected, in the respect of the rights of the victim and of those of the suspect. (Article 22 of the Bill)

Parliament seeks to increase the power of the prosecutor, whilst also strengthening her apparent neutral and independent judicial ideology. But the expression of her professional role in terms similar to that of the *juge d'instruction* is somehow unconvincing. The simple addition of a new clause to the *code de procédure pénale* changing the description of the prosecutor's role, will not in itself transform the ideology or practices of the profession.<sup>19</sup> The fact remains that authority is seeping away from the politically independent *juge d'instruction* to the *procureur*. Moreover, the legal rhetoric of independence is

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<sup>18</sup> Projet de loi no. 3473. This power is proposed in cases of organized crime and terrorism.

<sup>19</sup> The reform is inspired by the recommendation of Jacques Beaume, *Rapport sur la procédure pénale* (Paris:Ministère de la Justice, 2014), 30.

not supported by any change in the structure of prosecutorial accountability, which remains with the executive.<sup>20</sup>

### B. England and Wales

In contrast to the *procureur's* long history within French criminal procedure, the Crown Prosecutor in England and Wales is a relatively new function, established under the Prosecution of Offences Act 1985. Prior to the establishment of the Crown Prosecution Service (CPS), there was no public prosecutor in England and Wales. The police were responsible for criminal prosecutions, which they brought either in person, or through locally instructed prosecuting solicitors. This meant that there was no unified, centralized, national prosecution policy. In their review of criminal procedure arrangements, the Philips Commission (reporting in 1981) noted that police prosecution practices varied across the country, resulting in inconsistent levels of charging and the prosecution of weak cases unsupported by sufficient evidence.<sup>21</sup> The police were too close to cases and unable to make the legal and forensic judgments required.

The Commission recommended the establishment of a national public prosecution service headed by the Director of Public Prosecutions (DPP) in order to address these issues and to professionalize the prosecution of crime. A key feature of the new CPS was their independence from the police investigation

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<sup>20</sup> Controversially, article 18 of the Bill goes further still and provides the police with the authority to detain and question individuals for up to four hours without any judicial oversight. Detention is permitted of those for whom "there are serious reasons to think they represent a threat for the security of the state or that they are in direct and not coincidental relation with such people" --- without informing the *procureur*. When acting in this administrative, rather than judicial capacity, the police are under the hierarchy of the Minister of Interior.

<sup>21</sup> Royal Commission on Criminal Procedure (1981), Cmnd 8092, chaired by Sir Cyril Philips.

phase. Under the former arrangement, prosecuting solicitors worked for, and were consulted by, the police in around three quarters of police forces,<sup>22</sup> but had only an advisory role. They were bound to follow the instructions of their client, the police, and the prosecution process was under the control of the chief officer of police. With the establishment of the CPS, the initial charging decision remains that of the police, but cases then pass to a Crown Prosecutor to assess the strength of the evidence and to determine the final charge to be prosecuted. This means that the decision not to charge remains with the police; but cases where prosecution is anticipated are subject to review by the CPS who determines whether to prosecute the case as charged, prosecute a lesser offence, or discontinue the prosecution. In many areas, former prosecuting solicitors were appointed as Crown Prosecutors. However, this loss of power from the police to the newly independent CPS was not well received by officers who continued to investigate and gather evidence, but could no longer control the prosecution process.<sup>23</sup>

Removing from the police the decision to prosecute and making it entirely a CPS judgment, addresses the problem identified by the Phillips Commission, but the Philips principle, as it is generally known, goes further than this; it sees as crucial the separation between the investigation and prosecution phases in order to ensure the independence of the Crown Prosecutor's decision. This might be criticized as a narrow construction of prosecutorial independence on at

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<sup>22</sup> Statement of the then Home Secretary, William Whitelaw HC Deb, November 20, 1981, vol. 13, c532.

<sup>23</sup> The CPS deals with the prosecution of cases investigated by the police. Prosecutions are also brought by other agencies such as Her Majesty's Revenue and Customs, the Serious Fraud Office and the Health and Safety Executive.

least two counts. First, it casts the police as gatekeepers to the prosecution process: where the police decide not to pursue a case, other than in some specified circumstances, the CPS will have no involvement or knowledge of the investigation. They are unable to prevent the police from discontinuing investigations where the evidence is strong, or where there may be a strong public interest in prosecution. Second, although hailed as a new ministry of justice type role, the independence of the Crown Prosecutor function has been limited by their reliance on the police for the information on which their prosecution decision will be based. It might be argued that greater involvement in the investigative phase could produce better quality evidence and so a better-informed prosecution decision; the Crown Prosecutor would be less captive to the police view of the case.

This is very much the approach of the French model, in which the role of the public prosecutor, the *procureur*, is not separate from, but is inextricably linked with that of the police investigation. This stems in part from the different understanding of the prosecution process, which in France includes the investigation phase carried out under the judicial supervision and direction of either the *procureur* or the *juge d'instruction*, but it also allows the prosecutor to orient the enquiry from a legal perspective. In England and Wales, whilst the Crown Prosecutor may be consulted by the officers prior to charge, it is fundamental to the understanding of their roles as independent of one another that she is not an authority over the police and that there is a separation of the prosecution function from that of investigation. The *procureur*, on the other hand, is a direct authority over officers as they investigate the case and in

particular, during the detention and questioning of the suspect during *garde à vue*.

So, we have two very different models -- one in which the prosecutor has no power over the police investigation and charging process, understood as a necessary function of prosecutorial independence; the other in which the prosecutor is a judicial authority over the police, responsible for the investigation and prosecution of crime. In the latter, prosecutorial independence from the police might be understood through the power to require them to act in certain ways, in contrast to the Crown Prosecutor's dependence on police generated evidence. In my own fieldwork, French officers expressed admiration for what they saw as the far greater autonomy enjoyed by the police in England and Wales. In France, questions of independence and accountability center on the relationship with the Ministry of Justice rather than the police: the French prosecutor's independence as a judicial officer implementing government policy is understood to be guaranteed by the Minister, a member of the executive. Yet, as we shall see, this constraint on power through ministerial democratic accountability, carries with it the risk of political interference and so the potential to compromise the independence of the *procureur*. In England and Wales, the CPS was established in order to ensure the independence of the prosecution function from that of the police and it is this relationship that has attracted the greatest attention.

### III. The Changing Shape of the Prosecutor's Role

The roles of prosecutors in both jurisdictions have expanded in recent years, driven principally by a desire to improve efficiency by increasing the number of out of court case disposals and by speeding up the process of case disposition in general. In England and Wales, the prosecutor's function at the local level has been strengthened, providing her with greater powers of case disposition, but also a new role in mandatory charging advice and decision-making. At the national level, the DPP has developed a policy-making role through the issuing of guidance on charge and prosecution in a range of cases (such as domestic abuse and assisted suicide) to be implemented uniformly through local Crown Prosecution offices. Although she still lacks authority over officers and any powers of direction or instruction, the Crown Prosecutor now works more closely with the police and this has been the explicit aim of successive reviews of the CPS and the criminal justice process.

