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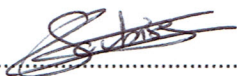
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PROSECUTORIAL DISCRETION AND ACCOUNTABILITY

A comparative study of France and England and Wales

by

Laurène Soubise

A thesis submitted in partial fulfilment of the requirements for the
degree of Doctor of Philosophy in Law

University of Warwick, School of Law

Université Lumière Lyon 2, Faculté de droit et de science politique

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Declaration

I hereby declare that this thesis comprises my own work and has not been submitted for a degree at any other university, apart from the University of Warwick and the Université Lumière Lyon 2 in accordance with the co-supervision agreement established between the two universities.

Laurène Soubise

Abstract

Tasked with enforcing the criminal law against suspected offenders, public prosecutors have traditionally enjoyed broad discretion, which is usually structured by legal and policy guidelines defining rules prosecutors should follow when making their decisions. Basing its analysis upon direct observations and interviews in the two jurisdictions under study, this comparative thesis endeavours to understand how the French and Anglo-Welsh criminal justice systems attempt to combine the necessities of accountability for public prosecution services in modern democratic societies with the flexibility and reactivity needed in the application of the law provided by prosecutorial discretion. There have been few systematic, empirical accounts of the decision-making process of these national prosecution services.

This thesis argues that neither system observed achieves a satisfactory balance between accountability and discretion for public prosecutors. In France, although democratic and hierarchical accountability channels are well developed in theory, oversight is weak due to the primacy of the concept of ‘adaptation’ in the legal culture and the strong professional ethos of *procureurs* as independent judicial officers. In England and Wales, public prosecutors are part of a highly bureaucratic and centralised structure which strictly enforces consistency in prosecutorial decisions at the expense of much discretion and autonomy for individual prosecutors whose responsibility is limited to narrow and repetitive tasks due to the segmentation of the prosecution process. This overbearing accountability structure, coupled with a historical balance of power in favour of the police, appears to prevent prosecutors from making decisions perceived as unpopular with their hierarchy or the police. Finally, pressure on resources and a drive for efficiency in both jurisdictions have resulted in the bureaucratisation of the criminal justice process with part of the prosecution workload being delegated to unqualified staff and minor cases being processed as quickly as possible into a one-size-fits-all system.

Chapter 1 – Introduction

A growing body of literature recognises the crucial role played by public prosecutors in criminal justice systems. Whilst in France, the public prosecution service (*ministère public* or *parquet*)¹ is a very old institution whose origins go back to the thirteenth century, in England and Wales,² the Crown Prosecution Service (CPS) is a much more recent creation, as autonomous police forces remained the main public prosecutors until 1986, employing legal professionals to represent them in court. The discretion entrusted in public prosecutors requires that they exercise it impartially to conform to the basic right of individuals of equality before the law and to protection from discrimination. This impartiality requirement calls for prosecutorial independence: a prosecutor would otherwise be suspected of bias in favour of the body or person they are dependent upon. Equally, broad discretionary power coupled with complete independence could also lead to potential abuses and arbitrary decisions if left unchecked.³ Consequently, both in England and France, predefined policies guide prosecutorial discretion to ensure coherent prosecution decisions across the territory.

¹ The French public prosecution service is composed of *procureurs*, the French prosecutors. The word '*parquet*' is also used as a collective term for *procureurs*. Its etymological origin has sometimes been explained by noting that prosecutors originally stood on the wooden floor of the courtroom, along with defence lawyers, at the bottom of the platform where the judges sat. This explanation did not convince Professor Jean-Marie Carbasse who notes that the separation between judges and prosecutors dates back to the beginning of the institution, at a time where the court floor was not covered with parquet, and in any case well before the term 'parquet' was used to designate this type of floor covering. Jean-Marie Carbasse, *Histoire du Parquet* (PUF 2000) 20; see also François Koning and Stanislas Vailhen, 'Le Ministère Public à L'audience Pénale: Tout Sauf Une "Simple Erreur de Menuiserie"' [1999] *Petites affiches* 13.

² The United Kingdom does not have a unified public prosecution service. There are in fact three national prosecution services: the Crown Prosecution Service of England and Wales (the CPS), the Crown Office and Procurator Fiscal Service (COPFS) in Scotland and the Public Prosecution Service for Northern Ireland (PPSNI). This study will be limited to the comparison of the French public prosecution service with the CPS.

³ Andrew Ashworth, 'The "Public Interest" Element in Prosecutions' [1987] *Criminal Law Review* 595, 606; see also Bernard Bouloc, Gaston Stefani and Georges Levasseur, *Procédure pénale* (20th edn, Dalloz 2006) 549.

This study seeks to provide a better understanding of the ways in which French and Anglo-Welsh public prosecution authorities operate in practice, in particular on how prosecutorial practices on the ground are shaped by policies implemented by the hierarchy and vice-versa. The analysis builds on empirical data collected across two research sites, in France and in England and Wales, where the daily working practices of prosecutors were observed. The study examines the legal framework of prosecutorial decision-making and the factors which influence and constrain it. These include the impact of prosecution policy and resources; the different status and training of prosecutors; their working practices and ideologies; their role within the wider criminal justice system and their relationships with other criminal justice actors (police, courts) and with the government; as well as the internal organisation of public prosecution services. The focus of the study is upon prosecutorial decision-making in France and England and Wales, and, in particular, the ways in which those jurisdictions are able to combine prosecutorial discretion and independence with accountability, both in terms of fairness and efficiency.

Despite important reforms, the jurisdictions under study remain quite different, the French system being founded on the inquisitorial principle and the English system stemming from the adversarial tradition. These differences are reflected in particular in their prosecutorial arrangements. The analysis is comparative in order to draw out contrasting features, as well as similarities, between the two systems. Comparison acts like a developing bath in photography: features of each system come into light and are better understood through the comparative lens. Whilst there are accounts of criminal justice systems and of public prosecution services in England and France, some of which take a comparative approach, little research has been done on the way national prosecution policies are disseminated and on the inner workings of public prosecution

services: researchers have focused either on its head (relationship of public prosecution services with the executive) or on its base (relationship of prosecutors with the police). Yet it is the articulation between the head and the base that allows policy decided at the top to be implemented by prosecutors at the bottom of the pyramid.

I. Historical Background

Whereas, in France, the creation of the office of public prosecutor precedes the development of police forces, the English public prosecutor was introduced more than a hundred and fifty years after their emergence. These historical differences play an important part in today's role and ethos of public prosecutors.

A. *The French prosecutor: the heir of a long history*

In France, the position of *procureur* goes back to the thirteenth century, when the king found it necessary to have representatives in the courts throughout the country to protect his interests and to present his views on litigation that affected the public.⁴ He gave this mission to '*procuratores*', simple lawyers who had a very distinguished client, the king himself. Progressively, another mission was added to the original one of protecting the king's interests, that of protecting the public interest.⁵ The concept of public interest developed as early as the middle of the twelfth century and the rule that 'it is the public interest that crimes do not remain unpunished' (*interest rei publicae ne maleficia remaneant impunita*) was adopted by royal lawyers during the thirteenth century at the latest. It was therefore only natural that the public sanctioning of the most serious crimes was carried out in royal courts at the initiative of the royal

⁴ Carbasse (n 1).

⁵ Guillaume Leyte, 'Les Origines Médiévales Du Ministère Public' in Jean-Marie Carbasse (ed), *Histoire du parquet* (PUF 2000).

procureurs, when the function emerged.⁶ In the fourteenth century, the role could only be fulfilled by lawyers who had bought an ‘office’ from the king and had taken an oath, swearing to fulfil their mission impartially. Thus, the *procureurs* became public officials and exclusively represented and protected the king’s interests in court. They stood on a platform to distinguish themselves from the private lawyers, but their function remained clearly separated from that of the judges.⁷

From defending the public interest, the *procureurs* were associated with the protection of public order as early as the fourteenth century and supervised police investigations. From the seventeenth century onwards however, the king believed that they were not dynamic enough in the fight against criminality and decided that the police would also be controlled by other royal agents, the intendants.⁸ A symbol of royal centralization and absolutism, intendants were royal civil servants. They were appointed and revoked by the king through ‘commissions’, not hereditary and purchasable offices, like other public officials, such as judges. That prevented the abuse of sales of royal offices and made them more amenable and obedient representatives of the king.⁹ Intendants were sent to enforce the king’s will in the provinces and carry out inspections. They had jurisdiction over three areas: finances, policing and justice. As police intendants, they were in charge of maintaining public order by supervising the police and keeping watch on public opinion. As justice intendants, they monitored the courts: they ensured that justice officers were neither too slow nor careless, nor too indulgent (in particular

⁶ Marie-Yvonne Crépin, ‘Le Rôle Pénal Du Ministère Public : L’exemple Du Parlement de Bretagne’ in Jean-Marie Carbasse (ed), *Histoire du parquet* (PUF 2000).

⁷ Christine Mengès, ‘Le Statut Des Gens Du Roi à La Fin de l’Ancien Régime (XVIe-XVIIIe Siècle)’ in Jean-Marie Carbasse (ed), *Histoire du parquet* (PUF 2000).

⁸ Jacqueline David, ‘La Participation Des Gens Du Roi à La Police Du Royaume Pendant l’Ancien Régime’ in Jean-Marie Carbasse (ed), *Histoire du parquet* (PUF 2000).

⁹ Although the *procureurs*’ office was not hereditary or purchasable, they were nonetheless irremovable.

with the nobility), nor too greedy. From then on, the *procureurs* became more dependent on royal power.

At the Revolution, the king's *procureurs* became the people's *procureurs*.¹⁰ Their hierarchical organisation and their dependence on the government were progressively reinforced under the Republics and the Empire. Appointed centrally, the *procureurs* were strictly subordinated to the executive and dismissible at any point. From people's *procureurs*, they became state's *procureurs*: *procureurs de l'Empire* first, then *procureurs de la République*. This gave the government a particularly docile instrument that the absolute monarchy never enjoyed.¹¹ From the nineteenth century, the recurring debate around the link between *procureurs* and political power started developing. At the time, the *procureurs*' functions were conceived as 'militant functions': the *procureurs* were unrelentingly subject to the demands of the political power.¹² The nineteenth century was marked by constitutional instability in France, with each regime succeeding the next at a rapid pace.¹³ Regimes only lasted about twenty years on average, and each regime change was accompanied by the removal of the *procureurs* considered too agreeable to the old regime.

The *Conseil Supérieur de la Magistrature* (High Council for the Judiciary – CSM) was established in 1946 to reinforce the independence of the judiciary by taking away from the ministry of justice the task of administering the careers of judges.¹⁴ However, its composition remained heavily political with six members elected for six years by

¹⁰ Eric de Mari, 'Le Parquet Sous La Révolution 1789-1799' in Jean-Marie Carbasse (ed), *Histoire du parquet* (PUF 2000).

¹¹ Jean-Pierre Royer, 'Le ministère public, enjeu politique au XIXe siècle' in Jean-Marie Carbasse (ed), *Histoire du parquet* (PUF 2000).

¹² *ibid.*

¹³ First Empire (1804-1814), Bourbon Restoration (1814-1830), July Monarchy (1830-1848), Second Republic (1848-1852), Second Empire (1852-1870) and Third Republic (1870-1940).

¹⁴ Alain Bancaud, 'Normalisation d'une innovation : le Conseil supérieur de la magistrature sous la IVe République' (2006) 63-64 *Droit et Société* 371.

the National Assembly, two members appointed by the President of the Republic and only four members elected by members of the profession.¹⁵ In 1958, the objective of the General de Gaulle was to reaffirm the authority of the state and all CSM members were then appointed by the President.¹⁶ Despite projects to assign the management of the *parquet* to the ministry of the interior after the war, the Ordonnance of 22 October 1958 established a unitary management of the professional body, but the CSM had no power over the career of *procureurs* until 1992.¹⁷ In 1993, the composition of the CSM was reformed to include a majority of *magistrats* elected by their peers and to create a new division to give opinions on the appointment, career progression and discipline matters of *procureurs*. The Minister of Justice does not have to follow the CSM opinions however. Recent years have been marked by several scandals involving attempts by the government to use the criminal justice system for political gains through its powers over the public prosecution service. Those scandals and calls they generated to sever the link between the *ministère public* and government are discussed in further detail below.

B. The English prosecutor: a new institution

Whilst the French prosecutors are the heirs of a long history, the English public prosecutor is a relatively new creation, since the CPS was created by the Prosecution of Offences Act 1985. Until the nineteenth century, private citizens had to find their own lawyers or present the prosecution case themselves, although legal historians have shown that justices of the peace¹⁸ played an important role in helping citizens prepare

¹⁵ *ibid.*

¹⁶ Conseil Supérieur de la Magistrature, 'Les quatre naissances du CSM' <<http://www.conseil-superieur-magistrature.fr/node/42>> accessed 11 November 2015.

¹⁷ Conseil Supérieur de la Magistrature, 'Le CSM et les magistrats du parquet' <<http://www.conseil-superieur-magistrature.fr/?q=node/57>> accessed 11 November 2015.

¹⁸ Justice of the peace was an unpaid office undertaken voluntarily by local gentlemen appointed in every county to 'guard the peace', i.e. to administer civil and criminal justice in minor cases. The more modern title given to justices of the peace is that of 'magistrate'.

the prosecution.¹⁹ From their creation in the nineteenth century, police forces progressively took over this role and prosecuted cases, in addition to investigating them. No legislation granted the power to prosecute to the police, but the private prosecution principle at common law authorises any citizen to prosecute a case in the name of the Crown. Taking advantage of this principle, the police simply took over the role of victims, the truly private prosecutors.²⁰ They achieved a significant degree of legitimacy in the first century of their life, becoming ‘a key component of national identity’²¹ and seen as politically neutral and acting independently from central government. ‘Thus police prosecution acquired enormous symbolic, as well as instrumental, power.’²² There was, however, some unease about the police exercising the role of public prosecutor, and there were calls for the establishment of a public prosecution service in England and Wales from the mid-nineteenth century.²³ The Prosecution of Offences Act 1879 created the office of Director of Public Prosecutions (DPP) who was responsible for the prosecution of important or complex cases and to give advice to Chief Officers of Police. The DPP was appointed by the Home Secretary, but acted under the ‘superintendence’ of the Attorney General. From 1908, they were also given the power to take over private prosecutions. It was the police, however, who remained in charge of most prosecutions: ‘[b]y 1960 the DPP’s cases amounted to only 8 per cent of the total number of prosecutions for indictable offences’.²⁴

¹⁹ John H Langbein, ‘The Origins of Public Prosecution at Common Law’ (1973) 17 *The American Journal of Legal History* 313.

²⁰ Robin White, ‘Investigators and Prosecutors Or, Desperately Seeking Scotland: Re-Formulation of the Philips Principle’ (2006) 69 *Modern Law Review* 143, 147–148.

²¹ Robert Reiner, *The Politics of the Police* (4th ed, Oxford University Press 2010) 67.

²² White (n 20) 148.

²³ Lawrence T Roach, ‘Detecting Crime: Part II - the Case for a Public Prosecutor’ [2002] *Criminal Law Review* 566, 574.

²⁴ Barry Hancock and John Jackson, *Standards for Prosecutors : An Analysis of the United Kingdom National Prosecuting Agencies* (Wolf Legal Publishers 2006) 82.

This solution was criticised as it created a confusion of the investigative and prosecuting roles. In 1962, the Royal Commission on the Police under the chairmanship of Henry Willink disapproved the use of the same police officers to investigate and prosecute cases. It recommended that each police force had its own prosecuting solicitor's department. Some, although not all, police forces followed this recommendation. This meant that the police could receive independent advice from lawyers employed by local authorities, but the police had the final say in the decision whether or not to institute proceedings. In 1970, JUSTICE, a British organisation set up to promote the rule of law and to assist the fair administration of justice, published a report recommending the adoption in England and Wales of a public prosecution system as existed already in Scotland. Following the Confait case in which three boys had been wrongly convicted on a number of false confessions, the report by Sir Henry Fisher concluded that, once a person had been charged, there was no one to question the police case and to encourage them to follow lines of inquiry which might be inconsistent with it. Another concern of the 1970's was the number of acquittals caused by weak cases being sent to trial by the police. In 1978, 43 per cent of the cases in the Crown Court were so weak that the judges stopped them, or even refused to let them start.²⁵

In order to remedy those concerns, a Royal Commission on Criminal Procedure was set up in 1978 under the chairmanship of Sir Cyril Philips to suggest ways to reform the English criminal justice system. It found that police officers who investigated a case were reluctant to abandon it despite apparent weaknesses. As a result, a high number of weak cases were taken to court, which led to a high percentage of judge-

²⁵ Joshua Rozenberg, *The Case for the Crown: The inside Story of the Director of Public Prosecutions*. (Equation 1987) 82.

directed acquittals. Furthermore, there were no national standards to decide whether or not to prosecute, each police force relying on its own standards. In its 1981 report, the Philips Commission recommended the introduction of a new independent prosecution authority to review police cases and decide whether or not to prosecute them.²⁶ The ‘Philips principle’,²⁷ as it became known, separates the investigative and the prosecuting functions within the criminal justice system. It recommends that these two functions are given to two institutions, independent from each other. The Prosecution of Offences Act 1985 created the Crown Prosecution Service (CPS) with the DPP at its head, who would be appointed by the Attorney General (not the Home Secretary as before) and continues to act under her or his superintendence. Organised in 31 areas each headed by a Chief Crown Prosecutor reporting to the DPP, the CPS started operating in 1986.

Unlike the French *ministère public*, the CPS does not have a monopoly over the prosecution process in England and Wales. In addition to the private prosecutions already mentioned, there are a number of specialised prosecuting agencies, such as the Serious Fraud Office (SFO) which prosecutes offences of serious or complex fraud; the Health and Safety Executive which brings prosecutions for offences arising out of safety at work; the Environment Agency which prosecutes offences of pollution; etc. In addition to those national agencies, local authorities are also responsible for prosecuting a number of offences (e.g. benefit fraud).

²⁶ Sir Cyril Philips, ‘Royal Commission on Criminal Procedure. Report’ (1981) Cm8092.

²⁷ See White (n 20).

II. The Scope of Prosecutorial Discretion

‘Prosecutors must be given discretion, so that they can respond sensitively to the great diversity of factual situations and policy issues which arise.’²⁸ The scope of this prosecutorial discretion, however, varies from country to country. Furthermore, it is also essential to place prosecutors within the criminal justice context: are they merely rubber-stamping a decision made by the police or are they actively taking part in the investigation? Finally, this section explores whether public prosecutors follow policies defined by their hierarchy and what links this hierarchy has with the executive branch of government. This leads us to consider some of the mechanisms in place to ensure prosecutorial accountability.

A. Opportunity vs. Legality

Public prosecution authorities are traditionally subject to two opposing principles. They can be forced to prosecute any criminal offence that comes to their knowledge, regardless of its gravity or its circumstances. In this system, called the legality principle, the prosecutor needs only to check that there is enough evidence to prosecute a particular individual. In contrast, the opportunity principle (also known as the expediency principle) grants prosecutors a broad discretion over whether to prosecute or not, allowing them to take into account factors other than evidence in making their decisions. Even when there is evidence of guilt, the public prosecutor should check if there are other reasons which suggest that prosecution is not the best course of action for this particular individual. These reasons are usually considerations of public interest and encompass a wide spectrum that include factors associated with the accused, the victim, the gravity of the offence, etc. ‘Decision-making on grounds of

²⁸ Ashworth (n 3) 606.

public interest recognises that competing values within any complex society must be reconciled'.²⁹

Countries of common law tradition normally opt for the opportunity principle; England and Wales do not depart from this rule. In 1951, Sir Hartley Shawcross, who was then Attorney General, made the classic statement on public interest: '[i]t has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution'. He added that there should be a prosecution: 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'.³⁰ This approach has been endorsed by Attorneys General ever since. The newest edition of the Code for Crown Prosecutors³¹ published in January 2013 follows the Shawcross statement and confirms that 'where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest'.³²

In France, the legality principle was adopted in revolutionary law by the Act of 16-19 September 1791 and the Code of criminal offences and penalties (*Code des délits et des peines*) adopted on 24 October 1795. Napoleon's *Code d'instruction criminelle* of 1808 did not clearly choose between legality and opportunity. Some of its articles seemed to suggest that the legality principle was favoured.³³ In fact, preparatory

²⁹ Graham Mansfield and Jill Peay, *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor* (Tavistock 1987) 27.

³⁰ HC Deb 29 January 1951, vol 483, col 681.

³¹ The Code for Crown Prosecutors is issued by the head of the CPS, the Director of Public Prosecutions (DPP), and sets out the basis upon which prosecutions are refused, discontinued or proceeded with. The latest edition is available on the CPS website <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html> accessed 29 July 2014.

³² Code for Crown Prosecutors, para. 4.7.

³³ Article 47: '[...] the *procureur* informed [...] that a criminal offence has been committed within his jurisdiction, *will be requested* to call for a *juge d'instruction* [...]' (emphasis added); see also articles 64 and 70.

discussions show that these articles distributed powers between the *procureur* and the *juge d'instruction* (to the former the exclusive power to prosecute, to the latter only the right to investigate), but did not limit the powers of the *procureur* with regards to their decision to prosecute or not.³⁴ The Code of criminal procedure (*Code de procédure pénale*, CPP), which came into force in 1959, clearly opted for the opportunity principle. Article 40-1 CPP details the different actions the *procureur* can decide to take if there is enough evidence: they can 'initiate a prosecution', 'implement alternative proceedings to a prosecution'; or 'close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify it'.

B. Prosecutors' authority over investigations

1. England and Wales

Britain has an established tradition of empirical research, in particular into the process of criminal prosecutions, although much of it was triggered by the debate about criminal prosecution in England and Wales in the 1980s and focused on whether or not the decision to prosecute should be removed from the police. The CPS began operating in 1986 for a very specific purpose: to 'make the conduct of prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process' in the interests of 'fairness'.³⁵ Prior to the institution of the CPS, the lawyers acting as prosecutors for the police acted within a solicitor-client relationship: the prosecutor as a solicitor acted upon the instructions of the police as client – they could offer advice, but the police were not bound by that advice. The

³⁴ In other words, according to article 47, if the *procureur* decides to prosecute the criminal offence that they have been informed of, they must call for a *juge d'instruction* who has sole responsibility to investigate, but they can decide not to prosecute and would not call for a *juge d'instruction* in this case. See Roger Merle and André Vitu, *Traité de Droit Criminel*, vol 2 (4th edn, Cujas 1989) para 281.

³⁵ Philips (n 26) 7.3.

Royal Commission on Criminal Procedure considered this to be deficient. The Philips principle stated that those who investigated the crime, namely the police, should not also have the responsibility for prosecuting because their objectivity might be questioned. The principle of separation between the investigating and prosecuting functions was criticised before the CPS even started to operate.

In 1982, Moody and Tombs published their research about the Scottish procurator fiscal, which followed an empirical method (interviews with prosecutors in particular).³⁶ They show that the prosecutor, even when formally independent, remains dependent on the police for the information at the basis of the case: it is the retention by the police of the power to present information to the prosecutor and the way it is presented which effectively limits the prosecution options. Shortly after the promulgation of the Prosecution of Offences Act 1985, Mansfield and Peay gave a historical account of how the decision to prosecute had been approached by the DPP prior to the CPS being established.³⁷ The researchers spent some time with officials at the DPP's office to observe the prosecution process, studying the whole process in respect of eighteen cases. Considering the proposals made by the Philips Commission, they note that 'independence for the prosecutor may not be created simply by demarcating the role of investigators of crime and reallocating responsibility for the decision to prosecute'.³⁸

A large-scale piece of empirical research was carried out by McConville, Sanders and Leng³⁹ who observed 1,080 adult and juvenile cases in three police force areas from 1986 to 1988 and analysed the police and prosecution decision-making in these cases.

³⁶ Susan R Moody and Jacqueline Tombs, *Prosecution in the Public Interest* (Scottish Academic Press 1982).

³⁷ Mansfield and Peay (n 29).

³⁸ *ibid* 45.

³⁹ Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge 1991).

It illustrates how police officers are able to control evidence collection and prosecution of the case, characterising the suspect or the circumstances of the crime in a manner which indicates how the case should be dealt with. The study shows a presumption in favour of prosecution from the CPS, particularly marked when the suspect was already charged by the police as opposed to when the police sought advice from the CPS prior to charging: it was perceived as disloyal and morally wrong to overturn the police decision to charge. CPS prosecutors believed that the close involvement of the police with the community made them the best arbiters of local needs; this led to uncritical acceptance of police decisions rather than independent review of these decisions. As a result, few cases were in fact discontinued by the CPS. When cases were dropped, it was usually on the recommendation of the police. Instead of following official prosecution guidelines as had been hoped by the Philips Commission, prosecutors seemed therefore to adopt informal police 'guidelines'.

The successive official reviews of the criminal justice system (Runciman in 1993,⁴⁰ Narey in 1997,⁴¹ Glidewell in 1998,⁴² Auld in 2001⁴³) emphasised the need for the CPS to be involved earlier in the investigative process to prevent the early focus of investigators on an individual suspect which had been identified as a major reason for miscarriages of justice.⁴⁴ However, they stopped short from recommending that the CPS direct police investigations. Anglo-Welsh researchers have long believed that one of the main reasons for the CPS weakness was its late involvement in the proceedings

⁴⁰ Viscount Runciman of Doxford, 'The Royal Commission on Criminal Justice. Report' (1993) Cm 2263.

⁴¹ Martin Narey, *Review of Delay in the Criminal Justice System: A Report* (Home Office 1997).

⁴² Sir Iain Glidewell, 'The Review of the Crown Prosecution Service. A Report' (1998) Cm3960.

⁴³ Robin Auld, *Review of the Criminal Courts of England and Wales: Report* (Stationery Office 2001) <<http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/auldconts.htm>>.

⁴⁴ Frank Belloni and Jacqueline Hodgson, *Criminal Injustice an Evaluation of the Criminal Justice Process in Britain* (Palgrave, 2000).

and the fact that the police retained the power to charge, i.e. to initiate proceedings.⁴⁵ Following the Auld review, the Criminal Justice Act 2003 gave the DPP the power to issue guidance on charging which police officers and prosecutors must comply with. The DPP's guidance⁴⁶ lists the offences that can be charged by the police and those where the decision must be made by prosecutors.

Following the original charging guidance issued by the DPP in 2007, the CPS took over charging decisions in the most serious, sensitive and complex cases, although police retained around 65 per cent of all charging decisions. The guidance sets out arrangements for the joint working of police officers and prosecutors during the investigation and prosecution of criminal cases. In particular, it advises the police on how to deal with a person where there is sufficient evidence to charge; how and when to seek early investigative advice from a prosecutor. It also details what evidence and information are needed for a charging decision to be made and in which circumstances a simple or a conditional caution can be given. It was noted that '[t]he change [...] marks a significant increase in the influence of the Crown Prosecution Service'.⁴⁷ The tide in favour of the CPS seems to be turning, however, with the latest guidance published in May 2013, returning some charging powers to the police who now have responsibility for charging in about 71.5 per cent of cases.⁴⁸

⁴⁵ McConville, Sanders and Leng (n 39); Ian Brownlee, 'The Statutory Charging Scheme in England and Wales: Towards a Unified Prosecution System?' [2004] Criminal Law Review 896; White (n 20); Jacqueline Hodgson, 'The Changing Role of the Crown Prosecutor' (2010) 79 Criminal Justice Matters 28; Chris Lewis, 'The Evolving Role of the English Crown Prosecution Service' in Marianne Wade and Erik Luna (eds), *The prosecutor in transnational perspective* (Oxford University Press 2012).

⁴⁶ The Director's Guidance On Charging, fifth edition, May 2013 <http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html> accessed 30 July 2014.

⁴⁷ Brownlee (n 45) 907.

⁴⁸ Crown Prosecution Service, 'Annual Report and Accounts 2012-13' (2013) 7 <http://www.cps.gov.uk/publications/docs/annual_report_2012_13.pdf> accessed 1 April 2014.

There have been no empirical studies of the effects of the charging reform on prosecutorial decision-making. Further research has been conducted following changes in the CPS over the years, but they have tended to focus on relatively narrow issues and many studies have been commissioned evaluations of pilot schemes. The Glidewell report recommended the creation of criminal justice units bringing together police officers and prosecutors to encourage greater cooperation between the agencies. Hunt and Baldwin were invited by the CPS to examine the extent to which police officers seek advice from Crown Prosecutors prior to charge, whether advice is sought in appropriate circumstances, and the effects of such advice on case outcomes.⁴⁹ They examined 600 CPS files, carried out observations in three CPS areas and conducted twenty interviews with the personnel involved, both police and CPS. They concluded that the experiments involving the placement of Crown Prosecutors in police stations to offer advice on the spot to officers about charging decisions had very limited effects on the outcome of cases.

English prosecutors were also given access to new information through pre-trial witness interviews (PTWI). Dependent on the police for information, prosecutors were previously unable to directly assess the credibility of witnesses because they were bound by strict codes of professional conduct not to consult with them. Roberts and Saunders were commissioned by the CPS to evaluate pilot schemes for PTWI in 2006.⁵⁰ They conducted twelve interviews with PTWI-trained prosecutors and supplementary interviews were completed with Chief Crown Prosecutors for four CPS areas. They also organised focus groups with PTWI-trained prosecutors at the start

⁴⁹ Adrian Hunt and John Baldwin, 'Prosecutors Advising in Police Stations' [1998] Criminal Law Review 521.

⁵⁰ Paul Roberts and Candida Saunders, 'Introducing Pre-Trial Witness Interviews: A Flexible New Fixture in the Crown Prosecutor's Toolkit.' [2008] Criminal Law Review 831.

and the end of the study. However, they did not observe PTWIs themselves, check case-files or canvass the views of police, defence lawyers, counsel or witnesses. Their findings were ‘consistent with the hypothesis that PTWI helps prosecutors to build up strong cases for trial, whilst rejecting evidentially weak cases at an earlier stage’.⁵¹ By giving prosecutors access to information they would not normally have, PTWI enhance their independence from police investigators. This moves away from the Philips principle which, ‘invested in maintaining a clear division between investigation and prosecution risk shielding prosecutors from much valuable information that is never disclosed in a police file’.⁵² The question remains, however, as to how often PTWI are used and whether they have such a great impact in practice.

2. France

In France, according to article 41 CPP, the prosecutor directs the police investigation and monitors police custody measures. Since *procureurs* are judicial officers in French law,⁵³ this control over police activity is traditionally perceived as a guarantee for suspects and rarely raises debates in French academic legal research. Following the *Medvedyev*⁵⁴ and *Moulin*⁵⁵ decisions of the European Court of Human Rights (ECtHR), the question of the control of police custody by the prosecutor was challenged by some commentators. The CPP provides that the prosecutor controls police custody and can extend it after expiry of the first twenty-four hours, but it was argued that it needed to be reformed to transfer this function to a judge, since the *procureur* is not a judicial officer according to the ECtHR.⁵⁶ Others claim instead that

⁵¹ *ibid* 844.

⁵² John Jackson, ‘The Effect of Legal Culture and Proof in Decisions to Prosecute’ (2004) 3 *Law, Probability and Risk* 109, 128.

⁵³ See discussion below.

⁵⁴ *Medvedyev And Others v France* (2010) 51 EHRR 39.

⁵⁵ *Moulin v France* App no 37104/06 (ECtHR, 23 November 2010).