In France too, the *procureur* now enjoys greater powers to authorize and oversee criminal investigations, as well as an increased range of case disposition options, including a guilty plea procedure where a reduced sentence is offered. This is one of a range of new procedures in which the defense is now explicitly written into the process and the judge's role has diminished in favor of a more party-centered approach. However, while the DPP in England and Wales has begun to develop national prosecution policy in a range of offence areas, this remains strictly Ministry of Justice territory in France. The French prosecutor's policy role, in contrast, has developed through engagement with local political and criminal justice actors. Relationships with the police are also changing in different ways. As noted above, the *procureur's* role has developed hand in hand

with that of the police and the practice of dealing with cases in real time in order to speed up decision-making, has led to yet closer working relationships. In contrast to England and Wales, however, where the prosecution is being encouraged to work more closely with the police, this has become a cause for concern and a recent review of the *parquet* recommended that prosecutors place some distance between themselves and officers, in order to preserve their independence.<sup>24</sup> As power shifts away from the *juge d'instruction* and towards the *procureur*, this also represents a shift in the political accountability and dependence of criminal justice, away from the judiciary and towards the executive. The counterbalance within the French criminal process is increasingly provided (in theory at least) by the defense, rather than by the judiciary. These are very different roles, however -- constitutionally, professionally and in their criminal justice function.<sup>25</sup>

In addition to relationships with other criminal justice actors, these changes in role and function have also impacted on the organization of prosecution work -- the degree of professional autonomy and discretion that she enjoys; the extent to which work is becoming standardized and delegated; and the extent to which her decision-making is regulated within pre-defined structures set by politicians, or the internal hierarchy of senior prosecutors. Lines of accountability intersect with changes in the professional role of the

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<sup>24</sup> The English Crown Prosecutor is not an authority over the police, so closer relationships are not seen to threaten independence in the same way.

<sup>25</sup> See, for example, Jacqueline S. Hodgson, "Constructing the Pre-Trial Role of the Defense in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process?" *International Journal of Evidence and Proof* 6, no. 1 (2002a): 1-16; Hodgson, *French Criminal Justice*, ch. 4.

prosecutor, and the boundaries between local and national politics as well as the policy role of the prosecution hierarchy itself, have shifted.

#### A. England and Wales: the CPS

The role of the CPS has evolved since its creation 30 years ago, from the powers of individual prosecutors, to the nature of the DPP's role in guiding and steering the organization. In contrast to France, where national prosecution policy is part of the political agenda set by the Minister of Justice, disseminated down through the prosecution hierarchy, in England and Wales, the DPP has developed this role. In addition to guidance on charging, prosecution, evidentiary matters, protocols on serious investigations, guidance based on case law and what must be proved in court, cautions and diversion away from trial, the DPP has established policies on the prosecution of particular offences such as domestic violence and assisted suicide. These are important supplements to legislation and case law, as the policies on prosecution will determine how the law develops subsequently. Many of these guidelines are preceded by a public consultation, the responses to which are published.<sup>26</sup> They range from the prosecution of child sexual abuse, to prosecution for perverting the course of justice and charging in rape and domestic violence cases. The stimulus for these guidelines is often a high profile case that has not gone well, or to provide certainty where there is a legislative gap, such as in the case of encouraging or assisting suicide.<sup>27</sup>

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<sup>26</sup> The guidance on the prosecution of assisted suicide followed a web consultation which elicited 4,700 responses.

<sup>27</sup> All of the CPS guidance is published in its website. See, for example, The Director of Public Prosecutions, *Policy for prosecutors in respect of cases of encouraging or assisting suicide* (London, 2014), [http://www.cps.gov.uk/publications/prosecution/assisted\\_suicide\\_policy.html](http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html).

This is an interesting alternative to more traditional democratic routes such as legislative guidance or policy disseminated by a government minister, as happens in France. The DPP is appointed by and responsible to, the Attorney General, whose office advises the government and represents the public interest in a range of capacities. This creates a less direct line of political accountability and one which, by convention, is “exercised very sparingly, and not used to further the narrow political interests of the government and its supporters”.<sup>28</sup>

At the other end of the organization, individual Crown Prosecutors have on the face of it, been given more power as they now make charging decisions in many instances that were formerly determined by the police.<sup>29</sup> Although the CPS is divided into 13 areas across England and Wales, each led by a Chief Crown Prosecutor, charging advice and decisions are taken by CPS Direct for the most part, with Area Crown Prosecutors being involved in some early investigative advice and charging. The police are able to contact CPS Direct through a single national telephone number and officers speak to the next available prosecutor. Although discussions take place over the telephone, evidence is transmitted electronically, as are decisions, providing an accessible case record from the outset. In theory, this places prosecutors closer to police officers in case building, and in advising on charge and evidence, but a recent Joint Inspectorate Report suggests that there is still some way to go in making this an effective

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<sup>28</sup> Antoinette Perrodet, "The public prosecutor," in *European Criminal Procedures*, ed. Mireille Delmas-Marty and John Spencer (Cambridge: Cambridge University Press, 2002), 422.

<sup>29</sup> See CPS, *The Director's Guidance on Charging 2013*, 5<sup>th</sup> edition (London, 2013), [http://www.cps.gov.uk/publications/directors\\_guidance/dpp\\_guidance\\_5.html](http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html).

working relationship.<sup>30</sup> It found one third of the cases in which the police brought charges, should have been dealt with by the CPS; one tenth of the cases dismissed by the CPS should have been decided by the police; and the police decision to charge was incorrect in eight per cent of cases.<sup>31</sup>

Whilst officers are free to consult the CPS in any case, this is mandatory for more serious and complex cases.<sup>32</sup> This change was made on the recommendation of the enquiry headed up by Lord Justice Auld with the aim of creating closer working relationships between police and prosecutors so that weak cases could be weeded out earlier, and ensuring that more recorded crimes resulted in a conviction or some other form of case disposal. The police tendency had been to overcharge, with high numbers of judge ordered and judge directed acquittals. This may be because the police adopt a more subjective and less formal and legalistic approach, or because they anticipate that more evidence will emerge justifying the higher charge -- or it may also flow from the differences in charging standards: the police are not required to take account of public interest considerations, but this is written in to CPS guidance. After piloting the procedure in 2002, legislation amended the Police and Criminal

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<sup>30</sup> HMIC, *The Joint Inspection of the Provision of Charging Decisions* (London, 2015), <https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/joint-inspection-of-the-provision-of-charging-decisions.pdf>, which was carried out jointly by Her Majesty's CPS Inspectorate and Her Majesty's Inspectorate of Constabulary.

<sup>31</sup> *ibid*, para 1.12.

<sup>32</sup> CPS, *Director's Guidance*, para. 7 states that early investigative advice (EIA) may be provided in serious, sensitive or complex cases and it should always be utilized in cases involving death, rape or other serious sexual offences. HMIC, *Joint Inspection*, para. 6.4 found that EIA is well established in the CPS Headquarter units (such as counter terrorism), but not in local areas. Officers were uncertain as to what was available and the Joint Inspectorate found that only two out of 13 rape cases and one out of 21 cases involving other serious sexual offences in their sample had sought EIA (paras. 6.5-6.7).