⁵⁶ Damien Roets, ‘Le Manque D’indépendance Du Ministère Public Français à L’égard de L’exécutif et Des Parties : Un Obstacle à L’exercice de Certaines Fonctions’ [2011] *Revue de science criminelle*

no reform is needed since ECtHR case-law indicates that ‘the strict time constraint imposed for detention without judicial control is a maximum of four days’; the French police custody of forty-eight hours maximum is well within this limit.⁵⁷ The control of police custody by the prosecution is therefore seen as an additional guarantee to the other safeguards in place for suspects (e.g. police regulation and control of a judge after 48 hours).⁵⁸

France does not have a strong tradition of socio-legal empirical research, although recent years have seen a great increase of empirical studies in the field of criminal justice by sociologists and criminologists, but rarely by French legal academics. Interestingly, empirical research on the relationship between *procureurs* and the police has been conducted for the most part by American and English academics and revealed a different picture than the doctrinal studies. Goldstein and Marcus carried out a limited number of interviews, including three with *procureurs*, and attended several trials, for their 1977 study of the French criminal justice system.⁵⁹ They concluded that judicial supervision of police investigations was a ‘myth’.⁶⁰ Leigh and Zedner also relied on interviews for their study to inform the 1991 Royal Commission on Criminal Justice on French and German criminal justice, although the details (number of

208; André Giudicelli, ‘Le Ministère Public N’est Pas Une Autorité Judiciaire Au Sens de La Convention de Sauvegarde Des Droits de L’homme : Quelles Conséquences Sur Le Contrôle de La Garde à Vue ?’ [2011] *Revue de science criminelle* 142.

⁵⁷ Jean Pradel, ‘Quel(s) Magistrat(s) Pour Contrôler et Prolonger La Garde à Vue ? Vers Une Convergence Entre La Cour de Strasbourg et La Chambre Criminelle de La Cour de Cassation’ [2011] *Recueil Dalloz* 338.

⁵⁸ Marc Robert, ‘L’Autorité Judiciaire, La Constitution Française et La Convention Européenne Des Droits de L’homme’ [2011] *Nouveaux cahiers du Conseil constitutionnel* 29.

⁵⁹ Abraham S Goldstein and Martin Marcus, ‘The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany’ (1977) 87 *The Yale Law Journal* 240.

⁶⁰ *ibid.*

interviews, quality of interviewees...) are not known.⁶¹ They emphasised the close cooperative nature of the relationship between the police and the *parquet*.

Hodgson published a major qualitative empirical study on French criminal justice in 2005.⁶² Her study is the most empirically grounded as she and two other researchers spent a total of 18 months observing *procureurs*, police officers and *juges d'instruction*. The direct observation was also complemented by interviews and questionnaires. The study does not focus exclusively on the French public prosecution service, but covers a large part of the criminal justice process, from arrest to trial. Hodgson finds that judicial supervision in the form of prosecutorial oversight places little constraint on police investigations and provides no real safeguard for suspects placed in police custody (*garde à vue*) as 'the direct involvement of the prosecutor in the investigation is anticipated neither by the text of the law, nor by the legal actors themselves'.⁶³

More recently, large-scale empirical studies have been conducted by French socio-legal scholars as well. Mouhanna's 2001 study of the relationship between investigators and *procureurs* was the result of observations across four research sites and over 200 interviews with *procureurs*, *juges d'instruction*,⁶⁴ police officers and

⁶¹ Leonard H Leigh and Lucia Zedner, *A Report on the Administration of Criminal Justice in the Pre-Trial Phase in France and Germany* (HMSO 1992).

⁶² Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing 2005).

⁶³ Jacqueline Hodgson, 'The Police, the Prosecutor and the Juge D'Instruction' (2001) 41 *British Journal of Criminology* 342, 342; see also Hodgson, *French Criminal Justice* (n 62).

⁶⁴ The function of *juge d'instruction* (investigative judge) is typical of an inquisitorial justice system. They are primarily responsible for supervising the gathering of the evidence necessary to resolve a case. They actively steer the search for evidence and question the witnesses, including the defendant. The *juge d'instruction* handles a case only if required to do so by the *procureur* or when requested to do so by a private citizen. Once the *procureur* has sent a case to a *juge d'instruction*, the decision to send the case to trial at the end of the *instruction* will be taken by the *juge*. The *procureur* will, however, present the prosecution case at trial.

gendarmes.⁶⁵ It shows the centrality of trust in the relationship between investigators and *procureurs*.⁶⁶ In 2007, Mouhanna and Bastard studied the impact of recent changes in French criminal justice aimed at accelerating procedures to avoid delays between the commission of the offence and trial.⁶⁷ They carried out observations across nine research sites of different sizes and conducted 250 interviews with a range of criminal justice actors (*procureurs*, police officers, gendarmes, defence lawyers, judges). The introduction of speedy proceedings (*Traitement en Temps Réel* – TTR) in the early 2000s, means that *procureurs* often make decisions by discussing the matter over the phone with police officers. Bastard and Mouhanna show that this results in the standardisation of their activity and the orientation of their cases towards the police officers’ documentation, as well as high rates of prosecution.⁶⁸ *Procureurs* do not have much time to think and to immerse themselves in the case.

A 2010 sociological study of district prosecutors (*procureurs de la République*) was based on statistical data about their careers and 25 interviews with district prosecutors, complemented by interviews with several ‘great witnesses’ on specific aspects, such as a *procureur général* (head of a regional public prosecution service), a representative of the Bar and a member of the disciplinary tribunal for *procureurs*.⁶⁹ It shows that *procureurs* try to establish a relationship of trust with the police and tend to limit themselves to a formal, rather than substantial, control to check the legality of the procedure.⁷⁰ In 2013, a study bringing together legal academics, sociologists, a

⁶⁵ Christian Mouhanna, *Polices judiciaires et magistrats : une affaire de confiance* (La Documentation française 2001).

⁶⁶ *ibid.*

⁶⁷ Benoit Bastard and Christian Mouhanna, *Une justice dans l’urgence : le traitement en temps réel des affaires pénales* (PUF 2007).

⁶⁸ *ibid.*

⁶⁹ Philip Milburn, Katia Kostulski and Denis Salas, *Les Procureurs, Entre Vocation Judiciaire et Fonctions Politiques* (PUF 2010).

⁷⁰ *ibid* 114–115.

psychosociologist and budgetary experts was carried out across five research sites in western France.⁷¹ A representative sample of over 7,500 cases dealt with in 2000, 2003, 2006 and 2009 were studied, direct observations were carried out, around sixty interviews were conducted with criminal justice actors (police officers, prosecutors, judges) and twenty-five judges and prosecutors were asked for their potential decision in four fictional cases (theft, drink driving, drug use and minor assault). Taking into account hundreds of variables (facts, procedures, sentences, suspects' and victims' profile, trial delays, etc.), it confirms the central influence of police investigators on prosecutorial decisions and highlights the pressures on resources that weigh on *procureurs'* procedural choices.

Previous research studies provide a valuable insight into the practices of public prosecution services. They help reveal that the broad discretion in the hands of public prosecutors needs to be put into perspective since their decisions are largely determined by the police in practice. Despite the differences between the English and the French systems, research in both jurisdictions shows that, in practice, the prosecution are largely unable to go beyond the police-constructed account. It remains unclear what impact recent reforms have had on the relationship between public prosecutors and the police as no overall research study has been conducted in recent years. Moreover, there has been no research on the impact of prosecutorial policies on police investigations nor on the influence of the police on prosecutorial policies.

C. The Constitutional Status of Public Prosecutors

The concept of independence in a criminal justice context usually refers to judicial independence founded on the separation of powers defined by Montesquieu.

⁷¹ Jean Danet (ed), *La réponse pénale dix ans de traitement des délits* (Presses universitaires de Rennes 2013).

Montesquieu described division of political power among an executive, a legislature and a judiciary. He based his model on the British constitutional system in which he perceived a separation of powers among the monarch, Parliament, and the courts of law. To prosecute is to initiate and conduct legal proceedings against a person for criminal behaviour. Originally, the prosecution was left to the victim of the criminal offence (private prosecution). Progressively, however, it was recognised that it is in the public interest that crimes do not remain unpunished. This argued for the creation of public authorities in charge of bringing offenders to justice. Public prosecution authorities, however, have an ambiguous constitutional position.

1. France

The French nation is ‘one and indivisible’, meaning that it is made up of equal citizens, not separate communities. Consequently, so must be the state which organises and embodies it. The Napoleonic – and later republican – state is characterised by a pyramidal centralisation of powers. The central administration of the state, organised around governmental power and structured in ministerial departments, is at the heart of the system. It has authority over the different administrative units at regional and local levels. These local units do not have their own powers, but merely apply locally policies that have been decided centrally. In parallel to this central structure, local authorities (*collectivités locales*) have locally elected assemblies and exercise powers that the central state has progressively devolved to them. In 1982, the central state lost the control it had over these local authorities as it was replaced by a system of judicial review of local authorities’ decisions. The remit of these local authorities and their financial independence from the central state remain, however, limited.

The French public prosecution system is modelled on this centralised organisation. The *parquet* is organised hierarchically with the Minister of Justice, a member of the

government, at the top of the pyramid. The primary source of national prosecution policy in France is the law, voted by parliament, but it is also decided at governmental level. Government's instructions are communicated to the *ministère public* through circulars issued by the Minister of Justice. These circulars detail the government's priorities in respect of preventing and combatting crime or provide guidance on the interpretation of new legislation. They are disseminated through the hierarchically organised prosecution service. The *procureurs* are members of the same professional body as judges; they are *magistrats*. They are recruited through the same national examination and are trained together at the *École nationale de la magistrature* (ENM) for thirty-one months before being appointed as prosecutor or judge. They are also able to move between the different functions throughout their career. Unlike judges though, prosecutors are appointed, initially or as a promotion, by the President of the Republic, with the High Council for the Judiciary (*Conseil Supérieur de la Magistrature* – CSM) only giving its opinion. It is not unusual for *procureurs* to be appointed despite a negative opinion from the CSM. Furthermore, the Minister of Justice is the head of the public prosecution service and, as such, has disciplinary power over all prosecutors.

In the 1980s, a flurry of cases regarding the illegal financing of political parties showed clumsy attempts by governments to stop or limit the investigations of the politically independent *juges d'instruction* through the (politically dependent) prosecutors' hierarchy.⁷² Following these '*affaires*', and under the pressure of public opinion, an apparent political consensus seemed to exist preventing interventions of the executive in individual cases. No text was voted to forbid those interventions however, and instructions in individual cases reappeared from 2002. Recent scandals showed that

⁷² See Hodgson, *French Criminal Justice* (n 62) 79–85 for more detail.

procureurs are still suspected to be the Trojan horse of the executive power in judicial cases. In July 2010, the *procureur* of Nanterre, Philippe Courroye, launched an inquiry into allegations that L'Oréal heiress Liliane Bettencourt made illegal donations to President Sarkozy's 2007 election campaign. A friend of Nicolas Sarkozy, M. Courroye refused to open a formal judicial investigation with a *juge d'instruction* in charge until October 2010.⁷³ The *Procureur général* of the *Cour de cassation*,⁷⁴ Jean-Louis Nadal, called for the opening of a formal judicial investigation at the time and has recently disclosed that he suspected pressures from the Élysée Palace to delay the opening of the judicial investigation.⁷⁵ In another case, in December 2011, Jacques Chirac, the former President of the Republic, was given a two-year suspended prison sentence for diverting public funds and abusing public trust when he was Paris' Mayor, despite *procureurs* consistently trying to drop the case and asking the court for his acquittal.⁷⁶

⁷³ See 'Affaire Woerth-Bettencourt : le procureur Courroye veut poursuivre son enquête préliminaire' *Le Monde* (Paris, 27 September 2010) <www.lemonde.fr/societe/article/2010/09/27/affaire-woerth-bettencourt-le-procureur-courroye-entendrait-poursuivre-son-enquete-preliminaire_1416812_3224.html> accessed 29 July 2014.

⁷⁴ The *Cour de cassation* is the highest court in the French judiciary. It is not a third level of jurisdiction as it does not rule on the merits of a case. When decisions are referred to the *Cour de Cassation*, the Court is merely required to decide whether the law has been correctly applied by the lower courts based on the facts. The *parquet général* of the *Cour de cassation* is not part of the hierarchical organisation of the *ministère public*. It does not prosecute cases. Its most important task is to ensure a harmonised interpretation of the law and that the case-law of the Court and all lower courts is consistent. The *Procureur général* acts as public prosecutor only in the *Cour de justice de la République*, competent to hear criminal cases against ministers for offences committed in carrying out their duties.

⁷⁵ See 'Affaire Woerth-Bettencourt : l'ex-magistrat Jean-Louis Nadal évoque une intervention de l'Élysée' *Le Monde* (Paris, 15 March 2012) <www.lemonde.fr/societe/article/2012/03/15/affaire-woerth-bettencourt-l-ex-magistrat-jean-louis-nadal-evoque-une-intervention-de-l-elysee_1669455_3224.html> accessed 29 July 2014.

⁷⁶ See 'Jacques Chirac case: Paris prosecutor seeks acquittal' *BBC News* (London, 21 September 2011) <www.bbc.co.uk/news/world-europe-14999929> accessed 29 July 2014; 'French ex-President Jacques Chirac guilty of corruption' *BBC News* (London: 15 December 2011) <www.bbc.co.uk/news/world-europe-16194089> accessed 29 July 2014; for an illustration of the distrust of the French press in the impartiality of the *procureurs*, see: 'Emplois fictifs : le parquet requiert la relaxe de Chirac' *Le Monde* (Paris, 20 September 2011) <www.lemonde.fr/politique/article/2011/09/20/emplois-fictifs-le-parquet-requiert-la-relaxe-de-chirac_1575030_823448.html> accessed 29 July 2014; Stéphane Durand-Souffland, 'Procès Chirac : la relaxe requise' *Le Figaro* (Paris, 20 September 2011) <www.lefigaro.fr/actualite-france/2011/09/20/01016-20110920ARTFIG00652-proces-chiracla-relaxe-requise.php> accessed 29 July 2014; Yannick Vely, 'Procès Chirac: le parquet demande la

The seminal study on the *ministère public* was published over forty years ago.⁷⁷ It recommends giving *procureurs* total independence from the government on the basis that *procureurs* had to make legal – rather than political – decisions. However, it also recognises the interests of the government in putting forward its opinion on the case being tried before the court and suggests this could be done through a separate representative. Although this solution might deal with the question of representing the prosecution case before the court, it is not clear who would be in charge of taking the decision to prosecute a case in the first place. It seems to suggest that *procureurs* should conform to the legality principle, rather than have the power not to prosecute a case for reasons of opportunity. Mincke raises two objections to this idea⁷⁸: firstly, it is questionable whether serving the law implies its uncontested and mechanistic application; secondly, it relies on the assumption that a neutral application of the law is possible, rather than always being influenced by the value system of decision-makers.

The question of the independence of the *ministère public* from the government has since been the focus of much debate. Some have found inspiration in the English model and advocate taking away from the Minister of Justice the power to define the prosecution policy to enhance prosecutorial independence from the executive.⁷⁹ Others argue that the Minister of Justice, a member of the government, has more democratic legitimacy to define the national prosecution policy than an appointed

relaxe' Paris Match (Paris, 20 September 2011) <www.parismatch.com/Actu/Politique/Proces-Chirac-le-parquet-demande-la-relaxe-150990> accessed 29 July 2014.

⁷⁷ Michèle-Laure Rassat, *Le Ministère Public Entre Son Passé et Son Avenir* (LGDJ 1967).

⁷⁸ Christophe Mincke, *Efficacité, Efficience et Légitimité Démocratique Du Ministère Public: Quand L'arbre Cache La Forêt* (Leuven University Press 2002) 47–48.

⁷⁹ Jean Pradel and Jean-Paul Laborde, 'Du Ministère Public En Matière Pénale. A L'heure D'une éventuelle Autonomie ?' [1997] *Recueil Dalloz* 141; Jean-Francois Burgelin and Paul Lombard, *Le procès de la justice* (Plon 2003); Rousseau in Yves Charpenel, Dominique Rousseau and Daniel Soulez-Larivière, 'Le Statut Du Parquet' [2011] *Constitutions* 295.

‘General Prosecutor’.⁸⁰ This view is also that of several official reports on the *parquet*.⁸¹ The possibility for the executive to intervene in individual cases has been strongly criticised as unacceptable political interference, although some commentators argue that it is sometimes needed, in particular in cases of national or international security.⁸²

Yet the French constitution guarantees the independence of the ‘judicial authority’ which refers to the judicial branch of government.⁸³ The *Conseil constitutionnel* (French constitutional court) has repeated on a number of occasions that the ‘judicial authority’ included both judges and prosecutors.⁸⁴ This certainty that *procureurs* belong to the judicial branch of the government was greatly shaken by the European Court of Human Rights (ECtHR) who ruled that the *procureur* could not be the ‘competent legal authority’ or the ‘other officer authorised by law to exercise judicial power’ referred to in the first and third paragraphs of article 5 of the European Convention of Human Rights (ECHR) because they do not ‘offer the requisite guarantees of independence from the executive and the parties, which precludes [their] subsequent intervention in criminal proceedings on behalf of the prosecuting

⁸⁰ Jean-Paul Jean, ‘Le Ministère Public Entre Modèle Jacobin et Modèle Européen’ [2005] *Revue de science criminelle* 670; Jean-François Renucci, ‘La Cour Européenne Persiste et Signe : Le Procureur Français N’est Pas Un Magistrat Au Sens de L’article 5 de La Convention’ [2011] *Recueil Dalloz* 277; Marc Robert, ‘L’avenir Du Ministère Public Français’ [2011] *AJ Pénal* 115; Charpenel in Charpenel, Rousseau and Soulez-Larivière (n 79).

⁸¹ Mireille Delmas-Marty, *La Mise En état Des Affaires Pénales: Rapport de La Commission Justice Pénale et Droits de L’homme* (La Documentation française 1991); Pierre Truche, *Rapport de la Commission de réflexion sur la justice* (La Documentation française 1997); Jean-Louis Nadal, *Refonder Le Ministère Public - Commission de Modernisation de L’action Publique* (Ministère de la justice 2013).

⁸² Jean, ‘Le Ministère Public Entre Modèle Jacobin et Modèle Européen’ (n 80).

⁸³ There is a debate in France whether the Constitution really recognises the existence of a judicial power as it merely refers to the judicial authority. It should be noted, however, that the Constitution does not refer to the executive or the legislative powers either, although no one ever doubted that Parliament detains the legislative power and the government exercises the executive power.

⁸⁴ Decision 93-326 DC, 11 August 1993, paragraph 5 <www.conseil-constitutionnel.fr/decision/1993/93326dc.htm> accessed 29 July 2014; Decision 2004-492 DC, 2 March 2004, paragraph 98 <www.conseil-constitutionnel.fr/decision/2004/2004492dc.htm> accessed 29 July 2014; Decision 2010-14/22 QPC, 30 July 2010, paragraph 26 <www.conseil-constitutionnel.fr/decision/2010/201014_22qpc.htm> accessed 29 July 2014.

authority’.⁸⁵ The ECtHR rulings were followed by the *Cour de cassation* who recognised that the *ministère public* was not a judicial authority within the meaning of article 5, para 3 ECHR.⁸⁶ Despite being anticipated,⁸⁷ these decisions were described as a ‘judicial earthquake’,⁸⁸ a ‘storm’,⁸⁹ or the ‘sound of the death knell’ for the French prosecutor.⁹⁰ Despite the shock and outrage expressed in the first reactions, the majority of commentators do not suggest a change of status for the prosecutor, but rather a transfer of functions to the judge.⁹¹ It is not the option defended by Daniel Soulez-Larivière, a lawyer, who instead of suggesting ‘cutting the umbilical cord’ between the executive and the *procureurs*, advocates a separation of the professional body of *magistrats*. For him, this unity of body coupled with the difference of status between judges and prosecutors is the cause of an ambiguity generating public mistrust in the whole justice system.⁹² In his opinion, independence of the judiciary does not imply independence of the prosecution: the debate is biased in France because of the unity of the professional body of *magistrats*.⁹³

⁸⁵ *Medvedyev v France* (2010) 51 EHRR 39, para 124. See also *Medvedyev v France* App no. 3394/03 (ECtHR, 10 July 2008), para 61 and *Moulin v France* App no 37104/06 (ECtHR, 20 November 2010), para 59.

⁸⁶ Cass. crim. 15 December 2010, Bull. Crim. no. 207.

⁸⁷ Already in 2003, Renucci warned that the *procureur* might not meet the requirements detailed in ECtHR case-law to be the ‘other officer authorised by law to exercise judicial power’ referred to in the third paragraph of article 5 ECHR: Jean-François Renucci, ‘Le Procureur de La République Est-Il Un Magistrat Au Sens de L’article 5, § 3, Conv. EDH?’ [2003] Recueil Dalloz 2268; Jean-François Renucci, ‘Le Procureur de La République Est-Il Un “Magistrat” Au Sens Européen Du Terme?’, *Libertés, justice, tolérance : mélanges en hommage au doyen Gérard Cohen-Jonathan Vol. II*. (Bruylant 2004). His concern was later shared by Jean-Paul Jean who argued that this called in favour of a strengthening of the prosecutorial independence in France: Jean, ‘Le Ministère Public Entre Modèle Jacobin et Modèle Européen’ (n 80).

⁸⁸ Jean-François Renucci, ‘Un Séisme Judiciaire : Pour La Cour Européenne Des Droits de L’homme, Les Magistrats Du Parquet Ne Sont Pas Une Autorité Judiciaire’ [2009] Recueil Dalloz 600.

⁸⁹ Jean-Pierre Marguénaud, ‘Tempête Sur Le Parquet’ [2009] Revue de science criminelle 176.

⁹⁰ Frédéric Sudre, ‘Le Glas Du Parquet’ [2010] La Semaine Juridique 2277.

⁹¹ Renucci, ‘La Cour Européenne Persiste et Signe : Le Procureur Français N’est Pas Un Magistrat Au Sens de L’article 5 de La Convention’ (n 80); Roets (n 56).

⁹² Daniel Soulez-Larivière, ‘Le Problème Du Ministère Public Français’ [2011] AJ Pénal 112.

⁹³ Charpenel, Rousseau and Soulez-Larivière (n 79).

These doctrinal studies examine the links between the public prosecution service and the executive and delineate the appropriate boundaries of the prosecutor's role and status under French law, but also in accordance with European commitments. However, they do not permit judgment on the level of influence the executive has on prosecutorial decision-making in practice. Empirical research suggests that the impact of the national prosecution policy on the ground is very limited. Mouhanna shows that 'the concept of prosecution policy is more symbolic than real'⁹⁴ with *procureurs* retaining a broad autonomy due to specialisation as well as a heavy workload and consequently the necessity to filter cases. Political pressure is also relatively rare,⁹⁵ with the exception of counter-terrorism cases in which the executive seems to be particularly involved.⁹⁶

2. *England and Wales*

In England and Wales, the question of the constitutional position of public prosecutors has not been the subject of many studies. When considering whether Crown Prosecutors are part of the executive or the judicial branch of government, Fionda quickly concludes that, since 'as part of the executive they would not be sufficiently objective or independent to carry out a quasi-judicial function', 'by default, the CPS must fit into the judicial branch, like their European counterparts'.⁹⁷ This argument is criticised by Rogers who considers that wanting to 'brutally force' the CPS into either category of a judicial or an executive function is wrong. For him, the exercise of prosecutorial discretion is quasi-judicial and partly executive.⁹⁸ It has indeed been

⁹⁴ Christian Mouhanna, 'Les Relations Police-Parquet En France : Un Partenariat Mis En Cause?' (2004) 58 *Droit et Société* 505, 513.

⁹⁵ Hodgson, *French Criminal Justice* (n 62) 94.

⁹⁶ Jacqueline Hodgson, 'The Investigation and Prosecution of Terrorist Suspects in France' (Home Office 2006) 41.

⁹⁷ Julia Fionda, *Public Prosecutors and Discretion : A Comparative Study* (Clarendon Press 1995) 46.

⁹⁸ Jonathan Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26 *Oxford Journal of Legal Studies* 775, 799.

recognised that public prosecutors are required to do more than present the prosecution case in court in a partisan way: '[i]n addition they have come to exercise what has been called a "quasi-judicial" function of scrutinizing the weight of the prosecution evidence impartially and fairly before deciding to initiate or continue a prosecution'.⁹⁹ This quasi-judicial function requires that they are sheltered from political influences, although Stenning suggests that government intervention in individual cases can sometimes be necessary in cases of national or international security.¹⁰⁰

Although the need for greater coherence in prosecuting decisions was put forward as one of the reasons for the creation of the CPS in 1985, the power to give general instructions to prosecutors was not given to a member of the government as is the case in France. Section 10 (1) of the Prosecution of Offences Act 1985 requires that the Director of Public Prosecutions (DPP) issues a Code for Crown Prosecutors detailing the general principles that prosecutors should apply when making their decisions. The Code is then presented to Parliament in the DPP's annual report. Parliament has therefore delegated its power to issue the Code to the DPP, but retains the right to verify that this power is being exercised properly. Little research has been done on the influence of national prosecution policy in practice. Hoyano was commissioned by the CPS to gauge the impact of the revised Code for Crown Prosecutors issued in 1994.¹⁰¹ The terms of reference for the research did not provide for any direct observation of CPS prosecutors' work nor an analysis of decision-making in a sample of cases. Instead, eighty interviews with CPS personnel were conducted in four CPS areas over

⁹⁹ Jackson, 'The Effect of Legal Culture and Proof in Decisions to Prosecute' (n 52) 112.

¹⁰⁰ Philip C Stenning, 'Discretion, Politics, and the Public Interest in "High-Profile" Criminal Investigations and Prosecutions' (2009) 24 *Canadian Journal of Law and Society* 337.

¹⁰¹ Allan Hoyano, 'A Study of the Impact of the Revised Code for Crown Prosecutors' [1997] *Criminal Law Review* 556.

a six-month period starting in September 1995 and the author concludes that the impact of the new Code upon actual case decisions had been very limited.

The DPP is appointed by the Attorney General and acts under her or his ‘superintendence’. The Attorney General in England and Wales is a member of the government and, as such, is a political appointment.¹⁰² Prior to the establishment of the CPS, Edwards studied the offices of Attorney General and Solicitor General and their constitutional, legal and political functions.¹⁰³ Edwards also examines the relationship between the DPP¹⁰⁴ and the Attorney General through historical practice and handling of several prominent cases, further exploring the themes of independence and accountability.¹⁰⁵ Following the ‘cash for honours’ scandal in 2006-2007,¹⁰⁶ Jackson has argued for the DPP to have sole responsibility for decisions to prosecute in individual cases, but for the Attorney General’s superintendence to be retained for prosecution policy and the overall conduct of the CPS to ensure parliamentary accountability.¹⁰⁷

Although an elected Member of Parliament or a member of the House of Lords, the Attorney General is a lawyer and must act independently and in the public interest in discharging his or her legal duties. Edwards lists the different doctrines that shaped

¹⁰² The Attorney General is a non-cabinet minister. Chief Law Officer of the Crown, they advise and represent the Crown and government departments in court. The Solicitor General is their deputy.

¹⁰³ John L. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England* (Sweet & Maxwell 1964).

¹⁰⁴ The DPP office was created by the Prosecution of Offences Act 1879. The DPP was responsible for the prosecution of important or complex cases and to give advice to Chief Officers of Police. From 1908, they were also given the power to take over private prosecutions. They are now the head of the CPS.

¹⁰⁵ John L. Edwards, *The Attorney General, Politics, and the Public Interest* (Sweet & Maxwell 1984).

¹⁰⁶ In March 2006, the Metropolitan Police launched an investigation into claims that peerages had been given to wealthy individuals in exchange for donations or loans to political parties. The CPS later announced that there was not sufficient evidence to prosecute any of the suspects arrested by the police. Following reports that the Attorney General might be responsible for making the final decision over potential prosecutions, claims of conflict of interests were raised given the Attorney General’s political links.

¹⁰⁷ John Jackson, ‘Let the Director Direct’ [2007] *New Law Journal* 23.

the relationship between the Attorney General and the government.¹⁰⁸ On one hand, the doctrine of ‘independent aloofness’ was defended by Peter Rawlinson (Attorney General 1970-1974) who argued that the Attorney General should not participate in the political debate in their party. On the other hand, the doctrine of ‘intimate but independent involvement’ was defended by Sam Silkin (Attorney General 1974-1979) for whom the Attorney General should be intimately aware of the government’s policies to advise it properly. He suggested that the Attorney General should attend all cabinet meetings, not just when they are invited. However, he considered that the Attorney General should have no vote in cabinet meetings and should speak only when asked to. Hartley Shawcross (Attorney General 1945-1951) advocated the adoption of a non-elected, non-political, public servant model for the office of the Attorney General: ‘[t]he once great office of Attorney General should now become one wholly outside the political arena and enjoying in the task of law enforcement the status and independence of a Judge’.¹⁰⁹

For Edwards, a totally independent Attorney General would mean that there would be no ultimate accountability in Parliament. Furthermore, he believes that strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest are more important than institutional independence.¹¹⁰ More recently, Samuels has argued for the office of Attorney General to be purely and simply abolished: ‘[t]he basic problem is that the Attorney General is a politician and a minister and at the same time required to act objectively and impartially under the law in the public interest. The conflict of

¹⁰⁸ Edwards (n 103); Edwards (n 105).

¹⁰⁹ Lord Shawcross, Letters to the Editor (The Times, 3 August 1977), cited by Edwards (n 105) 65.

¹¹⁰ Edwards (n 105).

interest, or at least the perception of conflict of interest, is immediately apparent.’¹¹¹ For Samuels, the different functions currently assigned to the Attorney General could be redistributed to other actors. The prosecution function in particular should be given to the DPP who would be directly accountable to Parliament.

III. Prosecutorial discretion and accountability: the need for a new comparative and empirical study

Our understanding of the function of prosecutor has long been rooted in the traditional dichotomy between inquisitorial and adversarial models of criminal procedure, of which the French and Anglo-Welsh systems respectively stem from. The establishment of a public prosecution service in England and Wales and the increase in adversarial rights for suspects in France (e.g. right to a lawyer, right to silence, etc.) have been hailed as proof of the convergence of European criminal justice systems and the demise of the traditional distinction.¹¹² It remains to be seen, however, whether these changes fundamentally altered the nature of prosecution services in each jurisdiction. This institution emerged under radically different legal procedural frameworks, as well as under different political and legal cultures. Nonetheless, as Western European criminal justice systems, France and England and Wales face similar problems and, as we have seen, similar debates exist in both jurisdictions on the proper status and role of public prosecutors and on accountability mechanisms. This new study offers a comparative analysis of the nature of accountability and

¹¹¹ Alec Samuels, ‘Abolish the Office of Attorney-General’ [2014] Public Law 609, 610.

¹¹² See, for example, Christine Lazerges (ed), *Figures du parquet* (PUF 2006); Chrisje Brants and Allard Ringnalda, *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (Wolf Legal Publishers 2011).

discretion for public prosecution services, not only by reviewing their different legal constructions, but also how they might be understood in practice.

The seminal comparative study on discretion and accountability in criminal justice systems was published in 1986 by Damaška who argued that one of the main differences between adversarial and inquisitorial models of criminal justice could be found in the dispositions of the government and the organisation of its administration.¹¹³ According to him, the inquisitorial model is characterised by an activist state, where the legal process is perceived as a means to enforce the law and implement state policy and administered by a body of professional officials following strict hierarchical guidelines. By contrast, the adversarial model is defined by a reactive state, where the legal process serves to resolve conflict between individuals and is administered ‘by a body of nonprofessional decision makers, organised into a single level of authority which makes decisions by applying undifferentiated community standards.’¹¹⁴ Yet, as discussed in subsequent chapters, CPS prosecutors have to follow much stricter guidelines than their French counterparts in practice and face much more constraining accountability mechanisms. The empirical element of this research provides important data in this respect, allowing the analysis to be grounded within practice as well as theory.