Evidence Act 1984 (PACE) to transfer charging decisions from the police to the DPP, through local Crown Prosecutors. Under section 37A(1) PACE, the DPP now has the power to issue guidance to police custody officers on how to facilitate the Crown Prosecutor's charge decision. Crown Prosecutors now direct (rather than advise) officers on formal cautions, warnings and reprimands also. The CPS guidance, in contrast, requires decisions to be based on a review of the evidence, not on an oral report. The Attorney General and the DPP regard this shift in roles as the most significant change in the relatively brief history of the CPS, expanding the CPS role and limiting constabulary independence as set out in *ex parte Blackburn*.<sup>33</sup>

One perhaps unexpected consequence of this different way of organizing charge and prosecution is that the process is more closely regulated both for prosecutors and the police. Crown Prosecutors have a range of legal guidance that they must follow such as when to apply the Full Code Test, or the Threshold Test;<sup>34</sup> when to characterize offences within certain categories such as homophobic violence or domestic abuse, and so follow the charging guidance on

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<sup>33</sup> *R v. Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QBD 118. Lord Denning stated that whilst every police officer is under a duty to enforce the law of the land, they are wholly independent of the executive and not subject to the orders of the Secretary of State: "The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone" (769 *per* Lord Denning, M.R.).

<sup>34</sup> The Threshold Test may be applied where the suspect "presents a substantial bail risk if released and not all the evidence is available at the time when he or she must be released from custody unless charged. The Threshold Test may be used to charge a suspect who may be justifiably detained in custody to allow evidence to be gathered to meet the Full Code Test realistic prospect of conviction evidential standard." CPS, *Director's Guidance*, para. 11.

these and other offences.<sup>35</sup> The result is that prosecutors are less reliant on their own professional discretion as lawyers following an evidential and public interest test. Instead, they are required to justify their decisions and their application of specific criteria through detailed record keeping that is subject to later review. This forms part of the file that will be passed to those working at the next stage of the prosecution process. Other than in serious, complex and sensitive cases where early investigative advice (EIA) should be sought, no single Crown Prosecutor is responsible for a case;<sup>36</sup> the file will pass through numerous sets of hands, with the result that case ownership is difficult to establish. This more bureaucratic model shares many of the features of an inquisitorial model.<sup>37</sup>

The other aspect that is significant in this way of organizing work, driven also by the constant need to work within a smaller budget, is the increased use of non-professionally qualified staff. Section 7A of the Prosecution of Offences Act 1985 empowers the DPP to designate Crown Prosecutor powers and rights of audience to non-legal staff, and to determine their training. A significant proportion of prosecution work, including bail decisions and guilty pleas, is now carried out at court by associate prosecutors (APs). These are typically, experienced former administrators within the CPS who have undergone one

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<sup>35</sup> CPS, *Domestic Abuse Guidelines for Prosecutors* issued by the DPP [http://www.cps.gov.uk/legal/d to g/domestic abuse guidelines for prosecutor s/](http://www.cps.gov.uk/legal/d%20to%20g/domestic%20abuse%20guidelines%20for%20prosecutors/); CPS, *Guidance on Prosecuting Cases of Homophobic and Transphobic Crime* issued by the DPP, [http://www.cps.gov.uk/legal/h to k/homophobic and transphobic hate crime/](http://www.cps.gov.uk/legal/h%20to%20k/homophobic%20and%20transphobic%20hate%20crime/) For the full range of legal guidance issued to the CPS, see <http://www.cps.gov.uk/legal/>.

<sup>36</sup> There should be "continuity of prosecutor" where the CPS has provided EIA. CPS, *Director's Guidance on Charging*, para. 7.

<sup>37</sup> Jacqueline S. Hodgson, "Hierarchy, Bureaucracy and Ideology in French Criminal Justice: Some Empirical Observations," *Journal of Law & Society* 29, no. 2 (2002b): 227.

week's training on criminal law and one week on criminal procedure.<sup>38</sup> The widespread use of these APs is indicative of the level of routinization that now characterizes criminal justice in the courts in England and Wales. It also creates a tier of CPS staff that is further removed from the usual lines of accountability.

In addition to stronger powers in charging decisions, Crown Prosecutors are now empowered to issue conditional cautions with punitive (rather than rehabilitative or reparative) conditions attached. Although a relatively minor measure, used infrequently,<sup>39</sup> this nonetheless represents a transfer of power from the judiciary to the CPS. The Attorney General has described this as the offender's choice, with the benefit of legal advice, but this is a weak notion of consent in a criminal process that makes guilty pleas the norm, enforced through a series of systematic and institutional pressures. Neither can basic constitutional principles be traded off for efficiency. This is a punishment (rather than a prosecution diversionary measure) and its administration by a prosecutor (lacking even the basic judicial status of the French *procureur*) does

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<sup>38</sup> For further detail and the selection and training of APs see CPS, *The CPS Annual Report and Accounts 2014-15*, Annex E (London, 2015), [http://www.cps.gov.uk/publications/docs/annual\\_report\\_2014\\_15.pdf](http://www.cps.gov.uk/publications/docs/annual_report_2014_15.pdf).

<sup>39</sup> Out of court disposals issued by the CPS at the pre-charge stage (a simple caution, conditional caution, reprimand, final warning or offence to be taken into consideration) accounted for 0.6% of the 500,000 cases prosecuted in 2014/15 (CPS, *Annual Report and Accounts 2014/15*). The numbers have declined, but were never more than 2.4% in 2008/09, (CPS, *CPS Annual Report and Resource Accounts 2010/11*, Annex B, (London, 2015), [https://www.cps.gov.uk/publications/reports/2010/annex\\_b.html](https://www.cps.gov.uk/publications/reports/2010/annex_b.html)). Recorded crime has declined steadily over the last decade from around 6 million in 2004 to around 4 million in 2014, a decrease of one third (see Figure 1), see Office for National Statistics, *Crime in England and Wales: Year ending December 2015* (London, 2015), <http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2015>. Prosecutions have halved in the same period from over one million to 500,000.

not offer Article 6 ECHR fair trial guarantees.<sup>40</sup> This increased power in the criminal process, and in the disposition of cases in particular, places accountability for the prosecutor's exercise of her discretion further under the spotlight.

### B. France: the *Parquet*

In England and Wales, the story has been the gradual transfer of power from the police to the public prosecutor. In France, power has shifted from the judge to the *procureur* (who has always exercised the same powers as the police), avoiding the lengthy pre-trial *instruction* and reducing the use of formal prosecution and the court disposition of cases in favor of a more speedy process handled by the prosecutor.<sup>41</sup> These include warnings (*rappels à la loi*), mediation, reparation and rehabilitation schemes but more significantly also the imposition of fines or community work (*compositions pénales*). There is also a range of rapid trial procedures, including the guilty plea procedure, the *comparution sur reconnaissance préalable de culpabilité* (CRPC).<sup>42</sup> The criminal response rate measured as a percentage of recorded crime where the offender is identified and there is evidence for prosecution, stands at 91%. 40% of these are

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<sup>40</sup> This is what Andrew Ashworth calls the borderlands of fair trial. See Andrew J. Ashworth, "Manslaughter: direction to jury - diminished responsibility," *Criminal Law Review* October (2006): 88.