Transnational comparisons over issues of prosecutorial discretion and accountability – especially between inquisitorial and adversarial traditions – take on a particular importance in a context of developing international and European criminal justice.¹¹⁵

¹¹³ Mirjan Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (Yale University Press 1986).

¹¹⁴ *ibid* 17.

¹¹⁵ See, for example, Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510; Allison Marston Danner, ‘Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel’ (2003) 55 *Stanford Law Review* 1633.

The Statutes of the three ad hoc Tribunals of the former Yugoslavia (ICTY), Rwanda (ICTR) and Sierra Leone (SCSL), as well as the Rome Statute of the International Criminal Court (ICC) set up an Office of Prosecutor for each Tribunal. Although in most countries authority to initiate criminal proceedings is vested in an independent officer – the public prosecutor –, how that authority is exercised varies from country to country.¹¹⁶ There are variations in terms of the prosecutor's authority over investigations, the scope of discretion over the decision to prosecute or not and the extent of prosecutorial independence. The creation of international tribunals to investigate and try crimes of world significance therefore meant the birth of 'procedural hybrids',¹¹⁷ not least public prosecutors. Much can therefore be learned from national practices to explain some of the difficulties faced by these new institutions, in particular in terms of legitimacy. The same is true of the prospect of the establishment of a European public prosecutor.¹¹⁸ The Lisbon Treaty provided a legal basis for the Member States of the European Union (EU) to establish a European Public Prosecutor with competence to prosecute crimes against the financial interests of the Union. The EU Commission presented a proposal for regulation on the establishment of a European Public Prosecutor in July 2013.¹¹⁹ In practice, the different legal frameworks in which public prosecutors operate in Member States have made it difficult to agree on the degree of discretion which should be granted to the new institution and on the ways in which prosecutorial independence and

¹¹⁶ Daniel D Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124.

¹¹⁷ Mark Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' (2001) 50 *International & Comparative Law Quarterly* 26.

¹¹⁸ See, for example, Cristina Mauro, 'Procureur de La République et Procureur Européen : Mêmes Enjeux' [2011] *AJ Pénal* 119; Gerard Conway, 'Holding to Account a Possible European Public Prosecutor Supranational Governance and Accountability Across Diverse Legal Traditions' (2013) 24 *Criminal Law Forum* 371.

¹¹⁹ Michele Caianiello, 'The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office: Everything Changes, or Nothing Changes?' (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 115.

accountability should be guaranteed.¹²⁰ In particular, the legitimacy of this new institution will need careful considerations and lessons could be drawn from the relatively recent establishment of a public prosecution service in England and Wales. Similarly, issues around the relationship between prosecutor and investigators will be key, especially if the European Public Prosecutor has to rely on national police forces.

Many research studies take a pan-European or comparative approach to cover the criminal process in general and public prosecutions in particular, although some are purely theoretical or doctrinal and rest on an analysis of statutes and decided cases or rely on secondary sources. There have been remarkably few comparative accounts of public prosecution authorities which take an empirical approach. One of the first comparative studies of European criminal procedures was published in 1995 in France¹²¹ (an English version was published in 2002)¹²² and was the result of research done by a group of international scholars from 1990 to 1994 sponsored by the European Commission. It compared the criminal procedures of Belgium, France, Germany, Italy, and England and Wales and developed issues of current interest, in particular the status of the public prosecutor and the balance of powers between the public prosecutor and the police, allowing the authors to make direct thematic comparisons between the jurisdictions under study.

In her 1995 study of the role of prosecutors in sentencing, Fionda assesses the influence of the public prosecutor in Scotland, the Netherlands, England and Wales and Germany over the process of sentencing offenders in the criminal justice

¹²⁰ Denmark, the United Kingdom and Ireland have already made clear that they will not participate in the European Public Prosecutor's Office, although the United Kingdom and Ireland maintained the possibility to opt in. See the EU Commission press release, available at <http://europa.eu/rapid/press-release_IP-13-709_en.htm> accessed 29 July 2014.

¹²¹ Mireille Delmas-Marty (ed), *Procédures Pénales d'Europe* (PUF 1995).

¹²² Mireille Delmas-Marty and John R Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002).

system.¹²³ She notes the wide disparity between the limited powers of Anglo-Welsh Crown Prosecutors over sentencing and those of their counterparts in the other three jurisdictions. She ranks those jurisdictions from the least (England and Wales) to the most evolved (The Netherlands), implying that the increase in prosecutorial powers over sentencing is inexorable.¹²⁴ As we will see below, although the Crown Prosecution Service saw its powers to divert cases away from the criminal justice system extended at first with control over conditional cautions, this power has since been taken away from them to be entrusted to the police instead, thus contradicting Fionda's thesis to a certain extent.

Bryett and Osborne's report in 2000 contributed to the review of the criminal justice system in Northern Ireland by conducting an analysis of various prosecution systems, with an emphasis on accountability and the independence of prosecutors, and on equity and fairness within the different models.¹²⁵ They favour explanatory and cooperative accountability based on transparency and openness to subordinate and obedient accountability which is not compatible with the independence of public prosecutors.¹²⁶ In 2006, Hancock and Jackson used the international standards for prosecutors as a method for analysing national prosecution systems and conducted a full examination of the three UK national prosecuting agencies through questionnaires and interviews.¹²⁷ In 2008, they extended their analysis to public prosecution services in Ireland, New South Wales (Australia), the Netherlands and Denmark.¹²⁸ They argue

¹²³ Fionda, *Public Prosecutors and Discretion : A Comparative Study* (n 97).

¹²⁴ *ibid* 172–193.

¹²⁵ Keith Bryett and Peter Osborne, *Criminal Prosecution Procedure and Practice : International Perspectives* (Stationery Office 2000).

¹²⁶ *ibid* 72–115.

¹²⁷ Hancock and Jackson (n 24).

¹²⁸ Barry Hancock and John Jackson, *Standards for Prosecutors: An Analysis of the National Prosecuting Agencies in Ireland, New South Wales (Australia), the Netherlands and Denmark* (Wolf Legal Publishers 2008).

that the system in England and Wales has only recently begun ‘to develop the concept of a strong and effective public prosecutor’, noting the uneasy division of responsibility resulting from the separation of the investigative and prosecuting functions, but claiming that the involvement of CPS prosecutors in charging will lead to greater cooperation with the police. They also noted the increased accountability which the CPS is subjected to, but warned of the challenge to independence represented by public prosecutors having to account for individual prosecution decisions.

Born out of the research efforts of fifteen doctoral students, Lazerges’ book of 2006 explores the different faces of public prosecutors in ten countries (Germany, England, France, Greece, Italy, Romania, Russia, Turkey, Iran and Brasil), as well as the recent prosecutor for the International Criminal Court (ICC) and the project for a European public prosecutor.¹²⁹ The chapter on the Crown Prosecution Service argues that the creation of the CPS was not the revolution it was hailed to be, describing a change of degree rather than nature due to the supremacy of the police in its relationship with the CPS, although it notes a growing cooperation between the two agencies. However, the structure of the book in different chapters, each dealing with a national public prosecution service, prevents the authors from providing direct comparisons between the jurisdictions under study.

Binet-Grosclaude’s comparative study of the pre-trial phase in France and England examines whether the right to a fair trial in article 6 of the European Convention on Human Rights (ECHR) could be considered as the central element of a potential

¹²⁹ Lazerges, *Figures du parquet* (n 112).

convergence of these two procedural systems.¹³⁰ She argues that the concept of fair trial is merely one element in the movement of convergence between the two systems which started long ago. Other elements – linked, on one hand, to the incursion of efficiency and managerialism in criminal justice and, on the other hand, to the growing importance of a securitarian approach in policing (terrorism and organised crime procedures, police databases, etc.) – tend nowadays to prevail over the right to a fair trial as converging factors for criminal justice systems. Brants and Ringnalda used an unspecified number of interviews for their 2011 comparative study of the CPS and the Dutch public prosecution service, but used interviewees as informants on the process rather than providers of quantifiable data.¹³¹ They conclude that Anglo-Welsh criminal justice has moved towards an inquisitorial model of procedure, at least as far as prosecution is concerned. Truth finding has shifted towards the pre-trial phase and, to redress the imbalance in terms of investigative resources between prosecution and defence, the state has taken responsibility for exploring ‘all reasonable lines of enquiry’. Whilst theoretical studies provide useful information on the legal framework in which public prosecutors operate, they cannot provide reliable data on the actual operations and the practical effects of the law. In particular, it is not clear how legal actors have reacted in practice to this shift towards an inquisitorial system given the adversarial roots in legal culture.

Another common trend in comparative law consists in bringing together a group of specialists from several countries to answer a common set of questions. Thus, in 2005, Peter Tak asked experts in seventeen European countries to answer specific questions

¹³⁰ Aurélie Binet-Grosclaude, *L'avant-procès pénal : étude comparée Angleterre-France* (Bruylant 2011).

¹³¹ Brants and Ringnalda (n 112).

on the tasks and powers of their prosecution services.¹³² To allow comparison each report followed a set format: relations with the police and the Ministry of Justice; the role of prosecutors in court and in relation to the execution of sanctions. The countries studied were Austria, Belgium, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden. Jehle and Wade also called for local criminal justice experts for their 2006 study of six nations (England and Wales, France, Germany, Netherlands, Poland, and Sweden).¹³³ Their research describes how criminal justice systems have reacted to high crime rates, but, contrary to previous studies, their results are supported by empirical data. Having developed common questions and data collection concepts, they were able to collect the country-specific information required to allow a comparison. Their data set covered the total number of cases the prosecuting authority recorded as having been dealt with within a particular year, the number of cases brought before a court, the number of cases dropped, the number of cases dropped conditionally and the number of cases ended by the imposition of a sanction. This study reveals the strong shift in power toward prosecutorial decision-making in the criminal process in Europe through statistical data.

The comparative dialogue on the prosecutorial function does not limit itself to Europe, as American scholars have looked to the role of prosecutors in Europe for insight on how to reform the American system of justice.¹³⁴ More recently, Luna and Wade,

¹³² Peter JP Tak (ed), *Tasks and Powers of the Prosecution Services in the EU Member States* (Wolf Legal Publisher 2005).

¹³³ Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer 2006).

¹³⁴ See, for example, Goldstein and Marcus (n 59); Richard S Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?' (1990) 78 *California Law Review* 539; Richard S Frase and Thomas Weigend, 'German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions' (1995) 18 *Boston College International and Comparative Law Review* 317.

through the works of their contributors coupled with their own analysis, demonstrate that valuable lessons can be learned from a transnational examination of prosecutorial authority, showing how the enhanced role of the prosecutor represents a crossroads for criminal justice with weighty legal and socio-economic consequences.¹³⁵ They underline the importance of education, training and legal culture in prosecutorial mindsets, arguing that European systems have a vision of the prosecutorial role as a nonpartisan public service which, although it might not be fully adhered to in practice, still shapes the ethos of public prosecutors. Gilliéron used some statistical data from official sources for her analysis of the public prosecution service in the United States and in Switzerland describing the position, powers, and accountability of both prosecution services within their respective criminal justice systems.¹³⁶ Sun Beale analyses how German, French and U.S. systems balance various goals in regulating the authority and discretion exercised by public prosecutors, such as accuracy, consistency and neutrality, in her contribution to a 2015 edited collection.¹³⁷ She concludes that all three systems responded to heavy caseloads and the need for efficiency by an increase in prosecutorial discretion, but the structure of public prosecution services distinguishes each system's accountability mechanisms.

Current research studies analyse prosecutorial decision-making and the factors influencing and constraining it, but they often examine only one aspect of it. Thus, in England and Wales, there has been a great deal of research on the relationship between CPS prosecutors and police investigators. The ability of police officers to shape the

¹³⁵ Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press 2012).

¹³⁶ Gwladys Gilliéron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany* (Springer 2014).

¹³⁷ Sara Sun Beale, 'Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control' in Michele Caianiello and Jacqueline Hodgson (eds), *Discretionary criminal justice in a comparative context* (Carolina Academic Press 2015).

criminal investigation from the very beginning was shown to prevent public prosecutors from providing a meaningful neutral filter between the police and the courts. Meanwhile, in France, researchers have focused on the influence of government's policies over prosecutorial decisions and the *procureur*'s independence as a judicial officer, although most studies provide a theoretical analysis of the issue, rather than an empirical assessment of it in practice. However, a multitude of factors affect the decision to prosecute in practice and the decision-making process must thus be analysed in its totality. In particular, there has been no empirical research on the way tasks are distributed within public prosecution services and on internal accountability mechanisms.

Empirical studies give us great insights into the practices of public prosecution services, but important changes have potentially altered the way those services make their decisions in both jurisdictions since the data was collected. In particular, public prosecution services have been urged to deal with more cases but with fewer resources which has forced them to find new ways to deal with cases more quickly and efficiently (e.g. introduction of TTR in France, delegation to unqualified staff). The CPS was encouraged to play a more active role in the criminal justice system and produced a substantial body of policies and guidance. It also modified its organisation which resulted in a move away from a local to a more centralised organisation.

This new empirical study endeavours to understand how the French and English criminal justice systems attempt to combine the necessities of accountability for public prosecution services in modern democratic societies with the flexibility and reactivity needed in the application of the law provided by prosecutorial discretion. It provides a better understanding of the way national prosecution policies are implemented on the ground and adapted to local needs. Not only does this study give an account of the

relationship of prosecution services with the executive in both jurisdictions, but it also examines hierarchical relationships within the public prosecution bodies themselves which allows us to see at what level national priorities are adapted to local circumstances, which systems of internal accountability are in place and whether they call into question prosecutorial discretion and autonomy. When examining the relationship of public prosecutors with the police, this study looks at the internal organisation of public prosecution services (caseload, team-working, case distribution) and how it impacts on the reliance of prosecutors on police information. Being based in the prosecutor's office, rather than at the police station like previous researchers, also enables the observation of this relationship from the prosecution point of view. This study also looks at recent developments in external accountability for prosecutors, such as growing pressure to give reasons for prosecutorial decisions and reviews by inspectorate bodies and courts.

Chapter 2 – Methodology

This research is a comparative study of prosecutorial independence and accountability in France and England/Wales. The pitfalls of comparing different legal systems have often been described. One of the difficulties is in the object of comparative studies itself: the law. Legrand points out that for many comparatists the law is to be found in legislative texts and judicial decisions, but notes that ‘law is, first and foremost, a cultural phenomenon’¹³⁸, arguing that ‘there is much of the utmost relevance to a deep understanding of a legal order, of an experience of law, that is simply not to be found in legislative texts and in judicial decisions.’¹³⁹ He emphasises the need for a contextual approach. The dominant functionalist approach in comparative legal research has been criticised. Focusing on problems and on how different legal systems resolve them, functionalism rests on three premises: ‘law answers to social needs; problems are at least similar across legal systems; and these problems tend to be resolved in the same way.’¹⁴⁰ These presumptions are arguably problematic. By focusing on the consequences produced by legal rules, functionalism ignores the historical and socio-economic context that prescribed them. Its implied universalism smooths over different cultural values. The choice of method is therefore of particular importance in a comparative study.

The majority of the data collected for this study was through direct observation, followed up by interviews. Direct observation, also called ‘participant observation’ or ‘ethnography’, entails the researcher ‘participating, overtly or covertly, in people’s daily lives for an extended period of time, watching what happens, listening to what

¹³⁸ Pierre Legrand, ‘How to Compare Now’ (1996) 16 *Legal Studies* 232, 236.

¹³⁹ *ibid* 235.

¹⁴⁰ Oliver Brand, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’ (2007) 32 *Brooklyn Journal of International Law* 405, 435.

is said, asking questions – in fact, collecting whatever data are available to throw light on the issues that are the focus of the research.’¹⁴¹ It is particularly well-suited for comparative studies where the researcher should avoid ethnocentric preconceptions. In this research project, fieldwork was conducted at a CPS office for four months in 2012 and for eight weeks at a medium-sized court in France in 2013. In total, I carried out six months observational fieldwork across these two jurisdictions. I was able to observe the work of prosecutors on a daily basis and complement my observations with discussion of particular cases and decisions with participants. Towards the end of the observation period, I conducted thirty-one interviews with CPS staff members (Crown Prosecutors, Associate Prosecutors, paralegal officers, Crown Advocates and CPS managers) and nine interviews with French *procureurs* (at both senior and junior level).

This chapter explains why this particular method was followed, how access was negotiated, how the fieldwork was carried out, taking into account ethical concerns, the limitations of the study and how the data was finally analysed.

I. Choice of method

The decision to prosecute or not is one of those ‘low visibility decisions in the administration of justice’ as defined by Goldstein.¹⁴² Low visibility decisions are mostly found in the early stages of criminal proceedings, at which point the future trajectory of cases is often determined. They are unlikely to be the subject of reviews, especially if agencies decide not to invoke the law. A classic example of these ‘low

¹⁴¹ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (2nd ed, Routledge 1995) 1.

¹⁴² Joseph Goldstein, ‘Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice’ (1960) 69 *The Yale Law Journal* 543.

visibility' decisions is street-level decisions by the police with regards to arrest or stop-and-search. Unlike a judge who has to justify their decision and whose judgment might be published, police officers do not usually have to give detailed reasons for arresting somebody on the street. In particular, if they decide not to arrest someone, there will be no review of their decision.¹⁴³ Similarly, prosecutorial decisions are rarely subject to reviews and prosecutors usually do not have to provide detailed reasons for their decisions, in particular if they decide not to prosecute. Even if they do have to justify their decisions, their explanations would not normally be made available to a large audience but would mostly remain confined to internal scrutiny.

The 'low visibility' of prosecutorial decisions means that very little information can be found in court cases about how the decision to prosecute was reached and even less information with regards to decisions not to prosecute, since these cases never reach the courts. The only available data relates to high profile cases where prosecution agencies are subject to external scrutiny by the media,¹⁴⁴ but very little data is available on routine cases which constitute the daily workload of prosecutors. As a result, a purely doctrinal approach focused on the analysis of statutes and decisions of higher courts is unlikely to yield many findings with regards to the everyday decision-making process of prosecutors. This is not to say that the current legislation and prosecution policies, as well as disciplinary procedures and external inspectorate bodies' roles, do not have to be examined. The existing literature also provides an indispensable theoretical frame to the study. Relevant here are not only research monographs and

¹⁴³ *ibid* 543.

¹⁴⁴ It should be noted that English courts are more and more willing to review public prosecutors' decisions. In these circumstances, court decisions detailing the decision-making process of prosecutors become available. However, it has been observed that '[t]he level of accountability to the court for decisions not to prosecute is likely to remain low' Mandy Burton, 'Reviewing Crown Prosecution Service Decisions Not to Prosecute' [2001] *Criminal Law Review* 374, 383.

journal articles, but also official reports and journalistic exposés. However, this study is not only concerned with ‘law in the books’, but also with ‘law in action’ as first described by Roscoe Pound at the beginning of the last century. This is essential in order to go further than what has already been said on issues around prosecutorial discretion and accountability and thus produce original research, the central requirement of any PhD endeavour.

In the context of a comparative study, relying solely on expert literature from a foreign jurisdiction can be especially problematic. As explained by Nelken,¹⁴⁵ ‘descriptions of social and legal ideas carry political implications’ and, whilst we might be able to associate experts from our own culture with a given political or policy position, the same will be much more difficult when relying on overseas experts. Even assuming that expert literature is impartial, it will only answer questions relevant to its culture which might not be pertinent to the outside researcher.¹⁴⁶ For instance, there is very little literature in France about the relationship between police and prosecutors because it is not seen as much of an issue as it is in England and Wales.¹⁴⁷ There will also inevitably be problems in translation. Simply translating the French ‘*procureur*’ for the English ‘prosecutor’ can mask great differences between their roles in each jurisdiction. Similarly, assuming that the French ‘*magistrat*’ is the same as the English ‘magistrate’ – as attractive as this may sound – can lead to considerable misunderstanding.¹⁴⁸ Solely relying on expert literature deprives us of other means of understanding the culture and thus of being alert to major differences.

¹⁴⁵ David Nelken (ed), *Contrasting Criminal Justice: Getting from Here to There* (Ashgate 2000) 6–7.

¹⁴⁶ *ibid* 8.

¹⁴⁷ See Chapter 1.

¹⁴⁸ In the legal system of England and Wales, magistrates, also called justices of the peace, are lay judges, namely people from the local community who hold no legal qualifications. They are not paid, apart from an allowance for loss of earnings, mileage and subsistence. They generally sit in threes and are advised on points of law and procedure by a legally qualified justices’ clerk.

Qualitative empirical research ‘involves an attempted in-depth exploration of legal processes, typically focusing on a modest number of interactions but viewing these from a variety of perspectives and perhaps over time. The strength of this approach lies in its capacity to reflect the complexity of legal processes, and the complexity of the relationship between process and outcome.’¹⁴⁹ This is particularly true of ethnography where the researcher can ‘immerse herself in the field in order to try to identify important and relevant issues, without the total constraint of precoded categories.’¹⁵⁰ In a comparative study, this is particularly useful as it can avoid ethnocentric preconceptions. This open-ended characteristic of ethnographic research neither waives the necessity of preparation before going into the field, nor means that the ethnographer should behave aimlessly in the field, but it implies that the research design should be a reflexive process throughout.

In this study, the completion of an initial literature review allowed me to define ‘foreshadowed problems’,¹⁵¹ rather than specific research questions. The existing literature has identified three main sources of influence for prosecutors’ decisions in both legal systems: the police, the prosecution services’ hierarchy and the government. It was important to find out how these three main influences played out in practice, what limited their respective impacts on prosecutorial decision-making and whether other factors played a role in prosecutors’ decisions. With this in mind, it was decided to focus on the internal organisation of public prosecution services (team work, bureaucracy, and hierarchical relationships), the implementation of a national

In France, a *magistrat* is a member of the career-trained judiciary which comprises both the ‘sitting judiciary’ (trial judges and *juges d’instruction*) and the ‘standing judiciary’ (*procureurs*).

¹⁴⁹ John Baldwin and Gwynn Davis, ‘Empirical Research in Law’ in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005).

¹⁵⁰ Hodgson, *French Criminal Justice* (n 62) 10.

¹⁵¹ Hammersley and Atkinson (n 141) 24.

prosecution policy, in particular its adaptation to local needs, and recent developments in external accountability for prosecutors. Whilst providing some structure to the researcher, these questions were sufficiently open to allow some flexibility in data collection, so that important issues were not ignored because they did not fit into the predefined categories.

Direct observation allowed me to identify factors influencing prosecutorial decisions that I might not have discovered otherwise. Often, in the weeks or months following the start of the fieldwork, what the ethnographer previously took for granted as knowledge about the organisation turns out to be inaccurate. In the process of observing the host organisation, the researcher progressively achieves an inside knowledge of it, which supplants their previous 'external' knowledge. Gradually acquiring an understanding of the organisation's culture, the participant observer achieves a certain objectivity, which is not usually accessible to members of the organisation themselves. Members of the group 'live inside the culture and tend to see it as simply a reflection of "how the world is". They are not conscious of the fundamental presuppositions that shape their vision, many of which are distinctive to their culture.'¹⁵² Thus, prosecutors themselves remain unaware of some aspects of their work because they simply consider them as insignificant. Entering an organisation as an outsider, the ethnographer notices important features that members of the group would not consider noteworthy because they take them for granted. Both French and English prosecutors were surprised that I was interested in observing them whilst they answered phone calls from the police. English prosecutors assumed that I must find this very boring, later telling me, when I was observing the work of Crown Advocates in the Crown Court, that this must be much more interesting for me.

¹⁵² *ibid* 9.

Similarly, French prosecutors tried to convince me to attend the *Cour d'assises*' hearings,¹⁵³ rather than sit in the office with them. Whilst observing trials is essential to understand what is required from the prosecution in the pre-trial phase, the research is principally concerned with the nature of routine day-to-day pre-trial decisions. The methods and resources used to deal with particularly serious offences are often very different from procedures followed for mass offences. For example, the investigations of the most serious offences tried in the French *Cour d'assises* have to be supervised by a *juge d'instruction*, not a *procureur*. The *juge d'instruction* also ultimately decides whether or not to send the case to trial. Attending *Cour d'assises*' hearings would have provided me with little data related to decisions by *procureurs*, and the focus would not be on the ordinary caseload of the *procureur*, but on the most serious three per cent of criminal cases.

The status of the ethnographer as an outsider is of particular interest in comparative research. Observing professionals in a foreign country, the researcher is doubly an outsider. This is both an advantage and a disadvantage. On the plus side, they might be able to notice important aspects of the professionals' work that a native researcher might have dismissed as 'normal'. As Hammersley and Atkinson explain, '[i]n research settings that are more familiar, it can be much more difficult to suspend one's preconceptions, whether these derive from social science or from everyday knowledge. One reason for this is that what one finds is so obvious'.¹⁵⁴ Being a 'double outsider' can also have its downside for the foreign ethnographer, as it might take them

¹⁵³ In the French legal system, the *Cour d'assises* is a criminal trial court with jurisdiction to hear cases involving defendants accused of the most serious offences, *crimes* in French, and the only one involving a jury of citizens. Under French law, a *crime* is any criminal act punishable by over 10 years of prison, such as murder and rape. It should be distinguished from *contraventions* (road-traffic offences, minor assaults), punished by a maximum fine of €3,000 (Art. 131-13 of French criminal Code), and *délits* (theft, involuntary manslaughter), punished by a maximum of 10 years imprisonment (Art. 131-4 of the French criminal Code).

¹⁵⁴ Hammersley and Atkinson (n 141) 103.

longer to understand the culture and thus notice further aspects as significant. The comparative ethnographer is subject to two contradictory imperatives: they must avoid ethnocentric preconceptions through immersion, but beware of ‘going native’.¹⁵⁵

Having been living and working in England and Wales for the past seven years, I have some knowledge of the English culture and am aware of the current public affairs in this jurisdiction. However, whilst conducting observational fieldwork in England and Wales, I was in the position of an outsider, having never practised law in this jurisdiction, nor studied English law at university. This meant that I noticed aspects of prosecutors’ work that I might not have seen as significant otherwise. For example, I might not have perceived as remarkable the fact that English prosecutors never meet suspects had I not been a French lawyer, aware that French prosecutors regularly see suspects, in particular to notify them of the charges against them. In order to create this new perspective when observing the work of prosecutors in France, I decided to carry out the English fieldwork first. Having spent time with English prosecutors, some features of French prosecutorial work struck me as interesting whilst I might not have noticed them if I had simply started by observing French prosecutors. For example, I noticed that French *procureurs* spoke to the police in a much more assertive way than their English counterparts who showed more deference. Nevertheless, being French also proved useful in the conduct of observational fieldwork in France. For instance, I am well aware of the importance of the discourse around ‘equality’ in France. Not only is it written on the pediment of all official buildings, at the centre of the slogan of the French Republic: ‘*Liberté, Égalité, Fraternité*’, but the concept of equality is also deeply rooted in French society. I therefore considered it particularly

¹⁵⁵ The term ‘going native’ refers to the danger for researchers to become too involved in the community under study, thus losing objectivity and distance. See Karen O’Reilly, *Key Concepts in Ethnography* (SAGE 2009).

significant when a *procureur* told me that ‘equality doesn’t exist’, when she explained that their first priority is to resolve a particular case in a manner which is adapted to the seriousness of the offence and the personality of the suspect, not to make sure that their decisions are coherent.

Direct observation and other qualitative methods sometimes come under criticism for lacking scientific rigour on the basis that the data and findings they provide are subjective, merely peculiar perceptions from a few cases that cannot offer solid grounds for accurate scientific analysis.¹⁵⁶ Quantitative methods, such as surveys, are perceived as more scientific, but they are useful only if the research questions can be answered by ways of standardised interrogation. They are therefore wholly unsuited to this study which seeks to understand an organisation and its decision-making processes, as human interactions – within the organisation and between members of the organisation and external agents – cannot be reliably measured through statistics.

Quantitative methods also suppose a pre-existing dataset that can be used to answer the research problems, as the large amount of data which would have to be collected to allow for a quantitative analysis is out of reach for a lone researcher. Although both England/Wales and France produce official statistics with regards to their respective criminal justice systems, it would be particularly dangerous to assume that it is possible to compare and contrast them. Take, for example, the discontinuance rate, i.e. cases discontinued by prosecution authorities. Considering that *procureurs* discontinue a much higher number of cases than their English counterparts, it could be concluded that they are less hesitant to forsake weak police cases and thus much more independent from the police. However, this would completely ignore the fact

¹⁵⁶ Hammersley and Atkinson (n 141) 6.

that French police have to report all offences to the *procureur*, whereas the English and Welsh police officers act as a filter in the first instance, only sending what they consider strong cases to the CPS. Similarly, a comparison of conviction rates could lead to the conclusion that *procureurs* prosecute less weak cases than English prosecutors, since they have a higher success rate at court. Again, this does not take into account important contextual aspects: apart from the fact that the law of evidence can be stricter in England and Wales than in France, *procureurs* enjoy a much closer relationship with judges than CPS prosecutors as they belong to the same professional body. Another explanation for the French high conviction rate could therefore be greater professional trust between French judges and *procureurs*, leading to a more favourable acceptance of the prosecution case than in England and Wales.

In this study, direct observation was completed by interviews towards the end of the observation period in each jurisdiction. Firstly, this allowed for a better-informed definition of interview questions. Secondly, although interviews provide a helpful insight into the opinions of professionals about the enterprise of the criminal justice system, researchers must remain vigilant about taking at face value what participants tell them during interviews. As explained by Hodgson, '[c]onsciously or unconsciously, interview subjects may offer up presentational data which does not reflect daily routines and experiences'.¹⁵⁷ Presentational data 'concern those appearances that informants strive to maintain (or enhance) in the eyes of the fieldworker, outsiders and strangers in general, work colleagues, close and intimate associates, and to varying degrees, themselves.'¹⁵⁸ Although it can also arise in

¹⁵⁷ Jacqueline Hodgson, 'Comparing Legal Cultures: The Comparativist as Participant Observer' in David Nelken (ed), *Contrasting Criminal Justice: Getting from here to there* (Ashgate 2000) 142.

¹⁵⁸ John Van Maanen, 'The Fact of Fiction in Organizational Ethnography' (1979) 24 *Administrative Science Quarterly* 539, 542.

conversations during observational fieldwork, interviews are more likely to produce presentational data because of the greater formality of the setting: interviewees are more cautious as to what they say, especially if the conversation is recorded. When explaining to a French *procureur* that I only wanted to record the interview to ensure accuracy, she replied that she did not intend to say anything that she could not stand by afterwards anyway. The ethnographer must always cross-check data they collect against previously or newly collected data. This can allow them to detect presentational data and reinterpret it for it to take a new importance: as Van Maanen pointed out, ‘people lie about the things that matter most to them (...) If the ethnographer can uncover the lie, much is revealed about what is deemed crucial by the individual, group, or organization.’¹⁵⁹ Having spent a long time observing their work before interviewing prosecutors allowed me to spot discrepancies between what they told me they were doing and what they actually did. For instance, I interviewed an Associate Prosecutor who assured me that they always had to seek the approval of a lawyer before making any decision, including when they were at court. However, I had spent a long time following Associate Prosecutors to magistrates’ court hearings by the time I interviewed her and I knew that they often made decisions without running it past a lawyer first. Her insistence that the rule was being observed underlined the importance of it being routinely broken for practical reasons.

In-depth interviews are also a great tool to find out what participants believe they are doing and why they are doing it. Interviews with prosecutors were essential to understand their underlying core values and their opinions on their job and status. Thus, it was particularly interesting that most *procureurs* I interviewed were very attached to their status as *magistrat* and worried at the prospect of losing it. Similarly,

¹⁵⁹ *ibid* 544.

CPS prosecutors I interviewed tended to describe their job by minimising the impact of their individual decisions on the final outcome, suggesting a feeling of disempowerment. Interviews can also bring new information that participants would not have revealed in the course of the observation because other colleagues were present. The confidential context of the interview might help them reveal aspects that they would not want to discuss with others. As such, it also shines a new light on data collected during the observation phase. Having slowly built trust with interviewees during the observation phase also meant that they were more likely to open up to me during the interviews than if I had been a complete stranger to them. This final characteristic was demonstrated *a contrario* by the stalemate I faced when I attempted to interview *procureurs* in a different location than the office I had observed.

II. Choice of setting and access

In this study, the decision was made to base myself at a prosecutors' office, rather than at a police station. This was despite the fact that the police are also a prosecuting authority in England and Wales, in the sense that they can decide to take a case to court without asking the CPS for authorisation in minor cases. Admittedly, it would also have been interesting to observe police officers in France to see how they shape the information they present to the *procureur* when they report to them over the phone. Crucially, the main reason to concentrate on the work of CPS prosecutors was the limited time resources of the lone researcher. Conducting observation at police stations as well as at prosecutors' offices would have meant a much greater amount of time spent in the field, gaining the trust of police officers before any meaningful data could be collected. Furthermore, it would have been difficult to negotiate access to police stations, in particular in France. Whilst English police have proven to be quite open to

external researchers, this is clearly not the case in France where the police are not open to external scrutiny. This is partly due to the fact that there is much less empirical research in France than in England and Wales and thus the French police do not have much experience of it. They have concerns over the confidentiality of the data and the potential impact on their image of the publication of the study. The French police are also extremely centralised and this could mean having to negotiate access at ministerial level. Whilst working on another research project requiring access to police stations,¹⁶⁰ it became clear to me that it would be extremely difficult to observe the work of French police officers. Whilst negotiating access to police stations might have been easier in England and Wales, an extensive body of work already exists where researchers have based themselves at police stations. In comparison, very few researchers have observed the everyday work of CPS prosecutors. For all these reasons, it was decided to observe the daily life of a prosecutors' office.

The scarce resources available to the lone researcher also meant that it was impossible to observe several prosecutors' offices in each jurisdiction. This was less problematic in England and Wales where access was granted to a large CPS office covering three magistrates' courts and one large Crown Court. In France, however, access could only be gained in a medium-sized court where only nine prosecutors worked. I attempted to complete data collection with interviews in another area to make sure that I was not

¹⁶⁰ The research project 'Procedural Rights of Suspects in Police Detention in the EU: Empirical Investigation and Promoting Best Practices' is a comparative study of implementation of suspects' rights in police detention in four jurisdictions of the EU (England and Wales, France, Netherlands and Scotland) funded by the European Union and the University of Maastricht. Despite months of negotiation, the team was unable to negotiate access to conduct observations at police stations in France. We were only allowed to accompany defence lawyers during the provision of police station advice. The project resulted in the publication of *Inside Police Custody*: Jodie Blackstock and others, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia 2014).

only describing local practices, but that my findings could be tested further in a different location. Unfortunately, I was not able to obtain the necessary permissions.

The first step of an ethnographic study is to obtain access to the data the researcher needs. As explained by Hammersley and Atkinson, the problem ‘is often as its most acute in initial negotiations to enter a setting and during the “first days in the field”; but [it] persists, to one degree or another, throughout the data collection process.’¹⁶¹

As described above, the difficulty in gaining access can sometimes lead to adjusting the research design. In official organisations, such as public prosecution services, it is necessary to focus initial access negotiations on obtaining formal permission from key personnel, often called ‘gatekeepers’ as they can grant or refuse access. It should be noted, however, that identifying relevant gatekeepers and obtaining their contact details is not always easy.

A. Negotiating access to the Crown Prosecution Service

In this research, I first attempted to make informal contact with the organisations I wanted access to. In England and Wales, my supervisor first approached a CPS office informally, only to be told that, considering the context of budget cuts, a researcher would have to pay to interview CPS members of staff to compensate for their time. This would have ruled out any research possibilities due to a lack of financial resources. The decision was made to try to contact the Chief Crown Prosecutor (CCP) of another CPS area to check whether this was a national policy. My supervisor approached an academic at another institution with good contacts in the CPS and they provided the email address of a CCP, describing him as ‘keen on academic research’. Following a first contact by email, the CCP seemed interested by the research project,

¹⁶¹ Hammersley and Atkinson (n 141) 54.

although he had some concerns with regards to the impact of the research on staff working capacity. Another advantage of ethnography is that I only needed to work-shadow members of staff, causing the minimum disruption possible for busy professionals. I was therefore able to provide some reassurance in this respect. The CCP told me that he had to inform CPS headquarters in London of the research project. Shortly afterwards, I was contacted by CPS headquarters and asked to fill out an 'external research application form'. The form detailed the research proposal, details of the data required from the CPS and the proposed research timetable. It also requested me to explain how ethical considerations and data protection obligations were going to be taken into account in the project. I was also requested to sign an agreement detailing the conditions of access to the CPS. Whilst some conditions with regards to data anonymity, sensitive data confidentiality and consent were unproblematic, others could potentially compromise the confidentiality of the data or result in censorship. For example, the agreement stated that 'any recording or transcript of interviews (...) will remain the property of the CPS' or that 'any book, article, broadcast or lecture based upon the research findings and incorporating information derived from the interviews for which permission has been granted will be submitted to the CPS prior to any publication for comment. The CPS retains the right to edit or otherwise restrict publication of any such information'. Sharing my concerns with my contact at the CPS headquarters, I was told that this was the standard research undertaking, but that it could be amended to meet the requirements of independent research.

I then had a face-to-face meeting with the CCP and the senior district prosecutor in charge of the office where the research might be based. The research project was discussed, as well as concerns about the research undertaking. The meeting was very

positive and revealed great interest in the project from CPS local hierarchy. It provided confirmation that the CPS was open to discussion and the CCP offered to smooth the way for the research by contacting CPS headquarters directly with regards to amending the research agreement. After some discussions, a new undertaking was agreed with CPS headquarters, specifying that the thesis would be sent to the CPS for comment prior to submission. I would then be able to either amend the thesis according to the CPS comments or to add the comments as a proviso. This was fully acceptable as it allowed the CPS to correct factual mistakes or misunderstandings, whilst still ensuring the independence of the research. Once security clearance was obtained, the fieldwork could finally start, more than a year after the initial informal contact.

As explained above, one of the great advantages of ethnographic methods is its open-endedness. Ideally, the research should be flexible and it is therefore difficult for researchers, especially when inexperienced, to evaluate exactly how long their fieldwork will last. Understandably, gatekeepers often ask how long the researcher will remain present within the organisation. I was very fortunate in that I did not have any difficulties in extending the original period of time for which I had been granted access at the CPS.

B. Negotiating access to the French ministère public

French *procureurs* are, with judges, part of the judicial professional body and are based in courts. In contrast to their English counterparts, they do not have separate offices. This means that a *parquet*¹⁶² covers all cases at one court centre. Having negotiated access in a CPS office which covered three magistrates' courts and one

¹⁶² There is a *parquet* in each court centre. The *parquets* of lower courts (*tribunaux de grande instance* – TGI) are each headed by a *Procureur de la République*. Each *Procureur de la République* acts under the authority of the *Procureur général*, the head of the *parquet* at the regional court of appeal.

large Crown Court, I chose a *parquet* with over thirty *procureurs*, in a large conurbation. French *procureurs* are used to welcoming students on work placements. They can be law students who wish to get an idea of *magistrats*' work and who could be allowed to spend up to a week observing the work of different *magistrats* (*procureurs*, *juges d'instruction*, trial judges, etc.), but also *magistrat* trainees who are attached to a court centre for several months during their training. Police officer trainees and lawyer trainees can also carry out a work placement at a *parquet* as part of their initial training. Each *parquet* therefore has a *magistrat* in charge of organising these work placements.

I was told that the best person to contact with regards to my research was the *magistrat* in charge of work placements at the selected *parquet*, by another *magistrat* I knew through personal acquaintance. I contacted this gatekeeper on several occasions by email, detailing the project. Following his lack of response and aware of some French administration's reluctance to electronic communications, I asked my French supervisor for a supporting letter on university letterhead. Unfortunately, this did not prompt him to respond either. The *magistrat* who first helped me personally recommended my research project to the gatekeeper without much success. Faced with this complete absence of response and hoping that my presence in France might help speed up the process, I again attempted to contact the gatekeeper several times by email and by telephone. My French supervisor also tried to speak to *magistrats* she knew about the project, in particular the presiding judge of the local court of appeal, without success.

In parallel, my English supervisor was in contact with the same *magistrat* about another research project funded by the EU.¹⁶³ She arranged a meeting with him for me to discuss some fieldwork on the EU project and I took this opportunity to speak about my own research project as well. I was told that it would be possible for me to spend two or three days observing the work of the *procureurs'* team who answered phone calls from the police. I explained that I needed to collect reliable data. Spending only three days with those prosecutors would not have allowed me to judge whether the data I collected was a representative sample of their everyday work or not. Following my explanations, he agreed to allow me to spend up to a week with them, but not any longer.

Following this setback, it was decided to contact another *parquet*. This other *parquet* was in a large conurbation as well and my French supervisor knew the *Procureur de la République* personally. I spoke to her over the phone and she seemed interested by the research, but explained that she was unable to allow me to observe the work of her *procureurs* as she had too many work placement requests and too heavy a workload. She recommended that I contact a smaller court where they would have more time to dedicate to this type of request, giving me the names and contact details of two of her colleagues. Following her advice, I contacted one of those *procureurs*. After having spent two months in France without any progress, I finally received an answer. After having sent a CV and a supporting letter from my French supervisor (on letterhead and with all the official stamps), it was agreed that I could spend a total of eight weeks at this medium-sized *parquet* with nine *procureurs*. I was not asked to sign any

¹⁶³ See above for details.

confidentiality agreement or to complete a security clearance and the whole negotiation took place by email, in stark contrast with the English fieldwork.

I spent four months at the CPS and interviewed a total of thirty-one people of different hierarchical levels. By contrast, I only spent eight weeks in a *procureurs*' office and could interview only nine *procureurs*. Furthermore, the two sites were of different sizes. I therefore decided to try to complete my observations in France with a week of fieldwork at the large court centre where I had been told that I could stay no longer than a week. Having spent time with *procureurs* in another site, I was now able to judge better whether or not the data collected was unusual or not. This would also have allowed me to meet more *procureurs* and to arrange further interviews. However, despite the earlier positive response, all my attempts remained unsuccessful. I also attempted to interview *procureurs* in other sites, but I was ultimately unable to secure access to other participants, even just for interviews.

C. Early stages in the field

Gaining access through high-ranking prosecutors had the advantage of ensuring a reasonable amount of cooperation from other members of staff, giving me a degree of credibility. However, gatekeepers sometimes try to shepherd the researcher in one direction or another, in their attempt to present their organisation in the most favourable light.¹⁶⁴ At the beginning of the fieldwork, I was happy to listen to suggestions from gatekeepers and other research subjects. After all, they knew the field better than me and could therefore point me in directions that might prove particularly useful. This decision was also strategic as it ensured a higher level of cooperation from research participants as they could see that their suggestions were

¹⁶⁴ Hammersley and Atkinson (n 141) 66.

taken into account by the researcher. Thus, I designed my CPS fieldwork in collaboration with the head of the CPS office. I wanted to follow the journey of a criminal file through the CPS and the CPS manager explained that a file would go through several teams (charging team, magistrates' court team, Crown Court team, Crown Advocates) and introduced me to each team leader. I then decided to spend time with each team, starting with the charging team as it is the first CPS port of call for a criminal file. The manager did not interfere further in my data collection, such as deciding how long I would spend with each team, but his help at the beginning was greatly appreciated.

Gaining access through high-ranking prosecutors could also have repercussions on the way I was perceived by lower-ranking staff: I could be suspected, initially at least, of being a spy or an auditor, hired by the hierarchy to evaluate the service or at the very least reporting back to them. Naturally, research participants have expectations about the ethnographer's identity and intentions. This has serious implications for the amount and type of information they will be able to collect. The personal characteristics of the researcher play a very important role in this respect: '[a]lthough it would be wrong to think of the effects of these as absolute determinate or fixed, such characteristics as gender, age, "race", and ethnic identification may shape relationships with gatekeepers, sponsors, and people under study in important ways.'¹⁶⁵ Being a young woman and a student certainly helped me in being accepted by my research subjects. As mentioned above, there is a strong culture of work placements in France and, as such, I was just another student who wanted to gain experience of their organisation. It also reassured prosecutors in England and Wales who did not perceive me as a threat. It might have been more difficult to justify my

¹⁶⁵ *ibid* 92.

presence if I had been a middle-aged academic researcher. Being French also played a role in being accepted in England and Wales as CPS prosecutors were pleased to have someone from another jurisdiction taking an interest in their work. In France, the knowledge that I was conducting a comparative study appeared to prompt interesting comparative comments from *procureurs*, for instance on their status as *magistrats* being misunderstood by the European Court of Human Rights due to an ‘Anglo-Saxon vision’ of criminal justice.

Nevertheless, some prosecutors were reluctant, or at least uncomfortable, that I was observing them. For instance, an Associate Prosecutor in England and Wales said he did not mind me coming with him to court, but that he would not deal with the case electronically with his new tablet if I was there. Whilst not questioning my presence as a researcher, he made clear that he did not want to use a new tool with which he was not fully familiar, whilst being observed. In France, a couple of *procureurs* were reluctant to let me be present when they notified suspects of charges against them. One refused to let me attend, saying that the suspect was unstable. Another one first stated that I could not come because I had not taken an oath, but finally relented after checking with his colleague that I had come with her for this type of operation before. Although I may have been able to push for the permission to sit in, I felt this would be counter-productive. Going against my social instincts, it may also have undermined my relationship with the subject and therefore future access to data.

As illustrated above, the issue of access is not resolved once the researcher has gained entry to a setting, since this does not guarantee access to all the required information. If this is to be acquired, negotiation of access is likely to be a constant concern for the ethnographer. Negotiation takes two different, but related meanings here. On the one hand, it refers to explicit discussions with research participants to access certain parts

of the setting or observe specific situations. On the other hand, it also involves a much wider and more complex process of gaining the trust of participants in order to collect the necessary data. People might be uncomfortable with me sitting next to them and simply watching them. It felt more natural to carry out small tasks, like bringing hot drinks or carrying stationery items to another room to help research participants. It helped me integrate by making me feel useful to participants.

Taking notes might also be intimidating for participants who know I am writing about them and it might lead to them offering ‘presentational data’.¹⁶⁶ In England and Wales, charging lawyers handed me the file the police had sent, along with the decision they had sent back to them. This not only gave me access to the data contained in these documents, but also provided me with something to do. I was seen as working and not as simply listening to the conversation CPS lawyers had with the police or with their colleagues. Similarly, during the month when I went to court with Associate Prosecutors, typing up my notes of the day before provided me with an excuse to spend time in the office and observe staff interactions. As noted above, in France, the culture of ‘*stages*’ (work placements) meant that my presence was more readily accepted. Despite the absence of a tradition of empirical research, *procureurs* were used to being observed and often commented on what they did at the same time for my benefit. They often seemed to enjoy the presence of an observer and relished the opportunity to show how they work.

At the start of my fieldwork, it was easy for me to claim naiveté, permitting prosecutors to explain things in their own words, thus avoiding imposing any restriction on my data collection. In the early stages of ethnographic fieldwork, it is

¹⁶⁶ Van Maanen (n 158) 542.

preferable to move along with the prevailing forces in the field rather than attempt to shape the flow of information which would prematurely narrow the type of data collected. Over time, as I was able to build trust relationships with my research subjects and to gain a good understanding of the way cases were handled, it was possible to have a bit more control over the information I was able to collect.

III. Doing the fieldwork

As the ethnographer becomes more and more assimilated into the setting, research participants will lower their guard and the quality of the data is significantly improved. Van Maanen distinguishes between ‘operational data’ ‘which documents the running stream of spontaneous conversations and activities engaged in and observed by the ethnographer while in the field’¹⁶⁷ and ‘presentational data’ ‘which concern those appearances that informants strive to maintain (or enhance) in the eyes of the fieldworker, outsiders and strangers in general, work colleagues, close and intimate associates, and to varying degrees, themselves’.¹⁶⁸ Over time, research participants tend to feed less ‘presentational data’ to the researcher because a rapport of trust has been established, but the researcher also has more experience to detect ‘presentational data’, being able to confront new data with previously collected information.

In England and Wales, because of the way things were done in the CPS office, I had to move between teams. Thus, I spent a month with charging lawyers in the office, then another month going to court with Associate Prosecutors before spending another four weeks with the magistrates’ court team. Finally, the last month of my fieldwork was divided between the Crown Court team, the Rape and Serious Sexual Assaults

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

(RASSO) team and the Crown Advocates team. Some people rotated between several teams and, the office being open plan, people got used to seeing me in the office, even when I was not observing them directly. Nevertheless, it meant that I had to go through the same adaptation period several times during the fieldwork, gaining the trust of new participants each time. I spent half the amount of time in France, but I was based within a small team with only nine *procureurs*, two trainee *magistrats* and three clerks. This meant that they quickly got to know me. Furthermore, I was located in the same office throughout the fieldwork, which was the heart of the *parquet*: all *procureurs* were in and out of this office throughout the day, reading the daily local newspaper, coming back from court and reporting back to their colleagues who worked over the phone with the police. This particular office was the communication hub of the *parquet*, as almost all information transited through it. Over time, staff became used to me sitting in this office. So, although I only spent two months observing French prosecutors, rather than the four months during which I observed English prosecutors, the data collected in France was richer and probably of better quality, as I was immersed with the same group for the whole two months.

Direct observation also allows for informal discussions, for example, when I went to court with Associate Prosecutors or when I accompanied a *procureur* to the *juge d'instruction*'s chamber or to a meeting. These short, informal discussions often offered useful snippets of information, such as reflections on the job. Participants are often more inclined to answer questions in these situations, as they have a bit of time to dedicate to the researcher. As I became more aware of the way cases were handled, I was also able to increase the relevance of my questions and to have more control over the range of data I collected. Participants started seeing me as a colleague, rather

than an external person, and therefore entrusted me with new information. There were jokes, both in France and in England, about me being able to take calls from the police.

Collecting rich and reliable data is not only contingent on increased integration in the field. Open-endedness is one of the characteristics of ethnography and the researcher can find a very important piece of information simply by chance. After three weeks in the field in France, I found out that the *parquet* had weekly meetings on Mondays. I had always been told that the *parquet* was a very hierarchical structure and that *procureurs* had to follow instructions by the *Procureur de la République*, head of their local *parquet*. During the meeting I was very surprised to see how many debates there actually were. It was not a meeting where the *Procureur de la République* simply went through a list of instructions, which were noted down by lower-ranking staff; there were heated debates, in particular with regards to matters of criminal policy. For example, the head of the *parquet* said: ‘I’m going to forbid recommendations for prison sentences below six months!’¹⁶⁹ (...) You might not have realised but we have a new government who clearly indicated that they didn’t want short prison sentences to be requested.’ She was simply reiterating what the circular of the Minister of Justice had said a few months earlier.¹⁷⁰ There was, however, a debate between *procureurs* on this issue, with the majority of them clearly disagreeing with the head’s position and making it known. In the end, the *Procureur de la République* had to retreat: ‘Okay, I don’t care what you say at the hearing (...) I respect the Constitution: as long as your written recommendations comply with this, I don’t mind’.¹⁷¹

¹⁶⁹ In France, *procureurs* make recommendations to the court as to which sentence would be most appropriate for the defendant.

¹⁷⁰ Circular of 19 September 2012 on general criminal policy, JUSD1235192C.

¹⁷¹ Here, the *Procureur* refers to the constitutional principle ‘*la plume est servie, mais la parole est libre*’, which means that *procureurs* should always respect hierarchical instructions in their written recommendations, but are allowed to say what they wish orally in court.

A high level of acceptance on the part of informants does not always facilitate things for the ethnographer. As they build relationships with research participants and observe events during the fieldwork, there necessarily are situations on which the researcher might have an opinion. In these circumstances, it is difficult to remain neutral. Criminal justice is an area loaded with values and I found it challenging not to express my opinion about issues that were raised over the course of the fieldwork. However, it is essential to avoid expressing a definite point of view, as it might influence future data or even antagonise the participant. I found it particularly difficult not to intervene or comment when my idea of the prosecutor's role conflicted with theirs. For example, there were a couple of instances in France where I felt the prosecutor did not check allegations of police violence seriously enough. In one particular instance, the police reported on a suspect who they wanted to see charged with obstruction.¹⁷² The police officer who reported to the *procureur* was not the arresting officer and she explained that the suspect claimed that the police had hit him, adding that the suspect did have 'kind of a bruise' on his arm. Immediately, the prosecutor exclaimed: 'I don't think your colleagues would have arrested him and that he would have been placed in *garde à vue*¹⁷³ for nothing! There is a presumption in favour of your colleagues that they are not arresting people who don't do anything.' He decided to charge the suspect for contempt¹⁷⁴ and obstruction. In such a situation, I felt it would have been counter-productive to try to confront the prosecutor on this

¹⁷² Obstruction is defined by article 433-6 of the French criminal code as 'opposing violent resistance to a person holding public authority or discharging a public service mission acting in the discharge of his office for the enforcement of laws, orders from a public authority, judicial decisions or warrants.' It is punished by up to a year of imprisonment and a fine of €15,000 (art. 433-7).

¹⁷³ The *garde à vue* (GAV) is the period of police detention of suspects in France.

¹⁷⁴ Contempt is defined by article 433-5 of the French criminal code as 'words, gestures or threats, written documents or pictures of any type not released to the public, or the sending of any article addressed to a person discharging a public service mission, acting in the discharge or on the occasion of his office, and liable to undermine his dignity or the respect owed to the office that he holds.' When it is addressed to a person holding public authority (here, police officers), contempt is punishable by up to six months' imprisonment and a fine of €7,500.

issue and decided to remain in my role as a neutral observer. Instead, I decided to question things indirectly, for example by asking how fundamental principles, such as *procureurs'* duty to protect individual freedoms, in particular the protection of suspects, played out in practice.

Greater integration can also become a threat to the researcher's objectivity. The term of 'going native' 'implies the loss of all objectivity, complete socialisation or immersion into the culture, and probably abandonment of the [research] project'.¹⁷⁵ Although it is of course important to understand the perspectives of participants, it is equally necessary to keep emotional distance and objectivity. The researcher must take care not to devote all their attention to a particular group of participants, for example senior prosecutors at the expense of rank-and-file staff members or vice-versa. Yet, during the fieldwork, the ethnographer will naturally spend more time with some participants and develop stronger relationships with them. Not only does this reduce the number of sources for the data collected by the researcher, but it is also likely to affect the researcher's perception of other sources. There is a risk of identifying with these participants' perspectives and, thus, of failing to treat these as problematic.

When managing to avoid this danger of over-identification, researchers often experience some degree of discomfort, sometimes even a sense of betrayal towards their research subjects. Having built relationships with them, they find it difficult to criticise their actions. However, the comments made in this thesis should be seen within the whole context of the study, such that no critical remarks are in any way personal, but rather form part of an overview of the activity of the organisations studied. 'The ethnographer needs to be intellectually poised between familiarity and

¹⁷⁵ O'Reilly (n 155).

strangeness; and in overt participant observation, socially he or she will usually be poised between stranger and friend.’¹⁷⁶ It is not an easy position to maintain, but it prevents a too cosy mental attitude: ‘the point is that one should never surrender oneself entirely to the setting or to the moment’.¹⁷⁷ The researcher must remain constantly aware of the reactive effect of their presence on research participants, but also of the subconscious filtering of data by the researcher themselves. A decrease in the volume of notes taken by the researcher over time is often a telling sign of things becoming ‘normal’ for the researcher and thus not worthy of a mention anymore. To avoid all these pitfalls, constant reflexivity and regular debriefings are essential. In a PhD context, these debriefings were an opportunity for me to report to my supervisor and thus were also a chance to start making sense of the data and to open new avenues of data collection.

A. Interviews

In order to complete the data collected through ethnographic observations, I conducted a number of interviews, to gain a better understanding of participants’ perspectives. A crucial issue that arises once the decision has been made to collect data through interviews is who should be interviewed. In the context of ethnography, the process of recruiting interviewees is made easier by the fact that the researcher already knows the research participants. Instead of soliciting people I did not know, I found it easy to simply approach people I had been observing and who were already aware of my research project. At the CPS, I decided to interview members of each team I observed. Only two Senior Crown Prosecutors were permanent members of the charging team, I therefore asked to interview them both. Other charging team members were Senior

¹⁷⁶ Hammersley and Atkinson (n 141) 112.

¹⁷⁷ *ibid* 116.

Crown Prosecutors rotating between different teams and I approached those who had spent most time on the charging team whilst I had been observing them. In total, I interviewed five charging lawyers. Following from this, I interviewed five Associate Prosecutors (out of a total of thirteen) to maintain some balance between the groups. I sampled Associate Prosecutors according to factors such as age, gender and experience. The magistrates' court team consisted of five paralegal officers – I interviewed three of them – and Senior Crown Prosecutors who rotated between different teams. During my fieldwork, the same Senior Crown Prosecutors tended to be attached to the magistrates' court team and I therefore chose five of them for interviews. I also interviewed three Senior Crown Prosecutors who worked mainly for the Crown Court team. I asked three Crown Advocates to answer my questions, as well as two Senior Crown Prosecutors from the RASSO (Rape and Serious Sexual Offences) team. I interviewed four District Crown Prosecutors who each headed a team. Finally, I interviewed the Senior District Crown Prosecutor, head of the whole office. In France, the team was much smaller and did not have the same specialisations. I therefore decided to interview all *procureurs* (from the highest ranking official to the most junior level: one *Procureur de la République*, three *Procureurs Adjoints*, two *Vice-Procureurs* and three *Substituts*). Unfortunately, I was unable to interview one of the *Procureurs Adjoints*, due to her busy schedule. Additionally, I interviewed one trainee *magistrat*, who was coming to the end of her training and was due to start as a *substitut* in another *parquet* a month later.

The interviews were semi-structured: I had prepared a list of questions, but my aim was not to go through all the questions in a particular order. On the contrary, I wanted to react to what my interviewees were saying to be able to dig a bit deeper on some things they mentioned. I used roughly the same outline for all interviews in both

jurisdictions to allow for comparison. Thus, I asked questions about their relationship with the police and with their hierarchy (policy and guidance, accountability) to all of them. However, the questions were adapted to the local context and to their role within the office. For instance, I asked CPS managers how they made sure that their staff knew the policies and applied them properly. I also asked French *procureurs* how they perceived their role of supervision of the police investigation. I usually started by asking the interviewee to tell me about their role and their experience as a prosecutor. I found that this was a good way to open the discussion and helped make them comfortable before asking more complex or sensitive questions.

I started preparing interview schedules after two months in the field. I wanted to start interviewing charging lawyers as I had already spent a month observing them at the CPS office and another month going to court with Associate Prosecutors. Interviews provided another perspective on the daily workings of the public prosecution service: since I knew from my observations what each actor did, my interviews could focus on what they thought. Drafting the interview schedule was informed by my observations. For instance, I decided to ask CPS lawyers what they thought of the current charging arrangements because I was aware that there had been a lot of changes in recent years: after a brief stint at police stations, charging lawyers had been called back to CPS offices and an agreement had recently been signed between the local area and CPS Direct.¹⁷⁸ How they perceived these changes and their impact on their work was particularly interesting for my research. Doing a comparative study, I was also interested in introducing elements of the French criminal justice system to English prosecutors and hear what they thought of them. For example, I asked CPS prosecutors

¹⁷⁸ CPS Direct provides charging decisions to police investigators across England and Wales. They operate twenty-four hours a day, seven days a week, 365 days a year. CPS Direct prosecutors are based throughout England and Wales, working from local CPS offices or their own homes.

whether they wished they could direct investigations from the start and have a supervisory power over the police. The questions were centred on the personal opinion of the interviewees on different aspects of their job or on some aspects on which I required clarification. For example, I asked CPS managers in what circumstances they would be asked to review a file as I had been unable to find a complete answer during the ethnographic fieldwork. It was also interesting to know when staff were supposed to refer a file to a manager, but failed to do so in practice. Thus, the data collected via interviews could be cross-checked against what had been observed earlier on. It permitted me to detect presentational data more easily or to realise that what I had taken for ‘normal’ behaviour in the course of the fieldwork was in fact in contradiction to the professed rules.

I was unable to conduct as many interviews in each jurisdiction for the reasons detailed previously. However, my English interviews lasted on average half an hour, whereas the French interviews all lasted over an hour. This is despite the fact that I had roughly the same amount of questions in each case. This meant that, although I have fewer French interviews, I could actually collect more data during them.

B. Ethical considerations

As ethnography involves human participants, ethical considerations must be a constant concern for the researcher. In my research study, the period of direct observation gave me access to case files which contained highly sensitive personal data about individuals (suspects, but also victims and witnesses). It was therefore of the uppermost importance to ensure the confidentiality of this type of data. To prevent any confidentiality breach, I did not collect any identifying detail of cases. It is also necessary to keep confidential the research sites’ locations and the names of the research participants. All data was anonymised at the point of collection and

identifying detail can be further removed before any publication. Of course, although specific names are not used, even a very general description can be sufficient for those involved to recognise themselves or their colleagues.

The Economic and Social Research Council (ESRC) recommends that participants should give informed consent before the study can begin. 'Informed consent (...) entails giving sufficient information about the research and ensuring that there is no explicit or implicit coercion (...) so that prospective participants can make an informed and free decision on their possible involvement. Typically, the information should be provided in written form, time should be allowed for the participants to consider their choices, and the forms should be signed off by the research participants to indicate consent.'¹⁷⁹ One of the main issues here is: how much is 'sufficient information about the research'? There clearly was no justification for me to conduct covert research, but did that mean that I had to spell out in full the objectives of the research and the procedures to be employed to all those involved, right from the start? Research problems change over the course of fieldwork and, at first, I was myself unsure of precisely what was relevant to my study. I stated my research aims in a general, but honest, manner as 'the independence of public prosecution authorities', further explaining that it was understood as independence from the executive in France whereas the debate revolves around independence from the police in England and Wales, and thus that I wanted to research both aspects. Revealing crucial issues also carries the risk of influencing the behaviour of people under study in such a way as to

¹⁷⁹ ESRC Framework for Research Ethics 2010 (revised September 2012) 29
<http://www.esrc.ac.uk/_images/Framework-for-Research-Ethics_tcm8-4586.pdf> accessed 13 December 2013.

invalidate the findings, although the probability of this was likely to remain limited in my research study, given the other pressures operating on research participants.