<sup>41</sup> Antoine Garapon, *La prudence et l'autorité: l'office du juge au XXI<sup>e</sup> siècle* Rapport de l'IHEJ (Paris: Ministère de la Justice, 2013), 107 describes the *procureur's* role as no longer being that of determining whether to prosecute or to drop a case. She now has a range of options allowing her to satisfy the broader demand for a criminal "response". This range of case pathways, from sanctions to punishments, to compensation and mediation, are often referred to as the "third way".

<sup>42</sup> For further discussion see Jacqueline S. Hodgson, "Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice," in *The Prosecutor in Transnational Perspective*, ed. Erik Luna and Marianne Wade (Oxford: Oxford University Press, 2012), 116-134.

dealt with by some form of alternative to prosecution, 5% by *composition pénale* and 46% by going to trial or *instruction*.<sup>43</sup> Even those cases going to trial are often channeled through procedures such as *comparution immédiate* that are within the control of the *procureur*. This places the *procureur* in a key position, determining the disposition of nearly half of all cases.

It is perhaps assumed that these measures ease the pressure on the courts by diverting cases away from trial, but the effects of these changes are not uniform across France. For example, comparing two court regions, Aubert demonstrates that whilst official figures suggest consistent results, in Bobigny these procedures are used to deal with cases that are not a local priority, but in Bordeaux they are used to deal with cases that would not have been prosecuted, thus having a net-widening effect.<sup>44</sup> Official statistics show that over the last decade, the *procureur* has dealt with greater numbers of cases, but the courts continue to try between 12 and 13 per cent of recorded crime, or between 45 and 46 per cent of prosecutable offences. The increased workload of the *procureur* has not been to reduce the court's docket, but to provide a response to cases that would otherwise have been dismissed. Dismissals have halved from 25 per cent of prosecutable crime to 12 per cent, while cases settled by the

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<sup>43</sup> Ministère de la Justice, *Une réponse pénale pour 91% des auteurs d'infractions* (Paris, 2015), <http://www.justice.gouv.fr/budget-et-statistiques-10054/infostats-justice-10057/une-reponse-penale-pour-91-des-auteurs-dinfractions-28451.html>.

<sup>44</sup> Laura Aubert, "[Systématisation pénale et alternatives aux poursuites en France: une politique pénale en trompe-l'œil](#)", *Droit et Société*, 74, no. 1 (2010): 17-33.

prosecution have risen from 28 per cent of prosecutable offences to 44 per cent.<sup>45</sup>

The function of the *procureur* is no longer principally that of accuser, but now includes responsibility for the management of caseloads and the disposition of a significant proportion of criminal cases. Justice has moved out of the courtroom and into the office of the *parquet*. This, of course, renders justice less visible as these procedures are not open to the public. There is no judge present (she will approve the procedure later, without even the presence of the *procureur*), only the accused's lawyer, but her role as potential negotiator and party to the case means that she cannot fulfil that same function provided by independent judicial oversight. Traditionally, the *magistrat* has been seen as the first defender of the rights of the accused, but the *procureur* lacks the independence of the *juge d'instruction* and this is no substitute for active defense rights. The prosecutor's role is to ensure that the suspect's rights are respected throughout the criminal procedure, not actively to challenge the legality of actions or to champion the rights of the accused.

The nature of the *procureur's* supervision of the police has also changed in some respects. As she has gained more power and responsibility, her supervision has become more intrusive. However, just as earlier research noted the bureaucratic nature of the *procureur's* supervision of the police investigation,<sup>46</sup> contemporary forms of oversight remain overly focused on detail

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<sup>45</sup> Ministère de la Justice, *Statistiques: Activité des parquets des TGI* (Paris, 2015), <http://www.justice.gouv.fr/statistiques.html> and Ministère de la Justice, *Chiffres Clés de la Justice 2015* (Paris: Directeur de la publication, 2015), [http://www.justice.gouv.fr/publication/chiffres\\_cles\\_20151005.pdf](http://www.justice.gouv.fr/publication/chiffres_cles_20151005.pdf).

<sup>46</sup> Hodgson, *French Criminal Justice*, ch 5.

and procedure, rather than with strategic oversight. The ‘real time’ procedure of *traitement en temps réel* (TTR) provides a good example of this. Designed to ensure that decisions re prosecution are made faster, this procedure requires the *procureur* to base her decision on the oral account provided on the telephone by the officer; the prosecutor will have seen neither the case file nor the accused. This has been criticized by the Beaume review as being too involved and intrusive,<sup>47</sup> turning the *procureur* into a form of ‘supercop’ and so threatening her independence. The prosecutor’s role is not to oversee the daily conduct of affairs, but to ensure the legality and proportionality of police measures and to supervise the general direction and quality of the investigation. However, Mouhanna criticizes the standardizing effect of this procedure, as prosecutors orient cases towards police standard documentation and high rates of prosecution.<sup>48</sup> The more closely involved in the investigation she is, the less that the *procureur* can claim impartiality.

As in England and Wales, these changes have an impact on the nature of the prosecutor’s way of working. In France, the *procureur* has increasingly become an administrator or manager, responsible for the effective management of caseloads and accountable for the nature and level of response to criminal cases.<sup>49</sup> The corresponding increase in the auditing of their work, however, is

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<sup>47</sup> Police officers are angry at the time they have to wait to get through to the *parquet* office on the telephone; prosecutors are frustrated that they are now less available for the more serious and long term investigations. Jacques Beaume, *Rapport sur la procédure pénale*, 28.

<sup>48</sup> Christian Mouhanna and Benoit Bastard, “Procureurs et substituts: l’évolution du système de production des décisions pénales” *Droit et Société* 74, no. 1 (2010):35-53.

<sup>49</sup> As in England and Wales, these methods that require prosecutors to manage caseloads as quickly, efficiently and inexpensively as possible are drawn

experienced by *procureurs* less as a means of ensuring an appropriate criminal response and more as a way of managing the *parquet* itself.<sup>50</sup> This came to a head in January 2016 when 86 per cent of the 168 *procureurs* in France decided not to produce their usual annual report for the Minister of Justice, but a less detailed version that would not include tables of figures that had to be produced by hand, as they did not have the technology to produce the required statistics.

Neither are the *procureur's* fellow judicial officers immune from this bureaucratic, rather than democratic, accountability. Justice is measured by quantitative standards that focus on the avoidance of delay above all else, and so the number of cases processed.<sup>51</sup> There is frustration with these managerialist imperatives to move cases along quickly and to involve prosecutors in minor cases that are easily oriented, leaving a gap where they are needed in more serious and complex cases. The TTR, for example, is also characterized as part of a trend to move to a faster procedure that depends on an oral account, resulting in a less considered review of the written evidence. This further undermines the professional identity of the judiciary, requiring decisions to be governed by economic, rather than judicial imperatives.<sup>52</sup> Furthermore, the responsibility placed on prosecutors to set clear justice priorities and ensure that cases are disposed of rather than discontinued, is in direct tension with the budgetary

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from the world of business and the language of productivity, and so are alien to those in the judicial world. Garapon, et al., *La prudence et l'autorité*.

<sup>50</sup> Philip Milburn, et al., *Les procureurs: Entre vocation judiciaire et fonctions politiques* (Paris: Presses universitaires de France, 2010), 94-5.

<sup>51</sup> Court areas and even individual judicial officers are measured by their productivity, by the fruits they bear. This emphasis on efficiency and reducing delay has resulted in the number of cases dealt with increasing by one fifth in the last decade. Garapon, et al., *La prudence et l'autorité*, 70, footnote.101.

<sup>52</sup> Garapon, et al., *La prudence et l'autorité*.

constraints they face. It is a familiar story: prosecutors are required to do more with less, wrapped in the euphemistic rhetoric of efficiency.

One aspect of managing these growing caseloads more efficiently (that is, more cheaply) is to delegate work. This is a feature of much modern professional life, from health, to education, to justice, as a rational response to increased demands and accountability, at the same time as budgets are shrinking. In England and Wales, criminal defense lawyers engaged in the mass delegation of criminal work to trainee solicitors and clerks in the 1980s and 1990s, with the result that their businesses thrived, but clients' interests were subordinated to profit.<sup>53</sup> As noted above, a good deal of magistrates' court work, the responsibility of Crown Prosecutors, is now assigned to non-legally trained Associate Prosecutors. Delegation is also a feature of the modern French prosecution function. Many aspects of the *procureur's* work are now carried out by mediators and associate prosecutors (*délégués du procureur*) who are typically former police officers or gendarmes. They operate a policy of auto prosecution with procedures such as the *composition pénale* and *ordonnance pénale*. Taken together with this increasing culture of accountability, this offers a reshaped picture of the profession -- one in which decisions about the procedure to follow are more standardized and less within the professional discretion of the *procureur* whose role is becoming less judicial and more administrative.<sup>54</sup> The *procureur* is at the center of criminal justice decision-making, but much of this is carried out in more standardized and pre-determined ways. If the

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<sup>53</sup> Mike McConville, et al., *Standing Accused: The Organization and Practices of Criminal Defense Lawyers in Britain* (Oxford: OUP, 1994).

<sup>54</sup> See also Garapon, et al., *La prudence et l'autorité*, 110.

mainstay of judicial safeguarding and accountability is increasingly subject to the administrative demands of the executive, this has important implications for the balance of power within criminal justice.

The *procureur's* role as local policy maker has also become significant. In addition to the top down hierarchical structures of policy and accountability associated with classic inquisitorial-type procedures,<sup>55</sup> the *procureur* now works with the police, local government, customs and border police to set priorities and to develop effective ways of handling cases. The TTR, for example, began as a local pilot but was then rolled out nationally. Historically, local security matters would have been the concern of local government (the *préfet*) but the *procureur* is now a visible part of civil society and local political life and her role within local policy-making has developed as a demand of a more security-oriented civil society. Although the *procureur* has welcomed this, confident that she is able to differentiate her judicial role clearly from that of the more political *préfet*, her *magistrat* colleagues are less convinced. There is a certain paradox in that it is her judicial status that defines her role, and the necessity for that role, within local politics, yet the further enmeshed within the local political administration the *procureur* becomes, the weaker her status as *magistrat* in the eyes of her judicial colleagues.<sup>56</sup>

This paradox is situated within a wider debate as to whether the *procureur* should retain the status of *magistrat* along with *juges du siège*, or whether her role as investigator and enforcer of government policy sets her apart. For their part, *procureurs* fear professional relegation to the rank of

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<sup>55</sup> Hodgson, "Hierarchy, Bureaucracy and Ideology," 227-57.

<sup>56</sup> Milburn, et al., *Les procureurs*, 137.

functionary and positioning within a hierarchy headed by the Minister of Interior. They see a government that determines the *parquet's* role against its will and an alliance between judges, lawyers and parliament to impose a more accusatorial procedure in which the *procureur* role will narrow to that of simply the accusing party and her judicial role will necessarily wither away. Given the tiny minority of criminal matters now dealt with by the *juge d'instruction* and the omnipresence of the *procureur* in the investigation and prosecution of crime, the prospect of her turning into a *superpolicier* would remove the current guarantees of independence and protection of rights and freedoms in favor (in theory, at least) of a more European rights based approach.<sup>57</sup> This would require a much improved and developed criminal bar, which currently is playing catch-up with the growth in suspects' rights and which has yet to be recognized as a serious guarantor of justice either by the judiciary or the government.<sup>58</sup>

In addition to, and often in tension with this more local role, the *parquet* also receives directives and circulars from her own hierarchy, coming down from the Minister of Justice -- but also from the Minister of Interior. These are of such a quantity that 80% of cases now fall within priority areas for action.<sup>59</sup> There has also been something of a legislative explosion of criminal legislation and

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<sup>57</sup> The Beaume Report warned against the *procureur* becoming a kind of supercop operating more as a superior police officer than a judicial authority. See Beaume, *Rapport sur la procédure pénale*, 28.

<sup>58</sup> Jacqueline S. Hodgson, "The role of lawyers during police detention and questioning: a comparative study," *Contemporary Readings in Law and Social Justice* 7, no.2 (2015): 47-56; Cape and Hodgson, "The right of access to a lawyer"; Hodgson, "Custodial Legal Advice," 14-15; Jacqueline S. Hodgson, "Safeguarding Suspects' Rights in EU Criminal Justice: A Comparative Perspective," *New Criminal Law Review* 14, no. 4 (2011): 611-665; Hodgson, "Constructing the pre-trial role," 1-16.

<sup>59</sup> Milburn, et al., *Les procureurs*, 92.

prosecutors report difficulty in keeping abreast of the range of procedures now in place for different offence types. As a result, *procureurs* are overloaded with, sometimes contradictory, demands and report feeling torn between their response as professionals, their role in shaping local criminal justice and security policy, and the demands of an executive (which increasingly includes the Minister of the Interior, as well as the Minister of Justice) keen to secure electoral success. An example of the tension created by these executive orders is the circular issued by the Minister of Interior inviting the *parquet* to contribute to an interministerial initiative to increase the number of identity checks carried out on the outskirts of schools. This was not coordinated with local policies, nor did it take account of local conditions. Only later was a circular from the Justice Minister issued, corroborating these instructions.<sup>60</sup> The prosecutor's role in safeguarding individual freedoms and as a local criminal justice policy actor, have become important modes of retaining her professional role and autonomy, and of resisting pressure on the *parquet* from the state, to be instrumental in putting into effect its repressive criminal justice agenda.<sup>61</sup>

#### IV. The Relationship Between Independence and Democratic Accountability

Discussion of concepts such as independence, accountability and democracy are riddled with difficulties. On the face of it, they appear to be positive, just as unaccountability, dictatorship and a lack of independence appear to be negative. But these are not universal concepts that mean the same thing wherever they

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<sup>60</sup> Milburn, et al., *Les procureurs*, 93.