The other traditional requirement of informed consent is that the information is provided in writing to research participants. In accordance with the University's ethics policy, I had therefore prepared information sheets detailing the nature and aims of the project and underlining that participation was entirely voluntary and that participants may withdraw at any time with the assurance that this would not have any negative consequences. I distributed these sheets to all the people I observed at the CPS and I also asked those I interviewed to sign a consent form. CPS participants were slightly taken aback by my request that they signed a form, but all agreed to it when I explained that I had to follow this procedure for ethical reasons. When I started translating this information for the French part of my study, I began to worry that French participants might perceive it in a more suspicious manner. This impression was confirmed when I showed the translated information sheet to French acquaintances. Insisting that participation was entirely voluntary and that they could withdraw at any point could actually make participants wary of my real intentions. Requests for signing consent forms in particular could be perceived as an attempt to cover my back, rather than an opportunity for participants to give informed consent. After discussing the issue with my supervisor, I decided not to use the information sheets and the consent forms in France. This decision was reinforced by the fact that *procureurs* are not vulnerable individuals, but educated professionals and, thus, were less likely to be coerced into participating. I still explained to them the purpose of my research in the same way I had explained it to CPS prosecutors, but I did so orally. Similarly, I asked for their authorisation to record the interviews, explaining that I would use some extracts as quotes in my thesis, but that I would endeavour to provide sufficient context for the

quotes to be understood properly. The primary objective of requesting informed consent is to conduct research openly and without deception. Most importantly, my role as a researcher was known to all those I observed during my fieldwork and they knew that information imparted to me was in that capacity.

One of the main ethical dilemmas I had to face in this study was with regards to attending suspects' interviews in France. French *procureurs* regularly see suspects either for a quick chat before deciding whether or not to extend the police detention period¹⁸⁰ or to notify them in person of the charges against them. Most *procureurs* asked suspects whether they minded me being present during those interviews. In these cases, they would introduce me as a work placement student. This could hardly be considered as informed consent as suspects were clearly in a very vulnerable situation, having already spent a long period of time at the police station, and in a deeply unbalanced negotiating position compared to the *procureur*. They were not in any position to refuse my presence. However, observing what was happening during those interviews was essential for the research. Furthermore, suspects were not directly involved in the project itself and what I was interested in was not their own behaviour but rather the *procureur*'s attitude towards them. Ultimately, I therefore decided to continue attending these interviews, but I made sure I did not record any identifying detail about them to ensure full confidentiality.

IV. Data analysis

In ethnography, data analysis should not be a distinct stage of the research, but should in fact inform research design and data collection. However, this dialogue between data collection and data analysis is not easy to sustain in practice due to the demanding

¹⁸⁰ This usually took place via videoconference.

characteristic of fieldwork and the equally time-consuming aspect of data analysis. Nevertheless, I tried to maintain some level of reflexivity, although it was not possible to carry out much formal data analysis before the fieldwork was completed. From this perspective, I kept a research diary to note down ideas and hunches over the course of the data collection phase. At the end of my fieldwork, I had hundreds of pages of notes and interview transcripts.

Data analysis was carried out with the help of the qualitative research software Nvivo. The software allowed me to code the data. Coding consists of attributing a category – or a code – to different bits of data. Reading through the body of data and generating categories which make sense of it are the initial stages of ethnographic analysis. At the start, the categories I used were very concrete (documents provided by police, questions asked by prosecutors, etc.), but more analytically significant concepts emerged from it (information provided spontaneously, information requested). The process of coding is a recurrent one: as new concepts are added, previously coded data must be recoded to see if it contains any examples of the new codes. The objective is to obtain a stable set of categories which will form a basis for the elaboration of an analytical model. This ensures that the analysis emerges from the data, rather than attempting to fit the data into pre-existing categories.

Several themes emerged during the data analysis which allowed me to build an outline for the thesis. The first theme to emerge was that of public interest and it is at the heart of chapter 3. In all criminal justice systems, public prosecutors are tasked with enforcing the criminal law against suspected offenders. However, both French and Anglo-Welsh prosecutors are not expected to seek convictions at all costs, but instead should act in the public interest. Whilst public prosecutors representing the public interest is strongly grounded in French legal culture and the *procureur*'s judicial status

as a *magistrat*, the relationship between prosecutors and public interest is different and perhaps less obvious in Anglo-Welsh legal culture. Furthermore, if public prosecutors are required to make decisions in the public interest, this raises the question as to what the public interest is and who should define prosecution policy in accordance with it. More broadly, chapter 3 analyses the links between public prosecution services and the state.

Analysis of the data also showed a clear bureaucratisation of the prosecution decision, which has become very much a process in England and Wales, passing through different stages and the hands of different prosecutors. Chapter 4 is dedicated to this important development. It analyses the reasons for this bureaucratisation and its repercussions on what it means to be a public prosecutor in each system. Whilst *procureurs* still conform to the image of autonomous professionals as they enjoy a high level of discretion, the work of CPS prosecutors has become akin to that of highly-skilled technicians applying set standards to individual cases. Chapter 5 examines the relationship between public prosecutors and police investigators. In both justice systems under study, public prosecutors are expected to carry out neutral reviews of police investigations to decide whether or not to prosecute. However, it appears that this task is imperfectly performed due to the factual dependence of public prosecutors on investigators to collect and assess evidence, suggesting an unrealistic expectation in both legal systems. Chapter 5 also analyses the impact of legal structure on the quality of the relationship between public prosecutors and police officers: whilst complete independence in England and Wales is accompanied by strong suspicion and tensions on both parts, the hierarchical link between prosecutors and police officers in France seems to promote a more appeased relationship due to a clearer allocation of responsibility. Finally, chapter 6 examines the influence of public prosecutors in case

disposals and argues that public prosecutors play a central role in the processing of criminal cases in a quasi-administrative fashion. Whilst guilty pleas have become a routine disposal in England and Wales with few safeguards for the accused under great pressure to plead guilty, it is not the case in France where different factors (more summary trials, inquisitorial ethos) animate public prosecutors. Meanwhile standardisation of case disposals has allowed prosecutors to delegate minor cases to less qualified members of staff.

Chapter 3 – The scope of prosecutorial discretion: public interest, legitimacy and centralisation

As the name suggests, public prosecutors are expected to prosecute, that is to enforce the criminal law against suspected offenders. In England and Wales, the Code for Crown Prosecutors states that '[i]t is the duty of prosecutors (...) to bring offenders to justice whenever possible.'¹⁸¹ Similarly, in France, article 31 of the Criminal Procedure Code (*Code de procédure pénale* – CPP) proclaims that 'the *ministère public* exercises the prosecution function and enforces the law (...)'. A core role of public prosecutors, both in France and in England and Wales, is thus the presentation of the case against the accused in court. However, '[e]very system of criminal procedure is unique in the sense that it reflects the specific political and social needs of the society in which it functions'.¹⁸² As a result, it is never safe to assume that concepts have the same meaning in the jurisdictions under study when doing comparative work. Simply because the English term 'prosecution' has a direct translation in French does not mean that it covers the same reality. Hodgson notes that '[t]he functions of investigation, prosecution and trial exist in the criminal procedures of both France and England and Wales, but the ways in which these various tasks are distributed between legal actors is not the same and the two legal systems do not share equivalent legal personnel either in name, task or status.'¹⁸³ Crucially, the role of public prosecutors in the pre-trial stage differs considerably between jurisdictions with French *procureurs* directing criminal investigations, whilst Crown Prosecutors have a very limited role. Even after the opening of court proceedings, public prosecutors do

¹⁸¹ Code for Crown Prosecutors, para. 2.2.

¹⁸² Brants and Ringnalda (n 112).

¹⁸³ Hodgson, *French Criminal Justice* (n 62) 65.

not have the same powers in all countries, in particular with regards to discontinuing the case and to recommending a sentence to the court.

In all jurisdictions, public prosecutors are not supposed to seek convictions at any cost. Instead, principles of accuracy, neutrality and efficiency should guide their decisions. Crown Prosecutors must ‘make sure that the right person is prosecuted for the right offence’¹⁸⁴ and ‘must be fair, independent and objective’.¹⁸⁵ French *procureurs* must carry out their role ‘in conformity with the principle of impartiality’.¹⁸⁶ In other words, public prosecutors are expected to act in the public interest. However, acting in the public interest requires the balancing of several goals and interests which can be in tension or even in direct conflict, illustrated by the traditional opposition between crime control and due process objectives. Given the inherent difficulties of the role, public prosecution services need a strong legitimacy basis on which to establish their position as representatives of the public interest and thus ensure public confidence in their decisions.

In this chapter, I will analyse the foundations of public prosecutors’ legitimacy in each jurisdiction and the impact on their respective roles and regulatory frameworks. On one hand, public prosecutors have a dual role of neutral judicial officers and representatives of the state in French legal culture and as such have a strong legitimacy to represent the public interest. On the other hand, English public prosecutors are torn between opposing expectations – to represent the prosecution side and also to act in the public interest (I). The powerful and authoritative status achieved by French *procureurs* as guarantors of the public interest is illustrated by their broad functions

¹⁸⁴ Code for Crown Prosecutors, para. 2.2.

¹⁸⁵ *ibid*, para. 2.4.

¹⁸⁶ Article 31 CPP.

in the justice system which are not confined to criminal justice issues, but also extend to civil and commercial cases. By contrast, the Crown Prosecution Service has a weak legitimacy bedrock in legal culture due to its short history and a weak normative underpinning of the role of public prosecutors in the English criminal justice system which makes it difficult for the CPS to define and defend its narrow remit (II). These fundamental differences in legitimacy bases and the resulting variations in the tasks assigned to public prosecution services have produced radically different regulatory frameworks for prosecutorial decision-making (III). The structure of accountability of the French prosecution service is built on traditional legitimacy sources that come from democratic elections (their link with the government) and neutral expertise (their status as *magistrats*), whereas the Crown Prosecution Service had to develop its own regulatory framework in response to legitimacy concerns, in an effort to be transparent in order to demonstrate its credibility in representing the public interest.

I. Prosecuting in the public interest

A. Public prosecutors: partisan advocates or defenders of the public interest

The French and English criminal justice systems are often presented as exemplifying the inquisitorial and the adversarial models respectively. Although neither the French nor the English system is a pure representation of one model or the other, this traditional distinction remains useful to explain fundamental differences between the two legal cultures as each system remains rooted in its own tradition. Damaška identified ‘that the opposition most revealing in its ramifications is the one contrasting the internal logic of the procedural design of an official inquiry with that of party

contest'.¹⁸⁷ Thus, in the inquisitorial model, a neutral judicial officer is empowered to search for the truth, acting in the wider public interest. In an adversarial system, on the other hand, it is believed that the truth will come out of the confrontation between two opposing parties, the defence and the prosecution.

1. The inquisitorial roots of the French procureur

Inquisitorial roots explain the central role played today by public prosecutors in French criminal procedure. The *juge d'instruction*, the investigative judge, is usually presented as the paradigmatic example of the neutral judicial officer in the French inquisitorial procedure: article 81 of the Code of criminal procedure (*Code de procédure pénale* – CPP) states that the *juge d'instruction* 'undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt.' In practice less than two per cent of cases are dealt with in this way.¹⁸⁸ The vast majority of cases are nowadays investigated by the police under the supervision of another judicial officer, the public prosecutor.

The *procureur* belongs to the *magistrature*, the French career-trained judiciary, along with the trial judge and the *juge d'instruction*. *Magistrats* can and do switch between roles throughout their career. As full-fledged members of the tribunal, *procureurs* have their offices at court, they enter the courtroom through the same door as judges and sit on the same platform.¹⁸⁹ As *magistrats*, *procureurs* are supposed to represent

¹⁸⁷ Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506, 577.

¹⁸⁸ Calculated as a percentage of cases proceeded with by public prosecutors (i.e. this includes prosecutions, alternatives to prosecution and *compositions pénales*) 17,766 cases out of 1,303,469 were sent to the *juge d'instruction* (around 1.36%) in 2013. Ministère de la Justice, 'Les Chiffres Clefs de la Justice 2014' (Ministère de la Justice 2014) 14 <http://www.justice.gouv.fr/art_pix/1_stat_livret_final_HD.pdf> accessed 21 July 2015.

¹⁸⁹ The courtrooms in Fort-de-France (Martinique) are the only ones in which the *procureur* sits at the same level as defence lawyers. This particularism has proven controversial: see Jean-Pierre Vergès, 'Le Parquet Grince à Fort-de-France' *Le Monde* (Paris, 26 March 2015) <www.lemonde.fr/m-

the wider public interest, whereas *avocats* (defence lawyers) are perceived as representing the narrow interests of their clients. The etymological origin of ‘*magistrat*’ can be found in the Latin word ‘*magistratus*’ which means ‘public service’ or ‘public servant’.¹⁹⁰ Bruno Thouzellier, a *magistrat* who briefly worked as *avocat*, thus contrasts the work of the defence lawyer with that of the *magistrat*:

The *avocat*’s first mission is to make his client’s interest prevail and to do everything in his power, within his professional ethics, to make [the client] win his trial or to avoid a conviction and a criminal sanction. The *avocat* is the servant of a cause, but this cause can be a bad cause from the point of view of the collective interest or of private virtues. This is the sense of his mission: to defend the innocent, but also the guilty (...). The judge’s mission is to apply the law to parties with contradictory demands, but also to punish behaviours which are against the law. It is a mission of public interest. It is therefore not the same job and it is not carried out in the same frame of mind.¹⁹¹

The centrality of the role of the *procureur* leads to a more diminished role for defence lawyers.¹⁹² *Procureurs* must ensure that all lines of enquiry are explored by the police, including those potentially exculpating the suspect. They are supposed to protect the rights of the accused, as well as to gather evidence against them. As a result, the defence lawyer is less important, as ‘her role is to act only as an additional procedural guarantee to safeguards already in place (such as judicial supervision [of police investigations])’.¹⁹³ French defence lawyers have thus been dubbed ‘professional outsiders’¹⁹⁴ by researchers or even ‘accessories that are not needed at all’,¹⁹⁵ as their

actu/article/2015/03/26/le-parquet-grince-a-fort-de-france_4596008_4497186.html?xtmc=&xtr=2> accessed 21 July 2015. See also Jacqueline Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ in Antony Duff and others (eds), *The trial on trial Vol.2 Judgment and calling to account*. (Hart Publishing 2006).

¹⁹⁰ *Trésor de la langue française informatisé* <<http://www.cnrtl.fr/etymologie/>> accessed 27 March 2014.

¹⁹¹ Bruno Thouzellier, ‘Avocats et magistrats’ (2012) 140 *Pouvoirs* 91, 93–94.

¹⁹² Hodgson, *French Criminal Justice* (n 62) 104.

¹⁹³ *ibid* 102.

¹⁹⁴ *ibid* 112–116; see also Stewart Field, ‘Judicial Supervision and the Pre-Trial Process’ (1994) 21 *Journal of Law and Society* 119; Stewart Field and Andrew West, ‘Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process’ (2003) 14 *Criminal Law Forum* 261.

¹⁹⁵ Soulez-Larivière (n 92).

profession is separate from the *magistrature*. Their offices are located outside of court and they stand next to their client on the courtroom floor. As *magistrats*, *procureurs* also organise with judges the listing of cases, whilst this power completely escapes defence lawyers.

The status of *magistrat* performs a crucial legitimising role for *procureurs* as guarantors of society's interests. However, their belonging to the same professional body as judges has recently been called into question. Recent decisions by the ECtHR have denied *procureurs* the status of judicial officer, due to their lack of independence from the executive and the parties, both of which form part of the inherent guarantees of a 'judicial officer' under article 5 para. 3 ECHR.¹⁹⁶ Daniel Soulez-Larivière, a defence lawyer, has argued for a long time that *procureurs* and judges should not be part of the same body.¹⁹⁷ This idea is today gaining momentum as a recent study found that a majority of defence lawyers, but also of judges, wished for a split of the *magistrature*.¹⁹⁸ The same research found that *procureurs* were for the most part opposed to this, fearing an 'Anglo-Saxon' drift, where prosecutors would be reduced to the role of public accusers. They felt that their status of *magistrat* was essential to defend their position.¹⁹⁹ The *procureurs* I interviewed largely shared this vision, although a minority disagreed.

I would like the professional body not to be divided, for us to remain *magistrats* because we work in the interest of liberties too. (...) If we go towards this, it will be irreversible, so there won't be the same openness and the same open-mindedness that we know. Being able to think 'I can

¹⁹⁶ *Medvedyev And Others v France* (2010) 51 EHRR 39, para 124; *Moulin v France* App no 37104/06 (ECtHR, 20 November 2010), para 59.

¹⁹⁷ Soulez-Larivière (n 92); Charpenel, Rousseau and Soulez-Larivière (n 79); see also Dalle and Soulez-Larivière cited in Hodgson, *French Criminal Justice* (n 62) 84.

¹⁹⁸ Milburn, Kostulski and Salas (n 69) 147–148. See also the speech by the First President of the *Cour de cassation* who regrets the confusion between judicial and executive functions represented by the French *parquet*: Bertrand Louvel, 'L'évolution de L'environnement Institutionnel Du Magistrat' (2015) <https://www.courdecassation.fr/publications_26/discours_publications_diverses_2039/discours_2202/premier_president_7084/ouverture_cadej_ebm_21.09.15_32569.html> accessed 22 September 2015.

¹⁹⁹ Milburn, Kostulski and Salas (n 69) 149–151.

swap functions' or 'I work with people who open my mind all the time' is important. There were even some suggestions that we might be thrown out of court buildings! Considering we should be closer to the Interior Ministry and the police... [Interview respondent FR2]²⁰⁰

[O]ur challenge is really independence and remaining part of the body. We really need to make sure we don't get pushed out. The Anglo-Saxonisation of concepts can well push us out. (...) I mean that, when I speak to people who are either Anglo-Saxon or shaped by Anglo-Saxon judicial culture, they don't understand our system because it seems completely strange to them. For an Anglo-Saxon, we are a bit like E.T. (...) we need to remain *magistrats*, independent *magistrats*. We need to remain within courts. It's a challenge, I'm not convinced we'll manage to do it. [Interview respondent FR1]

[W]e would lose a lot by having *procureurs* only being *procureurs* for their whole career. It's vital that we don't stay in the same functions within the sitting judiciary, but I think that it's also important to go from the sitting judiciary to the *parquet*. I think it's really good because we precisely keep an independent spirit and a spirit of the guardian of freedom that we maybe would lose sometimes at the *parquet*. [Interview respondent FR9]

However, one *procureur* did not consider the status of *magistrat* as essential to the profession of public prosecutor:

No, what I want to keep is the independence in dealing with individual cases. The judges of the administrative order don't have the status of *magistrats*, but have the same status as civil servants. They are independent nonetheless. So, for me, as long as I'm told I'm independent in the way I deal with cases and I keep the same attributions, whether I'm *magistrat* or not, it doesn't [matter]. (...) As long as we keep the same attributions and the same independence from the police and that we have the same power... If I'm in a different location, for example, personally it wouldn't bother me. [Interview respondent FR8]

Whilst the image of the public prosecutor as neutral judicial officer and, thus, representing of the public interest is embedded in French legal culture despite some recent challenges, a more ambivalent role emerges from the adversarial roots of the Anglo-Welsh system.

²⁰⁰ Interviewees and cases are coded by the letters F for France or EW for England and Wales and a number (i.e. F-56 or EW-126).

2. The adversarial roots of Crown Prosecutors

In a purely adversarial system, the victim or any other private citizen, not the state, prosecutes the defendant at court. Each party has to bring evidence in support of their case and the judge acts as an umpire. In this system, whilst the judge represents the public interest, it is not the case of the prosecutor who merely represents a party to the proceedings. The prosecutor's role traditionally mirrors the defence role. The defence lawyer is expected to gather, select and present evidence for trial, as their role counterbalances that of the prosecution. The adversarial origins of the Anglo-Welsh system can still be seen today in the fact that there is no difference in status between public prosecutors and defence lawyers. They are all lawyers and can be either barristers or solicitors.²⁰¹ Until recently, the prosecution was exclusively represented in court by lawyers in private practice, who alternated between prosecution and defence work. Since the CPS has been established, its lawyers only do prosecution work. Independent lawyers usually do defence work, but are still from time to time employed by the CPS to prosecute cases at the Crown Court or the magistrates' courts. CPS offices, like that of defence lawyers, are separate from courts and prosecutors sit next to defence lawyers at court, not on the platform with judges. Furthermore, the CPS has no special influence on case listing which means that it cannot fully control the timetables of its members of staff who go to court and decide to group together cases dealt with by the same lawyer for example.

²⁰¹ Solicitors provide legal services directly to members of the public (individuals or organisations). Sometimes, a solicitor will refer the work to a barrister for specialist advice or to appear in court to represent the client. Solicitors can appear in the magistrates' court as advocates, but only barristers and solicitors who have higher rights of audience can appear in the Crown Court. Each branch of the legal profession is represented and regulated by different organisations: solicitors are represented by the Law Society of England and Wales and regulated by the Solicitors Regulation Authority, whilst barristers are represented by the Bar Council and regulated by the Bar Standards Board. Judges are drawn from both branches of the profession and are therefore senior lawyers.

The eighteenth century saw a progressive shift from private to public prosecutions, in particular with the emergence of police forces.²⁰² Although they formally prosecuted cases in the name of the Crown, the status of police prosecutions remained unclear. Sanders argues that private prosecutions effectively remained the rule in England and Wales until the Prosecution of Offences Act 1985 and the establishment of the CPS. Although the police had taken over the role of the victim in collecting evidence on behalf of the prosecution, '[i]n principle they were – and arguably still are – private prosecutors as well.'²⁰³ This representation of the police as private prosecutors can be linked to their image as 'citizens in uniform': as first formulated by the 1929 Royal Commission on Police Powers and Procedures and later endorsed by the 1962 Royal Commission on the Police, '[t]he police of this country have never been recognized, either by law or by tradition, as a force distinct from the general body of citizens (...) the principle remains that the policeman, in the view of the common law, is only a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily (...) Indeed a policeman possesses few powers not enjoyed by the ordinary citizen'.²⁰⁴

The establishment of a truly public prosecutor in England and Wales was perceived as an attempt – destined to fail – to introduce inquisitorial elements into a largely adversarial procedure. Thus, Sanders noted that 'Crown prosecutors are clearly intended to scrutinize, and exert control over, the police; that is, to undertake an inquisitorial role.'²⁰⁵ McConville agreed, stating: 'All the schemes advanced, national

²⁰² See, for example, Alan Cusack, 'From Exculpatory to Inculpatory Justice: A History of Due Process in the Adversarial Trial' (2015) 5 *Law, Crime and History* 1; Langbein, 'The Origins of Public Prosecution at Common Law' (n 19).

²⁰³ Andrew Sanders, 'Arrest, Charge and Prosecution' [1986] *Legal Studies* 257, 260.

²⁰⁴ Cited in Reiner (n 21) 207.

²⁰⁵ Sanders, 'Arrest, Charge and Prosecution' (n 203) 268.

or local, have no doubt some merit and may indeed be preferable to a system in which the police investigate and decide whether or not to prosecute. But all suffer the same basic structural weakness: the assumption that it is possible to graft an inquisitorial decision-making model on to a system which continues at heart to be adversarial.²⁰⁶ A large-scale empirical research study showed that the police do not perceive the investigation as the neutral gathering of evidence, but as the construction of a case against the suspect.²⁰⁷ The introduction of a new public prosecution service, independent from the police, was supposed to alleviate the risks resulting from this early focus on a prime suspect. A duty for police investigators to pursue all reasonable lines of inquiry was finally given a statutory footing in 1996,²⁰⁸ but the CPS have no power to ensure this duty is complied with as they cannot direct the investigators. This reluctance to establish a powerful public prosecutor can also be explained by the perceived role of the state in criminal prosecutions.

B. Public prosecutors as representatives of the state

1. The reluctance to give the power to prosecute to the state in England and Wales

‘Common law countries [...] regard the public interest as an interest separate from that of the state – moreover, an interest which is often in direct conflict with the interest represented by the government.’²⁰⁹ This statement can be linked to British constitutional history, continually seeking the limitation of royal powers, from the 1215 Magna Carta to the 1688 Bill of rights. As Parliament progressively subtracted

²⁰⁶ Mike McConville, ‘Prosecuting Criminal Cases in England and Wales: Reflections of an Inquisitorial Adversary’ (1984) 6 Liverpool Law Review 15, 27.

²⁰⁷ McConville, Sanders and Leng (n 39).

²⁰⁸ Criminal Procedure and Investigations Act 1996 s. 23.

²⁰⁹ Vera Langer, ‘Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor’ (1988) 36 The American Journal of Comparative Law 279, 280.

legislative power from the King, the courts took hold of judicial power. Judges are thus perceived as enforcing limited government and the rule of law, protecting citizens against the state.²¹⁰ The 1701 Act Of Settlement guaranteed judicial independence by preventing judges from being removed or suspended from office, ‘unless by due cause of law’.

Traditionally, ‘[p]rosecutions are, as a matter of legal principle, *private* matters’ (original emphasis).²¹¹ Brants and Ringnalda explain in detail the strong reluctance in Anglo-Welsh legal culture to grant the power to prosecute to the state.²¹² Although the police progressively took over the conduct of public prosecutions prior to the creation of the CPS, this did not mean the introduction of state-controlled prosecutions. By contrast with the direct hierarchical links that exist between the police and the government in France, the Home Secretary, Robert Peel, voluntarily shielded the new police service created by the 1829 Metropolitan Police Act from direct government control.²¹³ Instead of a centralised police force, the police in England and Wales is divided in several independent local police forces. Furthermore, the doctrine of constabulary independence, a fundamental principle of English and Welsh policing, prevents any interference from central government into the investigation and

²¹⁰ Hodgson, *French Criminal Justice* (n 62) 18.

²¹¹ Andrew Sanders, ‘An Independent Crown Prosecution Service?’ [1986] *Criminal Law Review* 16, 16.

²¹² Brants and Ringnalda (n 112).: ‘In Parliament, the public prosecutor was called “an office of odious appellation”. It was something horribly French, and to the English all things French were synonymous with the arbitrary use of executive powers to limit civil liberties. Some even argued that increasing democracy made it more important than ever to ensure that the powers available to government were limited. Such sentiments about public prosecutions were shared throughout the political spectrum: “the consequences of prosecutions were too important for the political liberties to be entrusted to the executive”. The English had also not forgotten their own bad experience with executive control over prosecutions in the 17th Century.’ See also Steve Uglow, ‘Independent Prosecutions’ (1984) 11 *Journal of Law and Society* 233.

²¹³ *ibid* ch 2; Michael McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge 1991) ch 1.

prosecution of cases by the police. The Court of Appeal judgment of Lord Denning in the case of Blackburn²¹⁴ in 1968 is often cited as the key authority for this principle:

I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.²¹⁵

As a result, police discretion to prosecute or not was practically unlimited, producing great variations across the country. For instance, Sanders noted that '[s]ome police forces, including the Metropolitan Police, refuse to prosecute shop-lifters, leaving this to the stores. In other forces (such as the West Midlands) the offence of "simple drunkenness" is not prosecuted if the drunk is willing to go to a "wet shelter".'²¹⁶ The Philips Commission regretted that 'effective machinery for achieving conformity in prosecution policies is lacking. And there are greater variations in policy in certain respects than we believe to be desirable'.²¹⁷ Although accepting the idea that prosecution policy could vary depending on local circumstances, the Philips Commission was concerned with the level of inconsistency which could be perceived as arbitrariness. It noted that public prosecution authorities in Canada and the USA had 'produced manuals for the use of prosecutors which give both general and specific guidance upon prosecution policy and are intended to produce conformity of practice.'²¹⁸

²¹⁴ *R v Commissioner of Police of the Metropolis, ex p Blackburn (No.1)* [1968] 2 QB 118 (CA).

²¹⁵ *ibid* 136.

²¹⁶ Andrew Sanders, 'Towards an Independent Prosecutor' [1984] *Holdsworth Law Review* 113, 114.

²¹⁷ Philips (n 26) 138.

²¹⁸ *ibid*.

The CPS was created, in part, in response to the great diversity of prosecution decisions made by the police. Despite fears of over-centralisation and concerns over lack of local autonomy,²¹⁹ the Prosecution of Offences Act (POA) 1985 established a national prosecution service with a direct line of management from the lowest grade of public prosecutor in a local CPS office up to the national head of the prosecution service, the Director of Public Prosecutions (DPP). Thus, section 3 POA describes the prosecutorial functions it lists as ‘Functions of the Director’, not Crown Prosecutors, and section 1 (6) states that ‘every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director’. The main objective in establishing a centrally-based prosecution service was clearly that of avoiding arbitrariness and achieving consistency in prosecutorial decision-making, as illustrated by Leon Brittan’s speech, then Home Secretary, introducing the second reading of the Prosecution of Offences Bill in the House of Commons on 16 April 1985:

The changes introduced by the Bill are changes to a system which is in need of considerable improvement. (...) Variations across the country remain greater than can be explained by reference to differences in local circumstances. That is incompatible with the fundamental principle of justice that like cases should be treated alike. (...) The national service which we propose, as well as securing undivided accountability, has other important advantages. It will be so designed as to maximise efficiency and effectiveness. It also offers the best prospect of improving consistency in prosecution policy, which it will be the duty of the Director of Public Prosecutions to promulgate.²²⁰

As I have shown, the link between public prosecutors and the state does not automatically give them the legitimacy to represent the public interest in Anglo-Welsh legal culture. On the contrary, it is even viewed with suspicion. The creation of the

²¹⁹ The Philips Commission favoured local prosecution organisations under the control of local authorities over a national institution under the authority of central government. See also the debates in the House of Lords at the time of the adoption of the 1985 Act: HL Deb 29 November 1984, vol 457, cols 1037-1069.

²²⁰ HC Deb 16 April 1985, vol 77, cols 149-150.

CPS for a very specific purpose – to establish a neutral filter between the police and the courts – was not accompanied by a theoretical reflection of the broader role of public prosecutors in a modern criminal justice system. The absence of a written constitution and thus of the need to amend it deflected from a deeper reflection over the constitutional positioning of the newly created public prosecution service. The Prosecution of Offences Act 1985 offered no statutory underpinning to frame the decision-making of public prosecutors, simply focusing on organisational issues and defining which cases should be dealt with by the CPS. Professional codes of conduct also ignore the specificities of the work of public prosecutors and little vocational training is offered to CPS prosecutors who are primarily trained as (private) solicitors or barristers. It was left to the CPS senior management to delineate their role and define their own guidelines to regulate it.

By contrast, there is not considered to be any contradiction in the *procureur* being a representative of the state and thus of public interest in France. This is commonly accepted in French legal culture.

2. *The state as guardian of the public interest in France*

Since the French state is perceived as the guardian of the public interest, it naturally follows that criminal prosecutions are initiated by the state, to protect society's cohesion. Before the 1789 Revolution, the absolute monarch was the source of all power in France. When the state emerged as separate from the king, the sovereign power was transferred from the king to the republican state.²²¹ Rousseau's *Contrat Social* suggested the transfer of sovereignty from the monarch to the people. Under this conception, sovereignty is fragmented, as each citizen holds a part of it. Article 3

²²¹ See, for example, Philippe Ardant, *Institutions Politiques et Droit Constitutionnel* (12th edn, LGDJ 2000) 166–170; Louis Favoreu (ed), *Droit Constitutionnel* (5th edn, Dalloz 2002) 42–45.

of the Declaration of the Rights of Man and of Citizens (*Déclaration des droits de l'homme et du citoyen* – DDHC) of 26 August 1789²²² opted for another solution. It states that ‘the principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation’. Under the theory of national sovereignty, the nation is an indivisible entity, distinct from its parts. It holds sovereignty and its will is expressed by its representatives. The power to govern belongs to the nation, not to an individual (the king) nor to a group. The distinction between popular and national sovereignty does not appear to be useful any more, as the 1958 Constitution mixes the two concepts by stating: ‘the national sovereignty belongs to the people who exercise it through its representatives and through referendums.’ (Art 3). In practice, the sovereignty is exercised by the state, which ‘personifies’ the nation, since ‘the state is the legally organised nation.’²²³ As the sovereign power was simply transferred from the king to the republican state without any limitation,²²⁴ this has great relevance to the political legitimacy of the state as the guarantor of the public interest.