<sup>61</sup> Milburn, et al., *Les procureurs*, 101-2.

appear; they are at times interlinked and are highly context-dependent. As discussed above, prosecutorial independence and accountability are shaped in part by different historical and professional factors, but also by the balance of roles and responsibilities between legal actors,<sup>62</sup> by the nature of prosecutorial discretion, the procedural tradition (itself connected to the political culture, as noted by Damaška),<sup>63</sup> and even relations with the media.<sup>64</sup> In comparing the different constructions of prosecutorial independence, Di Federico characterizes the process as one of accommodating two conflicting values at the operational level:

On the one hand, there is awareness that public prosecution contributes substantially to the definition and implementation of criminal policy. This requires that mechanisms be devised to ensure that the active role played in that crucial area be somehow directed and controlled in the context of the democratic process. On the other hand, the need to guarantee that public prosecution be exercised with rigour, consistency and fairness makes it necessary to ensure that too close a tie with the political process be not unduly used by the existing majority to influence the conduct

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<sup>62</sup> Hodgson, *French Criminal Justice*, ch. 3, especially pp79-85 on the contrasting roles of *juge d'instruction* and *procureurs* and their assertions of independence in response to political pressure.

<sup>63</sup> Mirjan Damaška, "Structures of Authority and Comparative Criminal Procedure," *Yale Law Journal* 84 (1975): 480-544.

<sup>64</sup> Hodgson, *French Criminal Justice*, 82-3; Éric Zemmour, "Justice et médias, les nouveaux aristocrates de la Ve," *Pouvoirs* 99 (2001): 163-70.

(actively or by omission) of public prosecution for partisan purposes; more generally to ensure that citizens be treated equally.<sup>65</sup>

In the US, the role of prosecutors in the “definition and implementation of criminal policy” is “directed and controlled in the context of the democratic process” through the election of prosecutors in the locality where they serve. This populist model is criticized by some, such as Michael Tonry, as being “lawless” because prosecutors “exercise their enormous power over citizens’ lives without being accountable to anyone but the electorate”.<sup>66</sup> In Italy, in contrast, “absolute priority is given to the value of independence”<sup>67</sup> with no relevance accorded to democratic accountability to either an electorate or political power.<sup>68</sup> This is explained in part by the historical and political context of the prosecution function. Political independence and autonomy were considered paramount in establishing the prosecution function after World War II in order to avoid the political discrimination experienced during the Fascist period. This was accompanied by a principle of mandatory prosecution to avoid any arbitrary or political exercise of power. The result has been, argues Di Federico, the unjustified aggrandizement of the status of the profession and the exercise of discretion in a fragmented way that reflects personal and local

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<sup>65</sup> Giuseppe Di Federico, "Prosecutorial Independence and the Democratic Requirement of Accountability in Italy," *British Journal of Criminology* 38 (1998): 373.

<sup>66</sup> Tonry, *Prosecutors and Politics*.

<sup>67</sup> Di Federico, "Prosecutorial Independence and the Democratic Requirement," 375.

<sup>68</sup> See also Carlo Guarnieri, "Prosecution in Two Civil Law Countries: France and Italy," in *Comparing Legal Cultures*, ed. David Nelken (Aldershot: Dartmouth Pub Co, 1997), 183-93; Carlo Guarnieri, and Patrícia Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002).

preferences, rather than equal treatment before the law or any form of democratic accountability.<sup>69</sup>

In England and Wales and in France, this balance is struck in different ways. In France, prosecutors are not elected, but they sit in a direct hierarchical structure of authority with the Justice Minister at the apex. This might be described as a kind of second tier democratic input, through the filter of an already elected government. This has the advantage of uniformity and coherence, and perhaps the expertise and professionalism of government, but risks the imposition of the will of presidents and prime ministers on matters of justice, potentially compromising the independence of decision-making. The *procureur* is also increasingly implicated within local civil society, working alongside local politicians to shape local criminal justice policy. In England and Wales, prosecutors are neither elected, nor do they sit within a political/judicial hierarchy. There is a more indirect political accountability through the politically appointed DPP and the Attorney General, with a high degree of professional autonomy, albeit increasingly regulated through prosecution guidance and charging standards issued by the DPP. The professional status and the legal and political histories of prosecutors in England and Wales and France

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<sup>69</sup> He quotes (1998: 380) Giovanni Falcone, the judge who prosecuted, and ultimately was assassinated by, the mafia in 1992: "How can it be conceivable that in a liberal democratic regime we do not yet have a judicial policy, and everything is left to the *absolutely irresponsible decisions* of the various prosecutors' offices and often even to the personal decisions of their members? In the absence of institutional controls on the activities of public prosecutors, [there is] the peril that informal influences and hidden connections with hidden *loci* of power might influence their activities. It seems to me that the time has come to rationalise and co-ordinate the activities of public prosecutors rendered de facto unaccountable by a fetishistic conception of the principle of mandatory criminal prosecution." Giovanni Falcone, *Interventi e Proposte (1982-92)* (Milan: Sansei, 1994), 173-4.

are different, as are their models of democratic accountability and the relationship to prosecution policy.

#### A. The *Parquet*: Democratic Accountability Through Hierarchy

The solution in France has been to maintain a clear link with the executive, ensuring that the prosecutor acts within the sphere determined by a democratically elected politician. This is achieved through a mixture of Ministry directives and policy guidance from within the hierarchy of the *parquet* itself. For prosecutors, this provides a broad context, allowing individuals to provide responses that are adapted to the locality and the individual, without undermining the fundamental principle of democratic accountability. As one senior *procureur* explained it:

Of course there are problems of standardization...you cannot follow the same *politique pénale* everywhere because the cases are different, the populations are different, the problems are different...In one instance you will prosecute far more offenders than in another, because there is less delinquency...A uniform system of justice, which is delivered in the same way everywhere and so which does not take account of differences, would effectively be a non-democratic system of justice. [A6]<sup>70</sup>

However, some have also criticized the broad discretion that this allows.

Justice varies in different regions. You will not be prosecuted for some offences in some places -- which basically means that you can commit more crime in the city. I saw a case in the Alps when a person was

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<sup>70</sup> *Procureur adjoint*, interviewed in field site A, quoted in Hodgson, *French Criminal Justice*, 230.

prosecuted for letting out his cattle. They said it was a breach of public order there -- but I think hitting your wife is worse than that, yet it is not prosecuted [here]. I think they prosecute minor offences to justify their existence. [*Procureur*, Site D]<sup>71</sup>

This runs the risk of going beyond applying central policy in a way adapted to local or individual needs, and undermining the democratic line of accountability.

In this way, transgression of the same law leads to sanctions in one place, to total impunity in another. Diverted from its objective, as soon as what should and should not be sanctioned is translated into something over which there is total choice, the discretion to prosecute runs the not insignificant risk of resulting in unacceptable distortions in crime control between different jurisdictions; and that would go way beyond what could be justified by the criminal policy legitimately followed by each *parquet* according to its particular local conditions.<sup>72</sup>

In my own research, it was clear that these differences extended beyond court areas, to the exercise of individual discretion in a way considered by some to undermine democratic and hierarchical accountability. Some *magistrats* denied any personal choice in the application of the law.