As stated in article 6 DDHC, ‘law is the expression of the general will’. Yet in France, law is primarily a body of rules enacted by the state and to be found in codes.²²⁵ The courts are specifically forbidden to make general or regulatory pronouncements on the law by the Act of 16-24 August 1790, reaffirmed in article 5 of the *Code civil*. This follows the principle of separation of powers as described by Montesquieu for whom judges are ‘no more than the mouth that pronounces the words of the law’.²²⁶ This is

²²² The DDHC has been part of the French Constitution since 1958.

²²³ Ardant (n 221) 166.

²²⁴ Each state function is distributed to different organs however. Thus, the legislative function is shared by government and parliament, the executive function is exercised by government and the judicial function is exercised by *magistrats*, which include both judges and *procureurs*.

²²⁵ John Bell, *French Legal Cultures* (Butterworths 2001).

²²⁶ Montesquieu, *The Spirit of the Laws*, Book XI, Chapter 6.

even truer of French criminal law where the legality principle (*nulla crimen sine lege*) is central. Article 7 DDHC provides that ‘no man may be accused, arrested or detained except in the cases determined by the law [*la loi*], and following the procedure that it has prescribed’. Consequently, French courts cannot create new offences, nor can they extend penalties by inductive interpretation. As summed up by Hodgson, ‘[w]ithin this ideology, the executive-judiciary relationship has been configured in a way which is quite different from that in the UK, where judges may be regarded as playing a role in protecting citizens from the excesses of the executive, most notably through judicial review. In France, on the other hand, the executive would claim to protect citizens from the excesses of a non-elected judiciary.’²²⁷ The protection of the public interest is thus a function of the state, which exercises it through the courts, which include prosecutors.

CPS prosecutors are confronted with somewhat contradictory expectations. Whilst adversarial roots encourage them to act as partisan lawyers and leave safeguarding the interests of the accused entirely to the defence, the Code for Crown Prosecutors imposes that ‘[p]rosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.’ (para. 2.4). This is not to say that French *procureurs* do not also face contradictory demands in practice. They are tasked with enforcing the criminal law against suspected offenders, whilst protecting the rights and liberties of those same people. However, these contradictions are smoothed out through the concept of public interest, providing a powerful unifying theory for both facets of their role and a strong basis to justify their broad functions in the French justice system. By contrast, the lack of normative underpinning for the role of public

²²⁷ Hodgson, *French Criminal Justice* (n 62) 18.

prosecutors in the Anglo-Welsh justice system makes it difficult for the CPS to define and defend its own narrow remit.

II. The functions assigned to public prosecutors

This image of French public prosecutors as guarantors of society's interests before the courts is embodied by the broad functions assigned to them. Not only is the *ministère public* at the centre of the criminal justice process, but it also has a role in civil and commercial cases. By contrast, the CPS has a very narrow remit, limited to criminal prosecutions.

A. *The wide remit of the French public prosecution service*

French investigators must report all potential offences to the *parquet* (Art 40, para 2 CPP) and are theoretically never allowed to decide independently on the procedural track to be followed by a potential criminal offence once it is reported. For instance, I observed the police ring the public prosecutor on several occasions to report the discovery of a body. In these cases of suspicious death, the *procureur* decided what investigations needed to be carried out. In England and Wales, the CPS would not normally be involved in this type of cases until a suspect had been arrested by the police. Nonetheless, the practice notoriously differs from the law in the books. Aubusson de Cavarlay mentions the existence of 'the police docket, which is now being computerized, and which contains a day-to-day listing of those interventions and demands which do not immediately lead to the writing of a police report (...). This register mostly contains information on facts that do not constitute offences, but for some entries it is really a sort of preliminary to a police report of an offence, for which

there may not be any follow-up.’²²⁸ The *parquet* usually has no knowledge of these cases. However, when the police arrest a suspect, they must immediately report to the public prosecutor, as *procureurs* supervise the conduct of the *garde à vue* (GAV), the period of detention in police custody (Art 63 CPP). Failure to inform the *procureur* can result in the detention being declared illegal. The fact that the *procureur* has been informed is noted as part of the file.

The image of the *procureur* as protector of the public interest and *magistrat* gives them great prestige. Recently, it has also justified the transfer of powers from the judge to the public prosecutor to cope with justice system’s overload. Thus, prosecutors can now decide not to prosecute a case, but to engage alternatives to prosecution, such as warnings (*rappels à la loi*), mediation,²²⁹ voluntary regularisation/reparation, rehabilitation schemes, but also *compositions pénales*²³⁰ which allow the *procureur* to impose a fine or community work, if the suspect admits the offence. Even when *procureurs* do decide to prosecute the suspect, they can pick from several procedures: speedy ‘on-file’ procedure (*ordonnance pénale*),²³¹ guilty plea procedure

²²⁸ Bruno Aubusson de Cavarlay, ‘The Prosecution Service Function within the French Criminal Justice System’ in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems The Rise of Prosecutorial Power Across Europe* (Springer 2006) 198–199; see also Laurent Mucchielli, ‘Le “nouveau management de la sécurité” à l’épreuve : délinquance et activité policière sous le ministère Sarkozy (2002-2007)’ (2008) V Champ pénal para 14 <<http://champpenal.revues.org/3663>> accessed 26 March 2014.

²²⁹ *Loi* no. 93-2 of 4 January 1993 introduces mediation as an alternative to prosecution. See Jean-Pierre Allinne, *Gouverner le crime : les politiques criminelles françaises de la révolution au XXI^e siècle. Tome 2, Le temps des doutes, 1920-2004* (L’Harmattan 2004) 132–145.

²³⁰ Introduced by *Loi* no. 99-515 of 23 June 1999, the *composition pénale* is regulated by articles 41-2 and 41-3 CPP. See Claire Saas, ‘De La Composition Pénale Au Plaidier-Coupable : Le Pouvoir de Sanction Du Procureur’ [2004] *Revue de science criminelle* 827; Vanessa Perrocheau, ‘La Composition Pénale et La Comparution Sur Reconnaissance de Culpabilité : Quelles Limites à L’omnipotence Du Parquet?’ (2010) 1 *Droit et Société* 55.

²³¹ The *ordonnance pénale* is a procedure without a public hearing. Judges make their decision purely on the basis of the prosecution papers. Since there is no public debate on guilt, the defendant can oppose the decision within thirty days and demand a trial. However, such oppositions seem rare in practice: see François Zocchetto, ‘Juger Vite, Juger Mieux ? Les Procédures Rapides de Traitement Des Affaires Pénales, Etat Des Lieux’ (Sénat 2005) Rapport d’information 17.

(*comparution sur reconnaissance préalable de culpabilité* – CRPC),²³² speedy trial (*comparution immédiate*),²³³ trial before the *tribunal correctionnel*²³⁴ or formal investigation by a judge (*instruction*). This sentencing power given to the *procureur* in the *composition pénale* and the CRPC procedures has been the subject of debates in France. In 1995, the *Conseil constitutionnel* struck out the *injonction pénale*, a predecessor of the *composition pénale*, considering that a criminal sentence could not be pronounced by a public prosecutor, but required the intervention of a judge, i.e. a member of the sitting judiciary who is independent from the executive contrary to public prosecutors.²³⁵ A *composition pénale* or a CRPC must therefore be validated by a judge, but this check by a judge has been described as ‘quick’, ‘succinct’ or even ‘artificial’, underlining that the judge can only accept or reject the sentence proposed by the prosecutor and that a deeper check would go against the objectives of rapidity for which the measures were first introduced.²³⁶

Instituting proceedings is the monopoly of *procureurs* (Art 40-1 CPP), as is prosecution at court. The *parquet* also plays an important role in sentencing as it recommends a sentence to the court.²³⁷ They also have a role after the trial, in sentence

²³² The CRPC was introduced by *Loi* no. 2004-204 of 9 March 2004, *portant adaptation de la justice aux évolutions de la criminalité*. It is defined at articles 495-7 to 495-16 and 520-1 CPP and allows the *procureur* to offer a sentence to the defendant who admits the offence. The admission of guilt and the agreed sentence must then be validated by a judge. See Chapter 6 for more details.

²³³ The expedited *comparution immédiate* procedure is available in offences with a maximum sentence of between two and ten years imprisonment, where the *procureur* considers the case ready for trial (Art. 395 CPP). The procedure is designed to deal rapidly with cases which are tried within hours of the police custody period. See Laurent Mucchielli and Emilie Raquet, ‘Les Comparutions Immédiates Au TGI de Nice, Ou La Prison Comme Unique Réponse à Une Délinquance de Misère’ [2014] *Revue de science criminelle* 207.

²³⁴ The *tribunal correctionnel* is normally composed of three professional judges – although some offences can be tried by a single judge – and tries *délits*, mid-ranking offences such as burglary, theft, assaults, etc.

²³⁵ *Conseil constitutionnel*, Decision No. 95-360 DC 2 February 1995, <<http://www.conseil-constitutionnel.fr/decision/1995/95360dc.htm>> accessed 24 March 2014.

²³⁶ Saas (n 230).

²³⁷ Recommendations often followed by the courts + ref. Danet et al.

enforcement.²³⁸ In the office I was observing in France, a *procureur adjoint* was dedicated full time to sentence execution. Her remit included representing the prosecution at hearings with the *juge d'application des peines* (JAP)²³⁹ which took place either at court or in prison. Under French law, defendants who are not already imprisoned and are sentenced to less than two years imprisonment are summoned before the JAP in order to determine the conditions of implementation of their sentence, taking their personal situation into account (Art 723-15 CPP). Prisoners who are nearing the end of their sentence can also apply for their sentence to be adjusted to prepare them for their release.²⁴⁰ During those hearings, every aspect of their personal situation (employment, family, etc.) is examined to make sure that the sentence is adapted to fit their particular circumstances. The role of the *ministère public* at these hearings is to represent the public interest: '[r]ather than seeking a punitive response, the *procureur* worked in a spirit of cooperation to see what could be agreed (delaying prison to accommodate a rehabilitation program; substituting prison for electronic tagging or unpaid work; having a day release from prison to sit an exam), whilst ensuring that the sentence is credible ("you cannot come back to the prison in the evening completely drunk") and the victim's interests in receiving compensation are respected'.²⁴¹ All members of the *parquet* can also apply article 723-16 CPP which allows *procureurs* to send people directly to prison to serve their sentence if urgency and danger to people or to property are demonstrated. In the area I observed, this was particularly applied to people who were arrested after having been convicted and

²³⁸ See Book V CPP about Execution Procedures, in particular article 707-1 which states that: 'The public prosecutor and the parties seek to obtain the execution of that part of the sentence that concerns them.'

²³⁹ Judge in charge of sentence execution.

²⁴⁰ The sentence (or part of it) can be executed outside of prison through electronic tagging or be commuted to community work. The sentence can also be suspended or divided into small periods of time. Conditional release or day parole are also possible.

²⁴¹ Jacqueline Hodgson and Laurène Soubise, 'Understanding the Sentencing Process in France' Crime and Justice (forthcoming).

sentenced to a prison sentence for a previous offence, but had not served it yet. The danger and urgency required by article 723-16 CPP was considered to be demonstrated by the suspected reoffending.

The role of French prosecutors is not limited to criminal justice either, but also extends to a wider role of protecting the public interest by developing local crime policies in cooperation with other agencies and by intervening in family or commercial cases.²⁴²

During my fieldwork, I observed commercial court hearings attended by a prosecutor, where it was decided whether or not a company should go into administration or even should be dissolved. In these instances, the *procureur* defends the public interest from an economic point of view, trying to preserve the local economic environment. A circular of 18 April 2006 stated that the role of *procureurs* in commercial matters was not simply to detect criminal offences, but described the *parquet* as ‘the champion of public interest and of people in a state of weakness’.²⁴³ In the civil courts, the *procureur* also has competence in matters of personal status: change of name, child protection measures, legal guardianship and powers of attorney (*tutelles*), adoption and paternity disputes.²⁴⁴ For instance, the *procureur* in charge of juveniles also dealt with child protection and explained how he was able to use both aspects of his role to act in the public interest:

[This duality] is fundamental! (...) Why? Because when we have to deal with a situation, for example, I’m called for a shoplifting as duty prosecutor: classic case, 5pm, call to the duty phone line, local shopping centre, theft of two earrings in Claire’s. I’m going to ask the investigators: ‘did you see the parents? What’s the situation at the moment?’ and we can use the criminal case to report information to the local council, even if the criminal case will only result in a low-level warning, but it can be used as a base for something else about family problems which can be very

²⁴² See Marianne Cottin and others, ‘Le Parquet En Matière Civile, Sociale et Commerciale’ (GIP Mission de recherche Droit et Justice 2011).

²⁴³ Circular 18 April 2006 (NOR: JUSC0620263C) p. 2 <http://www.textes.justice.gouv.fr/art_pix/102-CIV-a.pdf> accessed 16 April 2014.

²⁴⁴ See Articles 421 to 425 of the Code of Civil Procedure.

complicated with people who are sometimes really struggling with their kids. These issues aren't necessarily known by institutions because it can be very difficult at home but there might not be any obvious problems at school. The commission of an offence by a juvenile is never insignificant. A juvenile who commits offences is a juvenile delinquent but it's also a juvenile who needs to be protected. [Interview respondent FR7]

The role of the *procureur* as representative of the public interest is clearly illustrated by their broad functions in the justice system. They are present from the start of criminal investigations which they supervise and have a monopoly over prosecutions at court. Furthermore, they have an important role in sentencing: as sentencers themselves through alternatives to prosecution, in strongly influencing the fate of cases through their charging decisions and their choice of procedural pathway, but also after trial, through their role in sentence enforcement. Finally, *procureurs* also have a role outside of criminal justice, in civil and commercial cases. By contrast, CPS prosecutors have historically limited functions and, although their remit was notably extended at first, it has gradually been restricted again since 2010.

B. The narrow remit of the Crown Prosecution Service

The role of CPS prosecutors was initially limited to reviewing cases investigated and charged by the police and its lawyers were not authorised to prosecute cases in the Crown Court, instead relying on independent barristers to do so. Ken McDonald QC, a former DPP, described the early CPS as 'sandwiched between the police and the Bar',²⁴⁵ claiming that 'the remit granted to the new CPS was as notoriously limited as its funding.'²⁴⁶ The Access to Justice Act 1999 removed earlier restrictions on employed lawyers exercising rights of audience, allowing CPS Crown Advocates to prosecute cases in the Crown Court. However, there are still many instances where the

²⁴⁵ Ken McDonald, 'Prosecuting by Consent: A Public Prosecution Service in the 21st Century' (2004) 1 JUSTICE Journal 66, 68.

²⁴⁶ *ibid* 67.

CPS instructs independent barristers for advocacy at the Crown Court, and sometimes even at the magistrates' courts where independent solicitors can also be employed to represent the CPS.

The CPS have no power over criminal investigations which remain the exclusive preserve of the police, in accordance with the principle of separation between the investigative and the prosecuting functions which prompted its creation.²⁴⁷ The most serious restriction to the CPS remit was the possibility for the police to charge an individual with an offence without first referring the case to the CPS. A charge is a legal act performed by the police to formally accuse a person of an offence. Section 15(2) (c) of the Prosecution of Offences Act 1985, which established the CPS, provides that the charge institutes criminal proceedings. It means that the CPS could not actually choose who to prosecute and for which offence, but could only decide to reverse the police original decision or not. This serious restraint on the CPS role was criticised from the start,²⁴⁸ as it was argued that 'the role of the Crown Prosecution Service remained essentially reactive and overly dependent upon early investigative and charging decisions taken by the police. As a consequence, the ability of the CPS to determine and shape the legal process that flowed from those decisions was diminished.'²⁴⁹ To remedy the situation, the 2002 Auld report²⁵⁰ suggested the early involvement of the CPS in the charging process. Legislation was enacted to allow the DPP to issue guidance for this purpose.²⁵¹

At first, the DPP seemed to seize this opportunity to expand the CPS remit, but this ambition appears to have waned. Guidance issued in February 2007 indicated that:

²⁴⁷ See chapter 5.

²⁴⁸ See, in particular, Sanders, 'Arrest, Charge and Prosecution' (n 203) 269.

²⁴⁹ Brownlee (n 45) 897.

²⁵⁰ Auld (n 43).

²⁵¹ Police and Criminal Evidence Act 1984, s.37 A, inserted by the Criminal Justice Act 2003.

‘Crown Prosecutors will be responsible for the decision to charge and the specifying or drafting of the charges in all indictable only, either way or summary offences²⁵² where a Custody Officer determines that the Threshold Test is met in any case, except for those offences specified in this Guidance which may be charged or cautioned by the police without reference to a Crown Prosecutor.’²⁵³ This suggests that the CPS had responsibility for all decisions to charge in principle, except in limited circumstances where the police were allowed to charge without referring to the CPS. Those exceptions covered minor offences, such as road traffic offences, offences under the Bail Act 1976 or under the Public Order Act 1986.²⁵⁴ However, every new version of the DPP guidance on charging issued since has limited the CPS remit for the decision to charge and returned powers to the police.²⁵⁵ Crown Prosecutors are now responsible for determining the charge only in the more serious and complex cases, which means that the police retain the decision to initiate proceedings in approximately 72 percent of cases.²⁵⁶ This has very practical consequences, as police contact the magistrates’ courts directly to list cases they have charged for the first hearing. This does not go through the CPS and the file is usually received by them only the day before the actual hearing, leaving them with little time to review it, let alone request further evidence to strengthen the case.

²⁵² In England and Wales, offences are classed in three categories: summary only, either-way and indictable. Summary only offences are minor crimes, such as motoring offences and minor assaults that can be punished under the magistrates’ court’s limited sentencing powers – community sentences, fines, short custodial sentences. Indictable offences, on the other hand, are serious crimes (rape, murder); after an initial hearing at the magistrates’ court, they are sent to the Crown Court, which has a much wider range of punishment. Either-way offences will ultimately fall into one of the previous categories depending on how serious the particular crime in question is. They include middle-rank offences such as theft, burglary, assault occasioning actual bodily harm (ABH), etc.

²⁵³ The Director’s Guidance On Charging, Third Edition: February 2007, para 3.1.

²⁵⁴ Ibid. para 3.3.

²⁵⁵ See Chapter 5 on the relationship between public prosecutors and the police for more detail.

²⁵⁶ Crown Prosecution Service, ‘Annual Report and Accounts 2012-13’ (Stationery Office 2013) 7 <http://www.cps.gov.uk/publications/docs/annual_report_2012_13.pdf> accessed 1 April 2014.

In fact, a large number of cases escape the CPS reach entirely, because the police act as a filter in the first instance for cases they send to the CPS for charging, only referring them if they believe they meet the Threshold Test.²⁵⁷ Police officers can decide that cases do not meet the test or that they should be diverted from the criminal justice system through cautioning for example. Alternatives to prosecutions, also called out-of-court disposals, have been developed in England and Wales, however, they remain largely in the hands of the police, rather than the CPS. The police can offer a cannabis warning,²⁵⁸ a simple caution,²⁵⁹ a community resolution²⁶⁰ or a penalty notice for disorder (PND).²⁶¹ Restorative justice is also increasingly considered by the police as an out-of-court disposal. The police do not need CPS authorisation to administer any of these measures. Whilst in France, the *procureur* selects the cases that should be dealt with by the criminal justice system to satisfy the public interest, this role is attributed to the police in England and Wales, suggesting that the police are considered to be more legitimate than the CPS to define the public interest.

²⁵⁷ Under the threshold test, prosecutors must be satisfied that there is at least a reasonable suspicion that the person to be charged has committed the offence and that further evidence can be gathered to provide a realistic prospect of conviction. Director of Public Prosecutions, ‘The Code for Crown Prosecutors’ paras 5.1–5.12 <http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf> accessed 26 April 2014.

²⁵⁸ Cannabis warnings are a non-statutory disposal introduced in 2004 by ACPO (Association of Chief Police Officers) guidance. There are formal warnings from a police officer for simple possession of cannabis. Cannabis warnings are recorded by the police, but do not constitute a criminal conviction.

²⁵⁹ Adult simple cautions are a non-statutory disposal. There are formal warnings from a police officer following an admission of guilt. Simple cautions do form part of an individual’s criminal record.

²⁶⁰ Community resolutions can include elements of restorative justice and can be used for adults or youths. They are a non-statutory disposal.

²⁶¹ An offender can be offered by a police officer to pay a fixed penalty of £60 or £90 to discharge liability for an offence and avoid a court appearance. PNDs were introduced by the Criminal Justice and Police Act 2001 (sections 1-11). A PND does not form part of an individual’s criminal record but are nevertheless recorded by the police.

The Criminal Justice Act 2003 introduced conditional cautions²⁶² which were administered by the police, with the authorisation of the CPS.²⁶³ This meant that a Crown Prosecutor decided whether a conditional caution was an appropriate disposal following a consultation with the police. Hodgson mentioned conditional cautions as an example of ‘the changing role of the Crown prosecutor’: ‘the role has changed significantly and prosecutors now do rather more than simply review the police file for prosecution. (...) the CPS exercises important dispositive powers through the imposition of conditional cautions – originally introduced for rehabilitative purposes but then made explicitly punitive.’²⁶⁴ However, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced changes to the conditional caution scheme which came into force in April 2013. Crucially, it removed the requirement for a Crown Prosecutor to authorise conditional cautions. Under these new arrangements, the police can now issue a conditional caution for any offence, except for indictable-only offences where the CPS authorisation is still needed.

Even when a case does go to court, the CPS does not always become involved. Under the Prosecution of Offences Act 1985 (Section 3(2) (a)), the CPS has a duty to take over the conduct of all criminal proceedings other than specified proceedings set out by order. Specified proceedings are followed by the police from arrest through to completion at court without any CPS involvement. Prior to recent changes, the list of specified proceedings was limited to certain low level traffic offences (for example speeding or failing to produce a driving licence).²⁶⁵ The range of specified proceedings

²⁶² Conditional cautions were introduced by the Criminal Justice Act 2003 for adults and by the Crime and Disorder Act 1998 for juveniles. They differ from simple cautions as certain conditions are attached to them, such as paying compensation to the victim or attending a drug rehabilitation programme. If the conditions are not complied with, a prosecution may follow.

²⁶³ Criminal Justice Act 2003, part 3, sections 22-27.

²⁶⁴ Hodgson, ‘The Changing Role of the Crown Prosecutor’ (n 45) 28; see also Lewis (n 45).

²⁶⁵ Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999, SI 1999/904.

has been gradually extended in recent years. In particular, in November 2012, the range of low-level offences treated as specified proceedings was extended to include, among other offences, alcohol and public order offences, driving without due care and attention and criminal damage under the value of £5,000.²⁶⁶ The CPS will still prosecute cases where a defendant pleads not guilty, is under the age of 16, or if the case starts by charge, but the Home Office estimated that the police could prosecute over half of all cases in the magistrates' courts following these changes.²⁶⁷

The House of Commons Justice Committee undertook an inquiry into the role of the CPS in 2009 and regretted the piecemeal approach to the CPS role and that 'the Crown Prosecution Service is sometimes defined by what it is not or by its relationship to other organisations, rather than its own aims and purposes, or by clarity about its role within the criminal justice system.'²⁶⁸ Rather than recommending the development of a statutory definition of the role of public prosecutor in the criminal justice system, the Committee stated that it was the responsibility of the Attorney General and the Director of Public Prosecutions to show clear leadership in defining the role. However, recent years have not seen a clarification of the role of public prosecutor in England and Wales, but instead a shrinking of the CPS remit with important powers being returned to the police in the piecemeal approach denounced by the Justice Committee. This raises the question as to who should define the public interest to frame the decision to prosecute. The different functions and aims assigned to national public

²⁶⁶ Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment No. 3) Order 2012, SI 2012/2681.

²⁶⁷ Home Office Press Release, Police powers to prosecute strengthened, 23 October 2012 <<https://www.gov.uk/government/news/police-powers-to-prosecute-strengthened>> accessed 10 April 2014.

²⁶⁸ House of Commons - Justice Committee, 'The Crown Prosecution Service: Gatekeeper of the Criminal Justice System' (Stationery Office 2009) 7 <<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/186.pdf>> accessed 23 April 2014.

prosecution services in each jurisdiction call for different regulatory frameworks for prosecutorial decision-making.

III. The dominance of the central state in defining prosecution policy

A. The apparent dominance of the central state in France

Given the extended functions assigned to *procureurs* in the justice system (see above), they represent a key instrument in national government's crime policy, especially since they decide which cases should be dealt with by the criminal justice system and which ones should be diverted from it. This politicised role justifies direct accountability to democratically elected politicians. However, this accountability is in tension with the *procureurs*' professional ideology as *magistrats* which emphasises independence. This potential conflict is minimised in practice through the centrality of the concept of 'adaptation' in French legal culture which favours the personalisation of the justice system's answers to individual cases over uniformity and allows *procureurs* to retain a large margin of appreciation in practice. 'Adaptation' also underpins the development of local prosecution policies.

1. The limited impact of national policies in practice

Despite the classical account of the French public prosecution service as a highly hierarchical institution directly accountable to the government, ministerial circulars often limit themselves to broad principles and relatively vague targets, allowing for wide prosecutorial discretion in practice. This can be explained both by a denial of discretion in the application of the law which permeates French legal culture and by a belief in the necessity of 'adapting' the prosecution response to the circumstances of the individual case.

The Ministry of Justice issues circulars which define its *politique pénale*²⁶⁹ or its interpretation of new law. Circulars define prosecution priorities and are therefore highly dependent on the government's political views. Thus, in the latest circular, *procureurs* are asked to 'take into account the state of overcrowding in prisons'²⁷⁰ in their decisions and reminded that imprisonment should be strictly limited to situations which require it.²⁷¹ This contrasts with circulars issued under previous governments where *procureurs* were advised to favour the use of *comparution immédiate*²⁷² and to request the application of minimum sentences for repeat offenders, to appeal decisions which did not apply minimum sentences to repeat offenders 'for reasons which would appear not to be relevant' and to reduce the delay in enforcing prison sentences after conviction.

The implementation of these national policies is ensured by the centralised hierarchy of the French public prosecution authority. The *ministère public* sees the Minister of Justice at the very top of its hierarchy; at the regional level, the *procureurs généraux*²⁷³ have authority over their direct subordinates and over the *procureurs de la République*²⁷⁴ of their jurisdiction (Art 35 CPP); at the local level, the *procureurs de la République* have authority over their subordinates (*procureurs adjoints, vice procureurs, substituts*) who act and sign in their name (Art 39 CPP). Hierarchical

²⁶⁹ The broad term *politique pénale* does not easily translate into English. According to Field, it includes operational policing strategies, prosecution policy, criminal policy and penal policy, but also community safety and crime prevention: Stewart Field, 'La Politique Pénale En Angleterre et Au Pays de Galles : Formation et Responsabilité' [2012] AJ Pénal 455. This broad scope can be linked to the wide role given to *procureurs* in comparison to their English counterparts.

²⁷⁰ *Circulaire de politique pénale de Mme la garde des sceaux*, 19 September 2012, NOR: JUSD1235192C, p. 6.

²⁷¹ *Ibid.* p. 4.

²⁷² Procedure in which defendants are more likely to be sentenced to imprisonment.

²⁷³ A *procureur général* is head of the *parquet* at a *cour d'appel*. There are 36 *cours d'appel* in France. They hear appeals on points of fact and law against convictions or sentences already pronounced by the courts of first instance.

²⁷⁴ A *procureur de la République* is head of the *parquet* at a *tribunal de grande instance* (TGI). There are 161 TGI in France. The criminal division of the TGI (*tribunal correctionnel*) has jurisdiction to try intermediate offences (*délits*).

superiors can give instructions to their subordinates and failure to follow them can result in disciplinary sanctions. Appointment, career progression and discipline matters are dealt with centrally, by the Ministry of Justice in consultation with the *Conseil Supérieur de la Magistrature* (CSM).²⁷⁵ This centralised hierarchy is justified in theory by greater certainty and consistency in prosecutorial decisions and the implementation of elected government's policies. A classical account of the French criminal justice system is that of a top-down hierarchical process, in which opportunities for the exercise of official discretion are minimised to avoid arbitrariness and to ensure certainty and uniformity of decision-making.²⁷⁶ Links between government and the public prosecution service are traditionally justified by the need for democratic legitimacy in prosecutorial decisions: it is perceived as important for the public prosecution service to be under the supervision of elected politicians to guarantee that they indeed conform to the public interest.

However, close links with elected politicians are not without their problems. A string of scandals from the end of the twentieth century²⁷⁷ saw governments giving instructions to prosecutors to drop certain cases, in order to protect political allies suspected of criminal offences. Such political interference in criminal justice matters prompted calls for severing the 'umbilical cord' which links the public prosecution service with government. Successive official commissions in 1991,²⁷⁸ 1997²⁷⁹ and

²⁷⁵ The CSM (High Council for the Judiciary) is an independent institution chaired by the President (or the *Procureur Général*) of the *Cour de cassation* and composed of six elected representatives of judges, six elected representatives of prosecutors and eight external members.

²⁷⁶ See Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (n 113); See also Jean Pradel, 'Faut-Il Supprimer Les Instructions Pénales Individuelles Du Garde Des Sceaux Au Parquet ?' [2013] *Recueil Dalloz* 1361; Denis Mondon, 'Pour Une Analyse Systémique de La Politique Pénale ?' [2012] *AJ Pénal* 442.

²⁷⁷ See Chapter 1.

²⁷⁸ Delmas-Marty, *La Mise En état Des Affaires Pénales: Rapport de La Commission Justice Pénale et Droits de L'homme* (n 81).

²⁷⁹ Truche (n 81).

2013²⁸⁰ examined the possibility of appointing a prosecutor at the head of the national prosecution service instead of the Minister of Justice, to enhance the prosecution service's independence. This solution was rejected by all official reports, pointing out that this reform would raise the problem of the democratic legitimacy of a national prosecutor:

Can we speak of '*politique pénale*' if it is defined, imposed and implemented by an authority lacking any direct democratic legitimacy? In other words, does the substitution by a technical hierarchy of the current political hierarchy not necessarily lead either to a form of 'government' of the judicial authority or to the forgoing of any *politique pénale*?²⁸¹

Nevertheless, in the last two decades, the French Parliament voted – somewhat reluctantly – for successive reforms to weaken the hold of politicians over decisions to prosecute in individual cases and thus improve public confidence in the criminal justice system. Since 1993, any instructions concerning a case were required to be in writing and placed on the case file, thus being disclosed to the defence before trial. In 1998, a bill was presented before Parliament²⁸² to weaken the hierarchical control exercised by the Minister of Justice over public prosecutors, as well as the role of politicians in their appointment and promotion. However, the change was opposed as giving too much power to prosecutors and leaving them insufficiently accountable to democratically elected politicians.²⁸³ Finally, the Act of 25 July 2013²⁸⁴ forbids the Minister of Justice to address any instruction in individual cases to public prosecutors.

²⁸⁰ Nadal (n 81).

²⁸¹ Delmas-Marty, *La Mise En état Des Affaires Pénales: Rapport de La Commission Justice Pénale et Droits de L'homme* (n 81) 125; See also Truche (n 81) 30–31; Nadal (n 81) 29.

²⁸² Bill no. 957, *relatif à l'action publique en matière pénale et modifiant le code de procédure pénale*, recorded before the *Assemblée nationale* on 3 June 1998.