The one thing I am afraid of is to have a moment of emotion. Sometimes, when I have a person before me, I try to make them face up to their responsibilities and when I see him leave [my office for court] I know that he is going to get four or six months in prison and sometimes that breaks

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<sup>71</sup> Hodgson, *French Criminal Justice*, 231.

<sup>72</sup> Magendie and Gomez, *Justices*, 102.

my heart. But I have a responsibility, a *politique* to respect and I apply it.

[A2]<sup>73</sup>

Others recognized the inevitability of individual discretion, unconstrained by broader policy.

The fact that the evidence must all be in writing does not prevent us from having a significant amount of leeway. It is procedural, but it does not prevent us from reacting...I am not at all tolerant of sexual offences, but I had a colleague who just didn't give a damn. It depends on your personality. [A4]<sup>74</sup>

This was also corroborated by police officers we surveyed.

The policies or decisions of certain *magistrats* are, in identical circumstances but in different places, often different. The differences in treatment are sometimes surprising, at the heart of the same jurisdiction. The personal involvement of some *magistrats* is difficult to manage. This subjectivity, without basis, is experienced quite negatively by police personnel. [Police questionnaire respondent 5]<sup>75</sup>

In this way, the exercise of prosecutorial discretion at the regional and individual level can conflict with the application of criminal justice policy set by the Ministry of Justice, and so undermine democratic accountability. On the other hand, it might be argued that local differentiation better serves local needs,

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<sup>73</sup> Junior *procureur*, interviewed in site A, quoted in Hodgson, *French Criminal Justice*, 232-3.

<sup>74</sup> Junior *procureur* interviewed in site A, quoted in Hodgson, *French Criminal Justice*, 234.

<sup>75</sup> Quoted in Hodgson, *French Criminal Justice*, 234.

especially given the *procureur's* role developing policy and new initiatives alongside local political and criminal justice actors. This might be seen as a form of local democracy shaping the prosecution function.

However, there is also broad discretion at the individual level. This includes the unfettered discretion enjoyed by the *procureur* in middle ranking offences (*délits*) concerning whether or not to open an *instruction* investigation, or to deal with the investigation herself. There is no legal guidance and so prosecutors may exercise their discretion to keep the investigation under their power, a decision that will necessarily deprive the accused of the due process rights that she would be afforded during the *instruction*. The courts have been inconsistent on this issue and what should or should not motivate the decision to retain a case within the jurisdiction of the *procureur* -- a trial court first striking out such a procedure in 2012, but the *Cour de Cassation* in 2013 upholding it as not in any way infringing the accused's right to a fair trial on the grounds that these rights would be available once at trial, so the accused was not disadvantaged. However, there is a world of difference between enjoying access to the dossier, being able to request investigative acts and having the benefit of legal assistance and representation all as pre-trial rights, rather than simply at trial.

A different kind of threat to prosecution and democracy in France is also represented by the executive itself. Historically, executive control of the *parquet* extended to instructions in individual cases, transforming executive or democratic structures of accountability into unacceptable opportunities for

political interference.<sup>76</sup> Rather than ensuring the consistent and impartial application of the law, instructions in individual cases enabled the government of the day to protect favored individuals from scrutiny, undermining the independence of the *procureur* and of the law. Orders were given to delay or to dismiss cases that may have "unfortunate and unforeseen consequences for a number of political representatives" as this was considered necessary to protect the interests of the state.<sup>77</sup> Many of these incidents involved senior politicians seeking to keep cases away from the independent *juge d'instruction* (over whom they exercise no control) and under the authority of the more politically malleable *procureur*. Even where cases have been investigated by the *juge d'instruction*, the *procureur's* lack of political independence has been of concern. In 2009, at the close of investigations into former French President, Jacques Chirac, for the misuse of public funds and breach of trust, the *procureur* recommended that no prosecution be brought on the grounds that there was insufficient supporting evidence. The *juge d'instruction*, Xavière Simeoni, disagreed and in a 215 page report, she set out why she considered that at least 21 of Chirac's associates were not in fact genuine employees.<sup>78</sup> In December 2011, Chirac was convicted and given a two year suspended prison sentence.<sup>79</sup>

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<sup>76</sup> Hodgson, *French Criminal Justice*, 80-85.

<sup>77</sup> Former Justice Minister, Henri Nallet, discussed in Hodgson, *French Criminal Justice*, 81.

<sup>78</sup> Hodgson, "The French Prosecutor in Question," 1382.

<sup>79</sup> "Jacques Chirac condamné à deux ans de prison avec sursis," *Le Monde*, last modified December 15, 2011, [http://www.lemonde.fr/societe/article/2011/12/15/verdict-attendu-dans-l-affaire-des-emplois-fictifs-de-la-ville-de-paris\\_1618652\\_3224.html](http://www.lemonde.fr/societe/article/2011/12/15/verdict-attendu-dans-l-affaire-des-emplois-fictifs-de-la-ville-de-paris_1618652_3224.html). For a chronology of events from the start of investigations in 1999, the constitutional reform giving him presidential immunity while in office, the criminal investigation and the reimbursement of funds to the office of the mayor of Paris,

Furthermore, whilst directives and policy guidance are in written form, affording a degree of transparency, instructions in individual cases were oral and secret. Even following reforms that required instructions to individual *procureurs* to be in writing, prosecutors reported continuing to receive oral instructions from their superiors, acting as a conduit for the Minister. Given the controlling influence on the *procureur's* career exercised by the hierarchy headed by the Justice Minister, the historic culture of obedience and subordination was difficult to break in practice.<sup>80</sup> Legislation in 2013 now forbids the Minister of Justice from issuing any instructions to prosecutors in individual cases.

#### B. The CPS: Accountability and Policy From Within

CPS accountability is very different from that of the French *procureur*. Crown Prosecutors are not under the direct authority of the Justice Minister, even through local internal hierarchies as in France, and as discussed above, the executive's relationship with the prosecution and the judiciary is also different. The executive hierarchy within which the *parquet* sits is regarded as a legitimate form of democratic accountability in France. As a republic, the state represents the will of the people. In England and Wales, this would be considered political interference with the criminal process. Whilst in France the State is and represents the public interest, "Common law countries [...] regard the public interest as an interest separate from that of the state -- moreover, an interest

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see "Chronologie: Affaire Chirac: 12 ans de procédure," *Le Nouvel Observateur*, accessed December 15, 2011, <http://tempsreel.nouvelobs.com/societe/20111215.OBS6852/chronologie-affaire-chirac-12-ans-de-procedure.html>.

<sup>80</sup> Truche, *Rapport*.

which is often in direct conflict with the interest represented by the government."<sup>81</sup> Representing or acting in the public interest is an important aspect of democratic accountability and this has been incorporated into the development of prosecution policy, principally through an open and transparent process of public consultation. After concerns were raised about the democratic legitimacy of the DPP setting out prosecution policy on assisted suicide, the practice of public consultation around CPS policies was instituted, with the results being published on the CPS website.<sup>82</sup> This would not be regarded as legitimate in France, where the public interest is understood as something different from and greater than the sum of private interests.<sup>83</sup> For the CPS in England and Wales, however: "The frequency with which the public's views are sought provides some assurance that the current public interest factors carry with them their acceptance and support".<sup>84</sup>

Although the CPS works with local police in order to provide information on high volume and priority crimes, it does not actively shape local policy. Guidance on a range of issues, procedures and offences is set nationally by the DPP, and CPS case record keeping reflects this explicitly, especially in key areas such as domestic violence and rape, where different procedures must be followed, evidence thresholds may differ and police-CPS consultation is required.

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<sup>81</sup> Vera Langer, "Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor," *American Journal of Comparative Law* 36 (1988): 279-280.

<sup>82</sup> See The CPS, "Consultations," The Crown Prosecution Service, <http://www.cps.gov.uk/consultations/index.html>.

<sup>83</sup> Laurène Soubise, "Prosecutorial Discretion and Accountability" (PhD Thesis, University of Warwick 2016), 131.

<sup>84</sup> Roger Daw and Alex Solomon, "Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute," *Criminal Law Review* (2010): 737-743.

However, the accountability of prosecutors themselves is not centralized. The organization of the CPS into charge teams, magistrates' court teams, Crown Court teams, rape and serious sexual offences teams and so on, reflects the segmentation of the criminal justice process, but also means that it is rare for one single prosecutor to have ownership of the case file. A series of decisions and reviews take place at each stage and so accountability itself is fragmented, limited to a specific range of actions at different points in the process. At the other end of the scale, the work of the CPS as a whole is subject to oversight. Cases are reviewed and decision-making is audited by national inspectorates, and performance targets are set nationally and locally.

We have seen that French prosecutors are subject to a form of macro democratic accountability from the Minister of Justice, but individual decisions are subject to little scrutiny. This stems from the legal cultural understanding of the application of law as an objective process, which leads to a logical and inevitable conclusion. Reasons are not, therefore, considered necessary, shielding the decision of the individual prosecutor from review. In the criminal process in England and Wales, the existence of discretion is recognized explicitly and so is more closely regulated. In contrast to the mass of DPP policy guidance for Crown Prosecutors, and requirements to demonstrate compliance by case record-keeping, the *procureur* enjoys almost unfettered discretion to determine how to proceed with a case. With more regulation comes the possibility of review, as there are clear criteria against which to measure the proper exercise of prosecutorial discretion. This transparency of decision-making lends legitimacy to the work of the CPS and provides the possibility for public

challenge, but can be experienced by prosecutors as a constraint on the exercise of their professional judgment.

## V. Conclusion

In both jurisdictions, the prosecutor's role in determining the prosecution, treatment and disposition of criminal cases is now significant. There has been a shift away from judicial processes (and so from the corresponding safeguards of transparency and publicity), towards pre-trial prosecution determinations that are designed to be faster and cheaper, and so more efficient. Mechanisms of accountability need to reflect these changes in the prosecution function in order to maintain the legitimacy of the criminal process. However, given differences in legal and political culture, as well as the role and functions of the public prosecutor in France and in England and Wales, we might not expect the same mechanisms of democratic accountability to be in place. Indeed, the concept itself is interpreted differently through the broader question of what is understood to be democratic -- whether this engages the state or the public -- and the nature of prosecutorial accountability -- whether this operates at the level of national or local policy, or of the individual case decision. In both jurisdictions, democratic accountability for prosecution policy more broadly is regarded in positive terms. It encourages uniformity and consistency and so fairness in the application of the law.<sup>85</sup> Operating at the level of individual cases,

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<sup>85</sup> Fairness is also a problematic concept and this account of fairness may be contested: absolute uniformity may appear unfair in some circumstances, as expressed by some of the *procureurs* quoted above. The concept of adaptation -- where the criminal response or the sentence, is adapted to the offender -- is important in French criminal justice. This form of discretion tempers the harsh rigidity of uniformity, but sits comfortably within the professional ideology of

however, it is the reverse. It seeks to impose differential treatment on an individual, undermining the consistency and independence of the law, replacing it with political favoritism and advantage.

There are also clear differences in the nature of local and national models of democratic accountability. In France, there is a tension, and even a contradiction, between the demands of local and national democracy as it relates to the prosecution function. Locally, the *procureur* is closely associated with the *préfet*, a government appointed head of local police and security. She works with the local political administration and other agencies in order to develop local criminal justice policy and responses to crime. However, at the same time, she is subject to targets and a variety of output measures set by the Justice Minister. Garapon et al (2013) talk about a different kind of democratization of justice, in which the government is implicated in everything from advancing the rights of victims; ensuring that more cases are disposed of; an explosion of criminal legislation; setting targets re cost-saving, reducing delays, case management and overall measures of efficiency. The result is that prosecutors and other judicial officers are governed more by economic imperatives than judicial reasoning. The need to comply with these national policies and target outputs, together with nationally determined budget constraints, creates a conflict of interests for the *procureur* and undercuts her ability to set workable local policies and targets.

The different procedural traditions of England and Wales and of France also affect the relationship between prosecutorial independence and democratic accountability. The inquisitorial framework of the French criminal process vests

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the *juge*. Jacqueline S. Hodgson and Laurène Soubise, "Understanding the Sentencing Process in France," *Crime and Justice* 45, no. 1 (2016).

greater power in the *procureur* than is enjoyed by the Crown Prosecutor, and together with her judicial status, this relegates the defense to a relatively marginal role, suggesting that the concentration of authority that independence implies, should be tempered by a democratic steer. Even with recent reforms that allow the defense a greater opportunity to participate in the investigation and trial of cases, the defense remains in a weak position from which to call the prosecutor to account. The judicial status of the *procureur* is understood to justify the concentration of power and of trust in the office of prosecutor: as a *magistrat* she represents the public interest and ensures compliance with due process safeguards. Who better to entrust with the impartial application of the law? Yet, she is not a judicial officer for the purpose of Article 5 ECHR and in practice, her judicial status has been found to clothe in neutrality a police and crime control orientation.

Whilst the democratic accountability of the *procureur* is understood to be provided through the hierarchical organization of the *parquet*, with the Justice Minister at its head, in England and Wales, the democratic accountability of the CPS lies more in the public's participation in the development of prosecution policies (developed by the DPP rather than a politician) and in the possibility of review. The autonomy of the Crown Prosecutor is limited, however, by the plethora of policy guidelines that must be followed and by the rigid division of case processing into pathways and stages. Discretion is defined and regulated and so subject to later scrutiny. The picture is very different in France. By denying the existence of a broad discretion, even in the face of the accepted practice of ensuring that the criminal response is "adapted" both to the offender

and the locality, the French *procureur* enjoys a high level of professional autonomy in her decision-making. Despite the generally bureaucratic nature of inquisitorially rooted procedures,<sup>86</sup> paradoxically, it is in England and Wales and not in France, that the individual accountability of the public prosecutor is greater.

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<sup>86</sup> Mirjan R Damaška. *The faces of justice and state authority: a comparative approach to the legal process* (Yale: Yale University Press, 1986); Hodgson, *Hierarchy, Bureaucracy and Legitimacy*.

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