²⁸³ See Pradel and Laborde (n 79); Jacqueline Hodgson, 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations' (2002) 29 *Journal of Law and Society* 227, 235–240; Hodgson, *French Criminal Justice* (n 62) 75–85.

²⁸⁴ Loi no. 2013-669 of 25 July 2013, *relative aux attributions du garde des sceaux et des magistrats du ministère public en matière de politique pénale et de mise en œuvre de l'action publique*.

A constitutional bill presented to Parliament on 14 March 2013²⁸⁵ was supposed to align the appointment procedure for prosecutors with that applicable to judges,²⁸⁶ but the qualified majority necessary for constitutional amendments (three fifths) could not be found and the project seems to have been abandoned. This means that appointments and promotions remain in the hands of the Ministry of Justice, with the CSM only giving its opinion.

The direct link with the executive and the political nature of the directives given to *procureurs* by the government are in tension with the professional ideology of neutrality that derives from their belonging to the *magistrature*. The influence of central government over prosecution policy should not, however, be overstated. General principles guiding prosecutorial decision-making remain scarce. Whereas *juges d'instruction* are required to have 'strong or corroborating evidence' to place a suspect under judicial investigation (Art 80-1 CPP), no evidential threshold is defined for prosecutions.²⁸⁷ The Ministry of Justice circulars usually concentrate on public interest issues, rather than on the application of legal principles. This lack of guidance on how to apply the law can be linked to a form of denial of discretion in French legal culture.²⁸⁸ As pointed out by John Bell, the French system is characterised by the

²⁸⁵ *Projet de loi constitutionnelle* no 815, portant réforme du Conseil supérieur de la magistrature, recorded before the *Assemblée Nationale* on 14 March 2013.

²⁸⁶ The Minister is obliged to follow the recommendations of the CSM to appoint and promote judges.

²⁸⁷ Article 40-1 of the CPP simply provides: 'Where he considers that facts brought to his attention in accordance with the provisions of article 40 constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, the district prosecutor with territorial jurisdiction decides if it is appropriate:

1° to initiate a prosecution;

2° or to implement alternative proceedings to a prosecution (...);

3° or to close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this.'

²⁸⁸ Nelken explains how '[i]n Italy, discretion is more easily given the meaning of "unacceptable" arbitrariness rather than the more neutral 'room for limited choice to be exercised with judgement' that is associated with it in English': David Nelken, 'Can Prosecutors Be Too Independent? An Italian Case-Study' in Tom Daems, Sonja Snacken and Dirk Van Zyl Smit (eds), *European penology?* (Hart Publishing 2013) 259.

primacy of codified law, i.e. not simply written law, but ‘systematic, complete, and principled’ law.²⁸⁹ Codified legislative rules are the starting point of the legal reasoning, also called legal syllogism: the major premise is the law, the minor premise is the factual situation and the conclusion is the application of the law to the facts. John Bell describes how statements for reasons are extremely brief in French published judgments and decisions. This is due to what some authors have dubbed ‘the myth of syllogism’ which erases any ‘discretion’ and allows *magistrats* to detach themselves from their decisions.

The myth of judicial syllogism functions as a mode of dissimulation of authority. It is an additional element which provides a way of keeping the personal intervention of the *magistrat* quiet. Supposed to be a perfect demonstration of the legal-rational accuracy of the decision, it releases the judge of the weight of his authority to all appearances. Set as an objective evidence, it erases the influence of a personal intervention of the *magistrat*.²⁹⁰

As Hodgson and Mincke both observed, *magistrats* use the law as part of their legitimisation discourse²⁹¹: for instance, Hodgson noted that ‘[d]ecisions are frequently prefaced by phrases such as “I am obliged by the law to...” or “I am required to...”’.²⁹² The law constrains *procureurs*, but it also bestows upon them their authority.

Ministerial circulars also remain relatively broad, setting out targets and principles which remain sufficiently vague to allow for broad prosecutorial discretion in practice.²⁹³ The vagueness of national directives can be explained by the strong belief in French legal culture that, although a uniform model of justice may appear to promote equality of treatment, it actually produces injustice. In tension with the

²⁸⁹ Bell (n 225) vii.

²⁹⁰ Christophe Mincke, ‘Les Magistrats et L’autorité’ [1999] *Droit et Société* 343, 355.

²⁹¹ Mincke (n 290); Jacqueline Hodgson, ‘Codified Criminal Procedure and Human Rights: Some Observations on the French Experience’ [2003] *Criminal Law Review* 165, 167–168; Hodgson, *French Criminal Justice* (n 62) 21–25; See also Mincke (n 78).

²⁹² Hodgson, *French Criminal Justice* (n 62) 21.

²⁹³ For instance, prosecutors are asked to improve the delay between the commission of the offence and trial, but are not given clear guidance on how to achieve this.

discourse around hierarchical order supposed to ensure uniformity and thus equality, the French criminal justice system greatly values the importance of an ‘adapted’ criminal response.

Who does not see that the seizure of a hundred grams of cannabis does not have the same impact and does not reveal a similar level of dangerousness of the offender in the Cantal²⁹⁴ or in the Seine-Saint-Denis,²⁹⁵ where recorded criminality for drugs varies from one to four, and surely in even more important proportions if we knew how to take into account the dark figure? Should we in such different contexts consider by principle similar responses?²⁹⁶

This vision echoes the remarks of Hodgson’s *procureur* respondents²⁹⁷ and the *procureurs* I interviewed also stressed the necessity of adapting the national policies to local circumstances.

[The *procureur*] will also adapt: is it an area where people drink a lot of alcohol or not? Is it an area where there is a lot of road traffic criminality or not? Is it an urban or rural area? So, inevitably, there is a very strong adaptation, so that priorities decided at the national level don’t always all have an impact at the local level. It’s both a liberty and a necessity to adapt to the local facts. It’s important. [Interview respondent FR1]

There is a clear expectation in the law that the national *politique pénale* needs adapting to regional and local contexts, as the CPP provides that the Minister of Justice defines the national directives of *politique pénale*, but the *procureur général* specifies them at the regional level and the *procureur de la République* adapts them and implements them at the local level (Art 30, 35 and 39-1 CPP). Further adaptation is achieved through the application of the law and those policies to individual cases by *procureurs*

²⁹⁴ Situated in south-central France, Cantal remains one of the most sparsely populated (25.9 inhabitants per square kilometre) and geographically isolated French regions. Aurillac, its main city, is the farthest removed regional capital from a major motorway. (2010 data – source: www.insee.fr)

²⁹⁵ Located to the north east of Paris, Seine-Saint-Denis is densely populated (6,443.9 inhabitants per square kilometre) and has a high level of unemployment (16.9%), as well as a high proportion of immigrants (27.7%). (2010 data – source: www.insee.fr) A town of Seine-Saint-Denis, Clichy-sous-Bois, was the scene of the death of two youths which sparked the nationwide riots of autumn 2005.

²⁹⁶ Mondon (n 276); see also Hodgson, *French Criminal Justice* (n 62) 228–231.

²⁹⁷ Hodgson, *French Criminal Justice* (n 62) 230.

on the ground, allowing them to keep a broad discretion and thus a certain independence from the national directives from the Ministry of Justice.

2. *Procureurs as local policy-makers*

In recent years, *procureurs* have been encouraged to develop local prosecution policies, in partnership with other criminal justice agencies. Although this practice is justified by the need to adapt prosecutions to local circumstances, local policies are often largely determined by limited resources and the need to deal with cases as quickly and efficiently as possible. Nevertheless, they have resulted in localised arrangements for prosecutions and the regular meetings taking place have provided a new accountability channel for public prosecutors. However, the multiplication of local policies has also contributed to a lack of transparency in prosecutorial decisions which could ultimately threaten the legitimacy of *procureurs*.

Both the availability of resources and the contours of local criminality play a role in this adaptation. In particular, the workload of the court is taken into account by French prosecutors when making decisions. The practice of '*correctionnalisation*' which consists of the systematic downgrading of serious offences (such as rape) into less serious ones (such as sexual assault) to avoid involving a *juge d'instruction* in the investigation and allow for a quicker and cheaper process has long been controversial.²⁹⁸ The practice was legalised by a legislative act in 2004.²⁹⁹ However, the development of alternatives to prosecutions has made the issue of the influence of resources over prosecutorial decisions even more acute. For instance, with the offence of driving under the influence of alcohol or drugs representing thirty per cent of

²⁹⁸ Boulloc, Stefani and Levasseur (n 3) 507–509 describe it as an illegal practice; Hodgson, *French Criminal Justice* (n 62) 211–212 shows how young prosecutors were shocked by the practice.

²⁹⁹ Audrey Darsonville, 'La Légalisation de La Correctionnalisation Judiciaire' [2007] *Droit pénal Étude* 4.

criminal courts' activity, *procureurs* have made great use of speedy procedures, such as *ordonnances pénales* (43 per cent) and *compositions pénales* (18 per cent), well ahead of prosecutions in court (39 per cent) where two out of five cases are dealt with through the guilty plea procedure (CRPC).³⁰⁰ The *procureurs* I interviewed also thought that resources determined the local prosecution policy to a large extent:

Prosecution policy, for that matter, is largely dependent on resources because, once again, you can fidget on your chair and say: 'I need to prosecute everything' but you cannot do with nine or ten *magistrats* what you could do with twelve or thirteen. You also have to look into the uptake capacity of the court because we're part of a criminal [production] line, or more exactly a criminal pipeline. I always take this metaphor of the funnel (...) to describe the *parquet*. In [this court], the *parquet* receives 38,000 files every year at the entrance of the funnel. At the other end, the court will make 6,000 decisions in criminal matters. How do we go from 38,000 to 6,000? You can see that there is a problem of distillation, of sorting, of cleaning, of sieving... Of course, all the files with no known suspect, with not enough evidence, etc.... Once this cleaning has been done and there remain about 9,000 files in which there is an offence, a suspect, a victim, etc., the *Procureur de la République* looks at the resources he's got. (...) He needs to play with procedural tools he's got to deal with the extra 6,000 files that cannot be tried by a judge. So, he will use alternatives to prosecution (...), but at the end of the year, he needs to find a solution for the 30,000 or 40,000 files that came in, either by a discontinuance, or a trial, or something else, but everything must find an answer. So, inevitably, the prosecution policy is fully dependent on this! We go from an absolute and we confront ourselves with the reality. [Interview respondent FR1]³⁰¹

An example of such 'adaptation' to local circumstances can be found in 'permanent directives', an instrument of local prosecution policy which shapes the case treatment structure of the *parquet*. The heads of local *parquets* can issue directives to the police, so that police officers can determine the outcome of certain cases without contacting the *parquet*. In the area I observed, the *Procureur de la République* had issued directives for shoplifting, drink driving and cannabis possession. These directives standardise the response to mass offences on the basis of grading scales relating to, for

³⁰⁰ Ivana Obradovic, 'La Réponse Pénale à La Conduite Sous Influence (alcool et Stupéfiants)' [2013] *Tendances* 1, 5.

³⁰¹ Similar views were also expressed by FR8.

example, blood alcohol level, quantity of drugs, or value of stolen goods.³⁰² These ‘permanent directives’ allow *parquets* to control their workload by partially delegating the use of out-of-court disposals to the police, as the files are sent directly by the police to the *délégués du procureur* in the *maison de la justice et du droit* (MJD – House of Justice) without contacting the *parquet*. Danet et al showed that they vary from *parquet* to *parquet*, representing real local prosecution policies.³⁰³ The researchers also showed that these directives were usually agreed with judges in advance, as judges have to validate certain measures, in particular *composition* and *ordonnance pénale*. Although the local structuring of discretion emphasises the broad discretion left to *procureurs* at the local level, the involvement of judges in validating their decisions imposes some degree of local uniformity.

This process of adaptation also allows for practical solutions put in place in local areas to be extended to the rest of the country if they prove successful. National prosecution policy can thus be shaped by local initiatives. In particular, the development of a wide range of out-of-court disposals, also known as the ‘third way’, find their origin in initiatives from local *parquets* at the end of the 1980s.³⁰⁴ They have grown to become a mode of criminal justice response in their own right³⁰⁵ and have quickly been taken up by the Ministry of Justice as good practices which should be spread across the

³⁰² For example, for a theft under €30 in value with a first-time offender who admits the offence and who lives within the area, a simple *rappel à la loi* by the police officer is deemed sufficient. For a theft between €80-120, the table distinguishes further: if the offender returned the stolen goods or eventually paid for them, the file should be dealt with through a *composition pénale*; if the offender did not return the goods or they were damaged and were not reimbursed, the case should be dealt with through an *ordonnance pénale*, in a gradation of the seriousness of the response.

³⁰³ Danet, *La réponse pénale dix ans de traitement des délits* (n 71) 83–112.

³⁰⁴ See, for example, Georges Apap, ‘Favoriser La Conciliation Pénale’ [1990] *Revue de science criminelle* 633; Jocelyne Leblois-Happe, ‘La Médiation Pénale Comme Mode de Réponse à La Petite Délinquance : état Des Lieux et Perspectives’ [1994] *Revue de science criminelle* 525; Christine Lazerges, ‘Médiation Pénale, Justice Pénale et Politique Criminelle’ [1997] *Revue de science criminelle* 186; Allinne (n 229) 135–136.

³⁰⁵ Laura Aubert, ‘L’activité des délégués du procureur en France : de l’intention à la réalité des pratiques’ (2008) 32 *Déviante et Société* 473: ‘between 1994 and 2006, the number of alternatives carried-out went from 68,879 to 468,045, namely an increase of 579.5%’.

whole territory,³⁰⁶ before the legislator decided to introduce them into the CPP in 1999³⁰⁷ at article 41-1. Similarly, the *traitement en temps réel* (TTR)³⁰⁸ resulted from local experiences, facilitated by the introduction of summons by a police officer on instructions from the *procureur* in 1985.³⁰⁹ Prior to that, summons had to be delivered by bailiff's order. The objective of the new law was to take advantage of the presence of the suspect at the police station to notify them of the court date, avoiding the risk of not finding them again and reducing the number of trials in absentia. Another objective was to avoid the delays resulting from the transfer of files by post. A new and more immediate form of communication between *parquet* and police therefore became necessary³¹⁰ and the TTR was born from local initiatives in Pontoise, Lyon and Bobigny in the early 1990s. It had been adopted by almost all *parquets* by 2000, following the impetus from the Minister of Justice.³¹¹ This role of local practices in shaping the national prosecution policy is thus clearly recognised and even encouraged by the Ministry.

The definition of local crime policies by *parquets* is done in collaboration with other agencies. They have been encouraged by central government to set up regular meetings with the police, the *préfecture*³¹² and local authorities. These meetings work at different levels (region, city or even smaller district): *conseil local de sécurité et de*

³⁰⁶ See Circular CRIM 92-13/SDJC of 2 October 1992 (NOR: JUSD9230022C) <http://bdoc.ofdt.fr/pmb/opac_css/index.php?lvl=notice_display&id=352> accessed 24 June 2014.

³⁰⁷ Loi no. 1999-515 of 23 June 1999, *renforçant l'efficacité de la procédure pénale*.

³⁰⁸ See Chapter 5 for an analysis the consequences of the TTR introduction.

³⁰⁹ Loi no. 85-1407 of 30 December 1985, *portant diverses dispositions de procédure pénale et de droit pénal*.

³¹⁰ Camille Miansoni, 'La Nature Juridique Du Traitement En Temps Réel Des Procédures Pénales (TTR)' [2012] AJ Pénal 152.

³¹¹ Benoit Bastard and Christian Mouhanna, 'L'urgence Comme Politique Pénale? Le Traitement En Temps Réel Des Affaires Pénales' [2006] Archives de politique criminelle 153, 153.

³¹² The *préfecture* is headed by a *préfet*, the government's representative at the local level. They operate under the Minister of the Interior. Their main missions include: coordination of police and gendarmerie forces; handling major crises; emergency defence procedures; decisions to evacuate zones facing natural disasters; organisation of relief operations; application of immigration rules.

prévention de la délinquance (CLSPD – Local council of security and crime prevention)³¹³, *groupe local de traitement de la délinquance* (GLTD – Local Group for Crime Management)³¹⁴; *État Major Départemental de Sécurité* (EMDS – Regional Security Taskforce) at the regional level.³¹⁵ In July 2012, the new government created the *Zones de Sécurité Prioritaires* (ZSP – Priority Security Zones) ‘to bring lasting and tangible responses to territories suffering from daily insecurity and ingrained criminality’.³¹⁶ Again, meetings between several agencies are regularly organised to discuss those specific areas, often a small district within a larger town or city.

I attended several of those meetings during my fieldwork. Discussions do not simply focus on crime, but also include employment, transport and housing issues. They are designed to foster coordination between public agencies. Particular cases are discussed in some of these meetings as illustrated by this extract from a meeting, where the police had given a list of people they had arrested in the last month who lived in the area under discussion:

Job centre representative: One of the people you named is not a surprise for us because we’ve been trying to find a solution for him without success because of his criminal record.

Police representative: It’s sometimes a good idea to take them out of their area.

Procureur: Absolutely, that’s on my agenda! It’s very difficult for victims to see their offenders back as they think justice has not been done. I’m very much in favour of bans from an area. There seems to be a cultural block from judges who would rather send them to prison than ban them from [the city]. It’s the best solution for victims though: they don’t care if

³¹³ Chaired by the mayor, it is attended by the *préfet* and the *procureur de la République* or their representatives. It is attended by many agencies and organisations, such as representatives for public transport, schools, police, social housing providers, probation, job centre, etc.

³¹⁴ Created and chaired by the *procureur*, it coordinates the actions of police and justice services in a particular area.

³¹⁵ Jointly chaired by the *procureur de la République* and the *préfet*, it should include regional heads of the police and the gendarmerie, but also the director of regional services from the Ministry of Education, the regional director of the tax administration and the regional director of customs.

³¹⁶ Joint press release of Ministry of Justice and Ministry of the Interior 15 November 2012, ‘Creation of 49 ZSP’ <<http://www.interieur.gouv.fr/Media/MI/Files/Dossier-de-presse-conjoint-du-ministere-de-la-Justice-et-du-ministere-de-l-Interieur>> accessed 26 June 2014.

the person goes to prison, as long as they don't see them back in the same area.

As illustrated by the above example, those meetings are an opportunity for the *procureur* to receive information on criminality in their jurisdiction and to explain the actions of the court to other criminal justice agencies. Thus, in a similar meeting, the police presented figures showing that they arrested more people than last year for burglary, but that fewer people were sent to prison and with greater delays between arrest and trial date, clearly blaming the justice system for these failings. The *Procureur de la République* defended the justice system by explaining that burglary is an offence that must be tried by a collegial formation of three judges, rather than by a single judge, which accounted for the delays noted by the police. These meetings therefore provide a new channel of accountability for French prosecutors, both to locally-elected politicians and other criminal justice agencies, such as the police. It also allows the *procureur* to define particular crime detection and investigation strategies in coordination with police forces and to define their local prosecution policy. However, it remains to be seen whether it could result in a renewed claim for legitimacy from prosecutors. Those meetings are largely open to public administrations and locally-elected politicians and could potentially sustain a claim of proximity in decision-making. Local politicians, such as mayors, remain the most popular and trusted politicians in France. However, these meetings remain closed to the public at large and the local prosecution policy is not publicly accessible, failing to respond to emerging demands for transparency.

B. The growing centralisation in England and Wales

In England and Wales, most prosecutions were the responsibility of the police until the establishment of the CPS and the system of police prosecutions was essentially local. The Philips Commission observed in its 1981 report that 'arrangements for

police prosecutions are, by and large, at the discretion of and under the control of the local chief constable and the police authority for each of the 43 separate police force areas.³¹⁷ The CPS was created, in part, in response to the great diversity of prosecution decisions made by the police. However, governments favour other criminal justice agencies – in particular the police – to implement their policy choices in criminal justice matters, since the CPS has a limited role in diverting cases from the criminal justice system. Thus, there are few government guidelines for prosecution, apart from policies issued by the Attorney General which are not normally dependent on the government's political hue. Prosecution policy is issued by the DPP, in accordance with section 10 of the 1985 POA which provides for the publication of a Code for Crown Prosecutors.³¹⁸

1. A growing body of national policy and guidance

In stark contrast with France, the discretion of criminal justice actors is better recognised in England and Wales³¹⁹ and recognition leads to greater regulation of prosecutorial discretion. Thus, the Code presents the general principles guiding prosecutorial decision-making, rather than a list of political priorities. It defines a two-stage test for the decision to prosecute (para. 4.1). First, the 'evidential test' requires prosecutors to consider whether they are more likely than not to prove the guilt of the defendant in court (para. 4.4 and 4.5). If they consider that there is sufficient evidence to prosecute, prosecutors must carry out the second stage of the test: the public interest stage. The Code provides for a presumption in favour of prosecution, stating that '[a]

³¹⁷ Philips (n 26) 126.

³¹⁸ The seventh edition of the Code for Crown Prosecutors was published by the DPP in January 2013 <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html> accessed 18 June 2014.

³¹⁹ See, for example, Andrew Sanders and Richard Young, 'From Suspect to Trial' in Rodney Morgan, Robert Reiner and Mike Maguire (eds), *The Oxford handbook of criminology* (5th ed, Oxford University Press 2012); McConville, Sanders and Leng (n 39).

prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.’ (para. 4.8). The Code goes on to list those factors: seriousness of the offence, level of culpability of the suspect, circumstances of and harm caused to the victim, age of the suspect, impact on the community, proportionality of prosecution, and protection of sources of information.³²⁰ The Code also presents guidelines on the selection of charges, out-of-court disposals, mode of trial, accepting guilty pleas and reconsidering a prosecution decision.

In recent years, the Code has been complemented by the publication of a myriad of policy and guidance documents providing guidelines on a wide range of matters. There are policies on specific themes (assisted suicide, domestic violence, football related offences, homophobic and transphobic hate crime, rape, racist and religious crime and the intentional or reckless sexual transmission of infection), but also legal guidance on other offences (from homicide to intellectual property crime and money laundering to name but a few), evidential issues (adverse inferences, alibi evidence, bad character evidence, confessions, DNA, hearsay, identification of suspects, etc.) or procedural rules (disclosure, appeals, proceeds of crime, etc.). All these policies are published on the CPS website and are easily accessible to the public.

Although CPS prosecutors mention in their decisions that they are applying specific policies, I rarely saw them actually read the policies. Many told me that they knew what the policies said and therefore did not need to refer to them to check. Others commented that certain thematic policies were not used on a daily basis as they rarely

³²⁰ Each factor is then further detailed. For example, when considering the proportionality of a prosecution, prosecutors should take into account ‘whether prosecution is proportionate to the likely outcome’ and ‘[t]he cost to the CPS and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty’, as well as ‘effective case management’.

had to deal with policy-relevant cases, but also explained that they did not necessarily provide more guidance than the Code for Crown Prosecutors:

On a practical level, day-to-day, because you're prosecuting a range of offences, you know, (...) Hate crime policy doesn't often appear. And the hate crime policy doesn't really take the charging decision much further than: is there enough evidence to charge it? (...) [Domestic violence] policy is fine but again that's basically the same policy: 'if it's there, charge it and be aware that these are difficult cases' but in the abstract... (...) in terms of practical day-to-day level, you always have to come back to 'is there enough evidence?' and 'where do you take it from there?' [Interview respondent EW25]

Little training is in place to disseminate the policies through the CPS. Some Crown Prosecutors explained that they simply received an email about new guidance and had to familiarise themselves with the policy on their own. Others described that online training had to be completed. A notable exception to this in the area I observed was domestic violence policy. Recent face-to-face training had been organised locally by a manager who thought that the online training was deficient: '[w]hether or not the staff currently have enough training in the application of those policies, I'm not clear about. I think we're losing our edge as far as training is concerned.' [Interview respondent EW22].

Those policy and guidance documents are issued by the DPP, rather than by a government minister as is the case in France. Although they are mainly technical, rather than political, concerns regarding democratic legitimacy were raised in particular with regards to the assisted suicide policy. In response, the CPS has developed an extensive practice of public consultation with regard to its policy and guidance³²¹: '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

³²¹ The CPS publishes the outcomes of these public consultations on its website <<http://www.cps.gov.uk/consultations>> accessed 13 June 2014.

support’.³²² Interestingly, this practice would likely be deemed unacceptable in France, where the idea that the public interest is greater than the sum of private interests dominates. Public consultations would likely be perceived as collecting views from different lobbies, not as legitimate representation of the public interest.

In England and Wales, policy and guidance is developed centrally, through public consultations or national agreements with other criminal justice agencies. By contrast with France, very few policies are developed at the local level. The evidential threshold of a ‘realistic prospect of conviction’ defined in the Code does not allow for local variations: prosecutors should not take into account the specific propensity of their local court to convict, but consider what a reasonable jury or judge could decide faced with the evidence. Issues of public interest are more fertile grounds for local variations. There is indeed national CPS guidance on ‘use of local information to ensure good quality decision-making’³²³ in which the importance of the local context is acknowledged. Thus, some prosecutors I interviewed mentioned a local policy with regards to prosecuting street prostitution, although I did not witness any such case. However, local initiatives remain limited.

During my fieldwork, I attended a District Burglary Meeting bringing together senior police officers and a CPS prosecutor who reviewed complex burglary cases in the CPS office I observed. These meetings were prompted by the local council who noted an increase in the burglary rate in the city and decided to give funding to the police to tackle the issue. The police carried out preventive actions, showing people how to keep their property safe and collaborating with prisons to work with convicted burglars

³²² Roger Daw and Alex Solomon, ‘Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute’ [2010] Criminal Law Review 737, 743.

³²³ <http://www.cps.gov.uk/legal/s_to_u/use_of_local_information_to_ensure_good_quality_decision-making> accessed 25 June 2014.

before their release. The CPS had been involved in drafting community impact statements with the police showing the high impact of burglaries on the city, which were then presented at court to help judges in their sentencing decisions. Although this approach to burglary crime was clearly informed by local circumstances, the CPS role remained circumscribed: they did not initiate it and it does not bear on their prosecution decisions as such.

McConville et al argue that CPS prosecutors view the police as the best arbiters of local needs, due to their close involvement with the community, which leads to uncritical acceptance of police decisions.³²⁴ This would arguably provide an explanation for a lack of local CPS policies. Indeed, if the CPS considers the police as best able to define the local public interest, then they have no incentive to develop their own policies in this respect. However, this perception can be explained largely by the restricted role given to CPS prosecutors within the criminal justice system in England and Wales. As explained previously,³²⁵ CPS prosecutors have no say in policing, nor in which investigations should be given priority. They only receive cases whose prosecution is deemed to be in the public interest by the police. The selection of cases suitable for alternatives to prosecution has already taken place when CPS prosecutors intervene in the process and their choice remains binary – to prosecute or not – when examining the public interest of prosecutions. Local circumstances therefore have a much lower impact at this stage than for their French counterparts.

Nevertheless, some policies which remain largely local in France are imposed from the centre in England and Wales. Thus, the case treatment structure is decided by the DPP through the Director's Guidance on Charging which decides in which cases the

³²⁴ McConville, Sanders and Leng (n 39) 142–143.

³²⁵ See Chapter 3.

police should seek authorisation from the CPS before charging. Currently, all 43 police forces have to report to the CPS indictable offences and either-way offences where a guilty plea is anticipated, but also, for example, all cases of hate crime or domestic violence, offences of violent disorder or affray and offences under the Licensing Act 2003. More localised arrangements could have been considered, taking into account local police charging patterns.

Similarly, information required from the police is negotiated at the national level. Thus, a National File Standard and the contents of charging reports from the police to the CPS have been agreed between CPS Headquarters and ACPO³²⁶ (the Association of Chief Police Officers).³²⁷ The guidance states that a full transcript of the police interview with the suspect should only be prepared for cases tried in the Crown Court. For cases tried in the magistrates' courts, a brief account by the police of what was said in the interview is sufficient, unless a full transcript is deemed necessary. During my fieldwork, some CPS prosecutors were complaining that they were having difficulties obtaining a full transcript of interview for summary cases, even when it was deemed necessary, as the police were reluctant to provide it. The same complaint was expressed with regards to CCTV footage by some charging lawyers, as the guidance states that a copy should only be sent to the charging lawyer when it is the sole evidence to be relied upon, otherwise a summary of its content with an identification of the offender/the offence is sufficient.

³²⁶ ACPO has been replaced by the National Police Chiefs' Council (NPCC) from April 2015.

³²⁷ <http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5_annex_c.html> accessed 14 January 2015.

2. Founding legitimacy on certainty and transparency

Although consistency was the first justification for a national prosecution service in England and Wales, the need to establish legitimacy through certainty and transparency appears to have justified further concentration. A relatively new institution, the CPS has been the subject of many criticisms since it was set up,³²⁸ not least by the police who saw some of their powers taken away and given to the new organisation. The CPS was blamed for the discontinuance of cases passed on to the CPS by the police, despite several official reports showing the weakness of certain police files sent for prosecution.³²⁹

Bottoms and Tankebe have argued that legitimacy involves a perpetual dialogue between power-holders who make legitimacy claims and audiences who respond to those claims.³³⁰ As a new institution having to establish its legitimacy, the CPS opted for a transparent approach by explaining to its audiences – both the general public and other criminal justice agencies – how its prosecutors make their decisions. Although the main concern when the Code was introduced was to guarantee a certain uniformity in prosecutorial decision-making, the objective of transparency made its appearance as soon as the first Code was published: the first annual report of the CPS to the Attorney General states that ‘[t]he purpose of the Code (...) is both to provide a basis for efficient and consistent decision-making and, by describing and explaining the

³²⁸ A study published by the Ministry of Justice showed that, in 2007/08, only 30 per cent of people thought that the CPS does a good or excellent job, compared to 53 per cent for the police, but a marked improvement from 2002/03 when only 23 per cent thought CPS was doing a good or excellent job: Dominic Smith, ‘Public Confidence in the Criminal Justice System: findings from the British Crime Survey 2002/03 to 2007/08’ (Research Series 16/10, Ministry of Justice, 2010) <<http://www.justice.gov.uk/publications/research-and-analysis/moj/2010/public-confidence-cjs>> accessed 16 January 2015.

³²⁹ In 2008, the Police Federation reported that many police officers thought the CPS were ‘risk-averse’ in their decisions and this was corroborated by the Criminal Bar Association as well as the Magistrates’ Association: Justice Committee, ‘The Crown Prosecution Service: Gatekeeper of the Criminal Justice System’ (HC 2008-09, 186) 17-18.

³³⁰ Anthony Bottoms and Justice Tankebe, ‘Beyond Procedural Justice: A Dialogic Approach To Legitimacy In Criminal Justice’ (2012) 102 *Journal of Criminal Law and Criminology* 119.

criteria which prosecutors must take into account, to develop and maintain public confidence in the quality of the decisions made.’³³¹ Later on, the aim of the Code’s third edition was set out by the Attorney General in a statement to the House of Commons in December 1993 as ‘to simplify the language of the Code and to put it into plain English to make it a document more easily understood by police officers and members of the public who are not lawyers’.³³² Prosecutors I interviewed were also aware of the importance of transparency.

[Policies] are good to inform the public of what we think of things, I think. It’s good that the public know that we are addressing issues that are of concerns, so DV [Domestic Violence], hate crime, other things like that. [Interview respondent EW25]

[I]t’s also not just for lawyers and internal people, but it’s for external people, the public and external agencies, they know what we’re sort of supposed to do and what our priorities are. [Interview respondent EW21]

Having demonstrated the dialogical dimension of legitimacy, Bottoms and Tankebe argue that ‘when engaging in legitimization practices power-holders are not only addressing audiences, they are also speaking to themselves – that is, legitimating themselves in their own eyes as holders of legitimate authority.’³³³ Thus, the CPS’ publication of detailed policy and guidance could be assimilated to putting forward legitimacy claims which are then responded to by the public, causing the CPS to revise its claims, but these claims also constitute an important aspect of self-legitimation. This quest for legitimacy based on demonstrating credibility as the main public prosecuting agency has also resulted in strict management oversight over compliance

³³¹ Crown Prosecution Service, ‘Annual Report for the period April 1986 to March 1987’, Stationery Office, 1987, 32.

³³² HC Deb 14 December 1993, vol. 234, col. 1049.

³³³ Justice Tankebe and Anthony Bottoms, “‘A Voice within’: Power-Holders’ Perspectives on Authority and Legitimacy’ in Justice Tankebe and Alison Lieblich (eds), *Legitimacy and criminal justice: an international exploration* (First edition, Oxford University Press 2013) 68.

with policy and guidance, at the expense of much discretion for individual CPS prosecutors.

Conclusions

As previous comparative studies have shown, public prosecutors fulfil various roles in each jurisdiction. In this chapter, I have argued that these variations can be explained by the strength of their legitimacy claim in representing the public interest. This factor is also linked to the policy framework regulating prosecutorial decision-making in each jurisdiction. In the adversarial ideal-type, the prosecutor is a partisan advocate and originally represents a private citizen, the victim, rather than the state. Yet, the creation of a public prosecution service in England and Wales was not accompanied by a strong normative underpinning of what should be the role of a public prosecutor in the criminal justice system, beyond providing a neutral filter between the police and the courts. There exists no statutory definition of the appropriate role of public prosecutors in the criminal justice system and the CPS does not benefit from a clear constitutional positioning. As a result, the CPS role remains very limited in comparison with that of the French prosecution service.

Although the French *ministère public* is traditionally described as a highly centralised system, this study shows that the CPS has actually become the more hierarchical of the two systems. The absence of a strong normative underpinning has implications for the trust placed in the public prosecution service by the public. The CPS has to constantly demonstrate its ability to act in the public interest. This resulted in a very detailed regulatory framework defined centrally by the DPP – rather than by elected politicians – and strongly curtailing the discretion of individual prosecutors. By

contrast, the French *ministère public* does not live up to its image of a hierarchical system, strictly accountable to elected politicians. Instead, national instructions remain broad and local policies play a more crucial role in framing prosecutorial discretion. The concept of ‘adaptation’ or ‘personalisation’ of decisions to individual cases largely protects the discretion of individual prosecutors. However, the lack of transparency in prosecution policies could give rise to concerns over the arbitrariness of some decisions.

In the next chapter, I focus on the implementation of this regulatory framework on the ground. Whilst the publication of prosecution policies performs an important legitimating role for public prosecution services, it is important to check whether these policies are applied by individual prosecutors when they make their decisions and to what extent they constrain prosecutorial discretion.

Chapter 4 – Prosecutorial accountability: bureaucracy, managerialism and professionalism

Tasked with enforcing the criminal law against suspected offenders, public prosecutors have traditionally enjoyed broad discretion. They choose which cases are sent to trial for the court to decide whether a suspect is guilty and on what charge. This raises questions as to which criteria public prosecutors apply to their decisions. What evidential threshold should trigger a prosecution? How should prosecutors assess available evidence? How do they choose a specific charge if several offences could equally characterise the suspect's actions? Even greater discretion is granted in systems of opportunity of prosecutions, such as France and England and Wales, where prosecutors are permitted not to prosecute a case even when they believe that an offence has been committed by the suspect, if they consider that it is not in the public interest to do so. As we have seen in the last chapter, this broad discretionary power is structured by legal guidelines, as well as national and local policies, which define rules prosecutors should follow when making their decisions in both jurisdictions under study. This chapter will focus on the way these rules are implemented in practice.

Many commentators have lamented the lack of legal checks in place to police prosecutorial discretion and avoid prosecutorial misconduct,³³⁴ and several have called for a stricter regulatory framework and the reinforcement of external controls by the courts and by the legal profession in order to strengthen the accountability of

³³⁴ Stephanos Bibas, 'Prosecutorial Regulation versus Prosecutorial Accountability.' (2009) 157 University of Pennsylvania Law Review 959; Ronald F Wright and Marc L Miller, 'The Worldwide Accountability Deficit for Prosecutors' (2010) 67 Washington and Lee Law Review 1587.

prosecution decision making.³³⁵ Others have argued that the regulation of prosecutorial discretion could be ensured through the more radical approach of restructuring the offices of public prosecutors and separating the law enforcement and adjudicative functions that public prosecutors often combine.³³⁶ These studies are predominantly from the United States, as issues of prosecutorial accountability have not been studied as closely in France nor England and Wales, but they are useful as a point of comparison for the existing mechanisms of accountability in those two jurisdictions.

In England and Wales, Edwards studied the different interpretations of the DPP's accountability to the Attorney General prior to the creation of the CPS. He concluded that modern interpretations tended to reject day-to-day control of the DPP's decisions by the Attorney General, but emphasised his or her regard to the overall prosecution policy and answerability to Parliament.³³⁷ The Philips Commission regretted the lack of accountability for police prosecution decisions and suggested that there should be 'some formal channel of explanatory accountability to a local body to ensure that [public prosecutors'] discretion is not arbitrarily exercised' following the creation of an independent public prosecution service.³³⁸ This option was rejected by the government who preferred a national setup when it established the CPS to avoid undue local interference. In 1994, Ashworth and Fionda criticised the lack of systematic

³³⁵ Ellen S Podgor, 'Department of Justice Guidelines: Balancing Discretionary Justice' (2004) 13 Cornell Journal of Law and Public Policy 167; Ronald F Wright, 'Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation' (2005) 105 Columbia Law Review 1010; Ellen S Podgor, 'Prosecution Guidelines in the United States' in Erik Luna and Marianne Wade (eds), *The prosecutor in transnational perspective* (Oxford University Press 2012).

³³⁶ Rachel E Barkow, 'Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law' (2009) 61 Stanford Law Review 869; Rachel E Barkow, 'Organizational Guidelines for the Prosecutor's Office' (2010) 31 Cardozo Law Review 2089.

³³⁷ Edwards (n 105).

³³⁸ Philips (n 26) 141.

external review of CPS performance.³³⁹ Other studies have noted the increasing willingness of courts to review prosecutorial discretion and the resulting pressures on the CPS to give reasons for its decisions, whilst noting the limits of such control due to the vagueness of the public interest criteria and the reluctance of courts to interfere in prosecutorial decisions.³⁴⁰ In France, researchers have shown an interest in the relationship between public prosecutors and the Ministry of Justice and have provided theoretical analyses of the tension that exists between the democratic legitimacy of the executive to determine the national policy on criminal justice and the necessary impartiality of prosecutorial decisions to conform with the principle of equality of all citizens before the law.³⁴¹ However, there has been no empirical analysis of internal accountability mechanisms within public prosecution services, neither in France nor in England and Wales. As a result, it is unclear to what extent the policies decided centrally are applied by individual prosecutors and what mechanisms are in place to ensure they are respected.

As I have shown in the last chapter, a strict regulatory framework is in place in England and Wales in the form of policy and legal guidance issued by the DPP. Although ministerial circulars remain vague, French *procureurs* have to abide by them, as well as policies defined locally, when applying the law. In this chapter, I will analyse the institutional architecture of public prosecution services and the ways that policies are implemented on the ground. Whilst French prosecutors enjoy a relatively high degree

³³⁹ Julia Fionda and Andrew Ashworth, 'The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest' [1994] *Criminal Law Review* 894.

³⁴⁰ Peter Osborne, 'Judicial Review of Prosecutors' Discretion: The Ascent to Full Reviewability' (1992) 43 *Northern Ireland Legal Quarterly* 178; Christopher Hilson, 'Discretion to Prosecute and Judicial Review' [1993] *Criminal Law Review* 739; Burton (n 144).

³⁴¹ Rassat (n 77); Mireille Delmas-Marty, 'La Politique Pénale Est-Elle Une Politique Publique Comme Les Autres ?' [1994] *Revue de science criminelle* 150; Pradel and Laborde (n 79); Robert, 'L'avenir Du Ministère Public Français' (n 80); Pradel, 'Faut-Il Supprimer Les Instructions Pénales Individuelles Du Garde Des Sceaux Au Parquet ?' (n 276).

of discretion with an overview of the whole process, the segmentation of the prosecution process in the CPS means that decisions are constantly reviewed by different members of staff (I). Although the French prosecution service is traditionally chosen as a prime example of bureaucratic accountability, I found that the CPS has become a much more bureaucratic system in practice (II). Ultimately, the degree of discretion left to public prosecutors impacts on the shape of the profession itself. Indeed, CPS prosecutors share many characteristics with technicians who apply set rules to individual cases and so do not conform to the traditional image of autonomous professional lawyers (III).

I. Segmentation of the prosecution process

Once the summons has been issued in France, proceedings are instituted (Art 390-1 CPP) and *procureurs* are not entitled to discontinue the case, as the court is in control of it from that moment on in an inquisitorially-based system. The file of evidence does not belong to the prosecution, but to the court. *Procureurs* have the possibility to request an acquittal if they believe that the defendant is not guilty, but there is no possibility for the prosecutor to decide not to submit the evidence uncovered during the investigation. Judges can decide to substitute a different charge to the one brought by the prosecutor, but the charge cannot be modified by agreement between the prosecution and the defence, forbidding any kind of plea bargaining.³⁴² By contrast, in England and Wales, prosecutors can decide to discontinue a case even after proceedings have been instituted; they can also decide to offer no evidence at trial and

³⁴² A specific guilty plea procedure has been introduced in France in 2004. The *comparution sur reconnaissance préalable de culpabilité* (CRPC) allows *procureurs* to offer a sentence (including imprisonment) to the defendant if the offence is admitted. If the sentence is accepted by the defendant, the agreement is submitted to the court for validation. The court can then only accept or refuse the agreement but cannot modify it. See Chapter 6.

they can agree with the defence to amend the charge on which the accused will be tried, which allows for plea bargaining. The court cannot alter the charge and can only adjudicate on the issues submitted by the parties. As a result, the prosecution decision in France can be located at one specific moment in the process, whereas it is fragmented into several stages in England and Wales with the possibility of amendment or discontinuance at every step: at the charging stage, before the first hearing in the magistrates' court, before trial, etc.

A. Fragmentation of the CPS decision-making process

The division of the process into several stages and the possibility for prosecutors to withdraw or add charges at any point enables the organisation of the CPS into dedicated teams and multiple reviews of cases by different, and sometimes less qualified, members of staff. The CPS office I observed was divided into five main teams – the charging team, the magistrates' court team, the Crown Court team, the rape and serious sexual offences (RASSO) team and the Crown Advocate team.³⁴³ This organisation seems fairly typical at the CPS, with prosecutors mentioning a similar organisation in other offices. Somewhat reminiscent of an assembly line, the prosecution process has been divided into smaller tasks (pre-charge advice, prosecutions at first hearings, preparation for trial, prosecutions at trial) and staff carry out the same narrowly defined routine tasks on files that enter the system, without an overview of the whole process.

The first point of entry for a criminal file into the CPS is through pre-charge advice. As explained in the last chapter, the police must obtain CPS authorisation before

³⁴³ Also on site was a complex case unit but I did not observe their work. Each CPS area has a complex casework unit, which has been set up to work in collaboration with the police to tackle organised and serious cross-border crime. It deals with complex cases such as substantial fraud and money laundering, serious drug offences, human trafficking, etc.

charging suspects in the most serious cases. Some cases are submitted by the police as ‘advice files’ to the District Crown Prosecutors heading the Crown Court or the RASSO teams who allocate them to specific lawyers. The lawyer doing the pre-charge advice then follows their cases all the way to trial. This means that the same lawyer will be giving pre-charge advice and setting up the case for the Crown Court. However, this continuous representation concerns only cases of rape, serious sexual assaults or child abuse cases, or cases that are too complex or too voluminous to be dealt with in a short period of time.

The vast majority of pre-charge advice is given by the charging team, over the telephone. Members of the charging team described their daily tasks in interview:

As a charging lawyer, I spend the day, 9 to 5, almost from dot to dot, in front of the computer and at the end of the telephone. I receive calls from 9 o’clock onwards in the morning from police officers who want advice about charging suspects they either have in custody or have bailed or have otherwise interviewed in connection with criminal offences. Certain offences have to come to CPS to charge and it’s my role to assess the evidence, discuss with the officer, consider whether, first of all, there is currently enough evidence on which I can charge, if not, to either ask for more evidence or, if there’s not enough evidence and never will be, to refuse charge. That’s essentially it. [EW4]³⁴⁴

Once a case has been charged – whether directly by the police or after CPS authorisation – the file is received by the CPS magistrates’ court team to prepare for the first hearing, since virtually all criminal cases start in a magistrates’ court.³⁴⁵ If the case was charged by the police without CPS involvement, the first CPS review of the file takes place at this stage. If the CPS gave the authorisation to charge, a second review of the file is carried out. Advocates normally receive files the day before the

³⁴⁴ Similarly, EW2.

³⁴⁵ In the magistrates’ court, cases are heard by a district judge or by a bench of three magistrates; there is no jury. District judges are professional judges, employed by the Ministry of Justice. They sit alone to hear cases. Magistrates, also called justices of the peace, are lay judges, namely people from the local community who hold no legal qualifications. Magistrates are not paid, apart from an allowance for loss of earnings, mileage and subsistence. Magistrates generally sit in threes and are advised on points of law and procedure by a legally qualified justices’ clerk.

hearing, leaving them with little time to prepare, and with no opportunity to request further evidence to strengthen the case if necessary.³⁴⁶

If the case is indictable only, the magistrates' court will decide whether to grant bail at the first hearing before passing the case on to the Crown Court. For either-way offences, the magistrates' court can decide that a case is so serious that it should be dealt with in the Crown Court, which can impose tougher sentences if the defendant is found guilty.³⁴⁷ In many cases, however, a guilty plea is entered at the first hearing at the magistrates' court. In those instances, a sentencing hearing takes place at the magistrates' court or at the Crown Court, depending on the seriousness of the offence, and the case is finalised. If a not guilty plea is entered or if the case is committed to the Crown Court, the file is passed on to another part of the CPS magistrates' court team or to the Crown Court team to be prepared for trial or for committal.³⁴⁸ Files are then reviewed again and the CPS must decide what evidence will be needed to prove the case against the accused, which witnesses should be warned to attend trial and what unused material should be disclosed to the defence.³⁴⁹ Each stage in this process will be completed by a different Crown Prosecutor, Associate Prosecutor or paralegal officer.

³⁴⁶ People arrested and charged during the night are brought to court the next morning if the police decide to keep the accused in detention. These overnight cases are brought to CPS advocates about half an hour before they go to court, leaving them with no time to review the case.

³⁴⁷ Magistrates can impose a sentence, generally of up to six months' imprisonment for a single offence (12 months in total), or a fine, generally of up to £5,000. If the case can be dealt with in the magistrates' court, a defendant can still insist on their right to trial by jury and elect the Crown Court.

³⁴⁸ Committal hearings are a procedural part of the court process, used to progress certain categories of cases from the magistrates' court to the Crown Court. They were abolished in 2001 for indictable-only offences. They are progressively being abolished for either-way offences. Cases will now be sent to the Crown Court as soon as it is clear the matter is serious enough, without the need for a separate committal hearing at the magistrates' court.

³⁴⁹ Unused material is material that has been retained and which may be relevant to the investigation but does not form part of the case for the prosecution against the accused. The prosecution must disclose any material that might undermine the prosecution case, or which might be reasonably expected to assist any defence and which has not previously been disclosed to the accused.

For Crown Court cases, a brief is prepared for the Crown Court advocate, who will be either an in-house Crown Advocate or an independent barrister. This will serve as instructions to the advocate and it should consider which pleas would be acceptable to the prosecution. At Crown Court, a preliminary hearing and/or a 'plea and case management' hearing (PCMH) will take place before any trial for a plea to be entered. If the defendant pleads guilty at this stage, the judge will decide on a sentence and the case will be finalised. If a not guilty plea is entered, the hearing will be used to ensure that all necessary steps have been taken in preparation for trial and sufficient information has been provided for a trial date to be arranged. The case will be reviewed once again in the CPS office in preparation for trial.

This segmentation of the prosecution process into a number of micro-decisions results in its bureaucratisation, with the written recording of all decisions in order that the file can be picked up by another member of staff later on in the process. This bureaucratisation is structured into the prosecution process centrally, by requiring reviewing lawyers to write up their decision following a set format. Decisions are saved on the CPS national database to be read by colleagues who will deal with the file at a later stage in the process. At court too, advocates have to fill out a Hearing Result Sheet to record what happened in the hearing.

It might be anticipated that the constant reviewing of cases by different members of staff would create a strong culture of cross-checking and so result in weak cases being weeded out and only strong cases being brought to court. In fact, the division of work and the constant reviewing of their decisions created a feeling of disempowerment among Crown Prosecutors. This discontinuity of case management meant that prosecutors lacked a holistic view of cases and so any clear appreciation of the impact of their own decision making. They enjoy little control over the whole prosecution

process, being restricted to defined points in the case pathway, and the limitations of their role cause them to minimise this role even more. Instead of creating a strong culture of accountability, this discontinuity in case management results in prosecutors feeling little ownership or responsibility for a decision that may be displaced by the person dealing with the case at the next stage in the process. Thus, a charging lawyer told me: ‘We only give opinions in this job’, referring to their decisions being reviewed later on in the process by other lawyers who might take a different view. However, this perhaps underestimates the importance of decisions made early on in the case: lawyers reviewing decisions made earlier on in the process were sometimes wary about reversing a decision made by one of their colleagues. This was expressed clearly by a Crown Advocate I interviewed:

If it’s a finely balanced decision, of course, you need to bear in mind that a different lawyer at pre-charge stage has said the case was good, the lawyer who reviewed it for committal has said the case was okay, you know, why am I making a different decision? Just because I disagree with somebody doesn’t necessarily mean the case is not good. In those circumstances, I’ll do what I can to sort of bolster the case and see if the police can come up with something else. [EW24]³⁵⁰

This comment underlines the subjectivity of prosecutorial decision-making in the fact that there is not always one clear choice, but several that could equally be acceptable. The fact that earlier prosecutors took a different view does not mean that they are necessarily wrong. However, it could also indicate a general reluctance to discontinue cases that have already been reviewed by CPS colleagues.

This possibility of a certain momentum building once a decision is made is further reinforced by an official target: the attrition rate. The attrition rate includes cases which have been charged and are later dropped by prosecutors before trial. The rate does not normally include cases in which prosecution witnesses are absent or

³⁵⁰ Similarly, EW12.

withdrawn, but purely cases which have gone all the way to trial without the CPS realising that there was not enough evidence. It is a 'key priority target' for the CPS to demonstrate that the service is 'good value for money compared to police prosecutions' as one District Crown Prosecutor explained. As one Crown Prosecutor put it to me: 'why should the government bother paying for the CPS to review cases when the police could just make charging decisions themselves for the same result?' The attrition rate target appears in reports which are used by national and local management to monitor the performance of the CPS. The attrition rate for the area is set against the national average and the national target. Staff were reminded of this target at a magistrates' court team meeting I attended where the manager told them that the attrition rate in the area was up again and that all discontinuances therefore had to be authorised by a District Crown Prosecutor. The manager mentioned that there would be an audit of all discontinued files or files which resulted in cracked trials³⁵¹ to check what had happened.

This auditing of discontinued cases was experienced as a form of disciplining Crown Prosecutors and so served as a disincentive from dropping obviously weak cases. The presumption against discontinuance is indicated by the categorisation of such cases as having an 'adverse outcome'. On a number of occasions, I witnessed Crown Prosecutors being reluctant to discontinue a weak case because it had already been reviewed by another CPS lawyer. One Crown Prosecutor explained to me that it would be viewed as an 'adverse outcome' for the CPS and thus their decision might be flagged up to managers and they might get 'a telling off'. They explained that managers look at adverse outcome cases at random to determine what went wrong.

³⁵¹ A cracked trial is a trial at which a guilty plea is entered or the prosecution offer no evidence. The trial therefore becomes unnecessary as there is no issue for the judge to adjudicate upon.

They said the temptation was to carry on with weak cases ‘which is morally wrong’ but that they had to ‘cover their backs’. In their opinion, the CPS were probably running too many weak cases at the moment for this reason. Another Crown Prosecutor referred to ‘managers who prefer to waste court time in trials they know they are going to lose than drop a case.’ Although prosecuting weak cases at all costs runs against any efficiency considerations, losing a case at trial does not seem to attract the same stigma as discontinuing that case, as long as it does not result in a judge-directed acquittal. The possibility that the defendant might plead guilty at the last minute also serves as an incentive to keep a case going for longer despite obvious weaknesses.

In case EW-263, a juvenile defendant was charged with common assault and criminal damage. The 17-year old boy was alleged to have assaulted a shopkeeper and one of his staff and to have caused some damage in the shop. The defence account was that the defendant had been assaulted by the shop staff. Whereas the complainants did not have any visible injury, the file included more than forty photos of the defendant’s injuries: large bruises and scratches, mainly on his arms and legs, but also on his lower back, stomach and face. Furthermore, the incident was captured by the shop’s CCTV, but they failed to release it and were described as ‘obstructive’ by the police. Although the charge had not been authorised by the CPS originally, the case was reviewed by the CPS at the first hearing and again afterwards and sent for trial. A Crown Prosecutor reviewed the case in preparation on the day before the trial. At first, he told me that he was not sure what to do with the case, but admitted that it would probably result in a not guilty verdict. Confronted with the impossibility of requesting further evidence from the police to bolster the case at such a late stage, the obvious choice seemed to be for the case to be dropped and the trial vacated. Despite the lack of evidence, he

rang the defence firm and asked them whether they would plead to the criminal damage only, but they refused. A guilty plea for criminal damage would have dispensed the CPS from bringing any evidence of guilt and it was deemed preferable from a pure and simple discontinuance which required the authorisation of a hierarchical superior. Faced with the refusal of the defence, he finally decided to discuss the possibility of discontinuing the case with a manager and attempted to convince her of the merits of a discontinuance, emphasising that there had been no CPS pre-charge advice and that the defence risked claiming abuse of process. The manager gave him authorisation to drop the case. The Crown Prosecutor commented that he had 'to jump through hoops' to discontinue the case.

Charging lawyers do not feel that their decisions are particularly important, as they know they will be reviewed by somebody else later on in the process. Yet, staff who review those decisions are reluctant to correct them, acting under the supervision of managers constrained by official targets. The nature of the division of work can thus lead to a dilution of a sense of accountability, with staff not feeling responsible for failures which result from the decisions of several members of staff, rather than being attributed personally to a single individual. Encouraged by the perverse incentives created by the implementation of targets controlled through audits, these failures thus become systemic rather than personal. For example, the Senior Crown Prosecutor prosecuting case EW-298 at trial had had no involvement in the preparation of the case for trial. When she lost the case, she said that she had done the best she could with what she had but that she would have prepared the case differently, for example filing a bad character application, if she had been in charge of it from the start.

The fragmentation of the prosecution process into routine tasks carried out by different members of staff promotes staff dedication to case progression, rather than successful

prosecutions, as no one has an overview of the system and a clear vision of the case journey through it. In his 2015 review of the criminal justice system, Leveson calls for case ownership, arguing that ‘there must be one person who is (and is identified to be) responsible for the conduct of the case.’³⁵² According to him, this would allow for greater engagement between defence and prosecution to attempt to identify and resolve issues at an early stage. Some Crown Prosecutors were also very critical of the fact that they could not follow cases from start to finish, pointing out some of the resulting inefficiencies.

I think the time we dealt with things best was at what they called the ‘cradle to grave’ stage. (...) If you were the charging lawyer, you kept that case all the way through, doing the trial if necessary. It was allocated to you, so somebody always knew what was going on. Unfortunately, that fell by the wayside. (...) So you end up with files which have been looked at by five different lawyers, nobody’s really got a full grasp of it or if they have it’s moved on so much since they last saw it, they can’t just pick it up again. (...)

One of the other unfortunate side-effects of that is that you do end up with situations where things just get shunted: they get put to the bottom of the pile, because they’re complicated and they’ll take a long time, so at the end of the day, the lawyer just says ‘oh, I haven’t had time to deal with that one’ and everybody does it, I’ve done it. Then a week later, it’s still sitting there on the list because nobody wants to deal with it, it’s become... you know, almost psychologically too heavy for anybody to want to pick up. I’d rather that we were in a position to say ‘okay, this is yours, you have to deal with it’ (...). [Interview respondent EW16]³⁵³

B. A less fragmented process and greater autonomy for prosecutors in France

Practical reasons mean that different prosecution tasks are distributed to *procureurs* in France too. In the research site I observed, the *parquet* was organised in several remits: *traitement en temps réel* (TTR), juveniles, sentence enforcement, commercial and financial offences, etc. The introduction of the TTR procedure requires the creation of

³⁵² Brian Leveson, ‘Review of Efficiency in Criminal Proceedings’ (Judiciary of England and Wales 2015) 9.

³⁵³ EW1 offered similar views, referring to the ‘silo mentality’ which resulted from the segmentation of the process.

a dedicated unit within a *parquet*. Within this unit, *procureurs* answer phone calls from police officers who report orally on their investigations. The *procureur* can ask questions and order further investigations. If the case is straightforward, they will indicate the charge to be brought and the court date, and the police will issue the official summons to appear. By contrast to the charging team in England and Wales, however, the TTR unit is not staffed by *procureurs* exclusively assigned to it. In the medium court where I conducted observations, three *procureurs*, out of nine in total, took part in the daytime TTR for police custody cases. This meant that they were duty prosecutors only one or two weeks a month, being able to go to hearings and deal with other files the rest of the time. One *procureur* I interviewed described the repartition of his workload thus:

I mainly work as daytime duty prosecutor. This represents about 55 per cent of my activity time-wise. It's usually one week out of two, sometimes three, but more often one out of two. So, that's my main activity. In parallel, I deal with the post we receive with regards to offences against property, mainly thefts and criminal damage, because other *magistrats* have been allocated frauds and other economic and financial offences. I also deal with road traffic offences. About 10 per cent of my time is dedicated to hearings: *assises*,³⁵⁴ *correctionnel*³⁵⁵ and others depending on needs. [FR3]

All *procureurs* took part in the TTR for custody cases at nights and weekends and in the TTR for investigations without custody, including the head of the *parquet*. Finally, two *procureurs* were in charge of juveniles within the *parquet* and they also took phone calls from police officers about investigations involving juveniles from their own offices. My findings are corroborated by Bastard and Mouhanna's study of nine courts of different sizes.³⁵⁶ They observed that there was no dedicated TTR structure in place in small courts where *procureurs* took phone calls from the police from their

³⁵⁴ The *Cour d'assises* tries *crimes*, the most serious offences under French law, such as murder, rape, etc.

³⁵⁵ The *tribunal correctionnel* tries *délits*, the middle-ranking category of offences.

³⁵⁶ Bastard and Mouhanna (n 67).

own offices. In larger courts, they noted that the TTR was a specific unit, in a dedicated office, with allocated administrative personnel to which all members of the *parquet* were associated on a rota basis. They only observed one large court where a small proportion of staff took part in the TTR: in this court, only five out of twenty-five *procureurs* worked at the TTR. They still appear not to work on the TTR full-time however, since the authors mention three main posts (for five members of staff): answering phone calls, dealing with *déferrements*³⁵⁷ and going to *comparution immédiate* hearings. Even there, other *procureurs* participated occasionally in the TTR by covering the duty periods at nights and weekends.

In practice, the organisation in separate remits allowed each *procureur* to work relatively independently on their own files, under the overarching (but relatively distant) authority of the *Procureur de la République*. This autonomy born from the division of tasks within the *parquet* was also noted by Mouhanna:

The autonomy displayed by *substituts*, and all the more so by *procureurs adjoints*, is based upon the division of labour: in the biggest *parquets*, and indeed even in the smallest ones, the different areas of legal action in criminal matters are shared between the different members of the *parquet*. Thus, drugs cases are dealt with by a *substitut*, financial matters by a second one, juveniles by a third one. To this division by topic can be added a geographical sharing. (...) [T]his accumulation of ‘niches’ generates de facto an important autonomy for each of these specialists.³⁵⁸

This was echoed by the *Procureur de la République* I interviewed:

You know when you’re [*Procureur de la République*] and you haven’t dealt with sentence enforcement for a while, the *procureur adjoint* who deals with sentence enforcement becomes much more competent than you.
[Interview respondent FR8]

³⁵⁷ A *déferrement* is the transfer of the suspect from the police station to the court to see the *procureur* (Art. 393 CPP). The *procureur* will inform the suspect of the charge brought against them and can decide to summon them for trial at a later date (Art. 394 CPP) or to try them on the same day by *comparution immédiate* (Art. 395-396 CPP).

³⁵⁸ Mouhanna, ‘Les Relations Police-Parquet En France : Un Partenariat Mis En Cause?’ (n 94) 512.

Cases are not allocated to specific individuals and they are routinely dealt with by different *procureurs* at different stages. However, the process is not as fragmented as in England and Wales with generally only one or two hearings being necessary to dispose of a case. As mentioned earlier, the decision to prosecute taken following the investigation is final and cannot be modified by another *procureur* at a later stage. Thus, prosecutors taking decisions at the start of the process do not have the same disempowerment feeling as their CPS counterparts. One junior *procureur* commented on the contrary that he felt that he was in a very powerful position and that his decisions could fundamentally alter the fate of cases and thus the life of suspects and victims alike.

II. The rise of bureaucratic accountability

A. Limited bureaucratic accountability in France

The French criminal justice system, along with other inquisitorially based systems, is classically described as relying on internal bureaucratic accountability to keep public officials, such as *procureurs*, in check. Such bureaucratic accountability is traditionally characterised by the systematic recording of decisions in written files, which are subject to reviews by superiors.³⁵⁹ French law indeed opens the possibility for individuals to appeal a decision by a *Procureur de la République* not to prosecute a case to the *Procureur Général* who can require them to initiate proceedings (articles 36 and 40-3 CPP).

³⁵⁹ For a classic account, see Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (n 113); see also Wright and Miller (n 334). For a classic account, see Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (n 113); see also Wright and Miller (n 334). For a classic account, see Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (n 113); see also Wright and Miller (n 333). For a classic account, see Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (n 113); see also Wright and Miller (n 332).

In practice, however, the majority of prosecutorial decisions are made over the phone due to the TTR. Although *procureurs*' decisions are recorded on file – mostly by the police who note that they are acting in accordance with the *procureur*'s instructions – there is no recording of the reasons that have led to the decision. This absence of reasons is in line with the dominant perception in French legal culture that the application of the law is an objective task leading to a logical conclusion and, therefore, there is no need to detail the reasoning behind it,³⁶⁰ but it is also an obstacle to any in-depth review of *procureurs*' decisions. Audits therefore remain rare in the French criminal justice system and have been limited to miscarriages of justice, such as the Outreau case in which thirteen out of seventeen defendants were acquitted (seven in first instance and six on appeal) in 2004-05. A working party was immediately set up by the Ministry of Justice,³⁶¹ followed by a parliamentary inquiry.³⁶² Since serious and complex cases such as Outreau are dealt with through the *instruction* procedure, the reports and ensuing public debates mainly focused on the work of the *juge d'instruction* in the case, rather than the *procureur*.

Although several studies have focused on the growth of managerialism in the French justice system,³⁶³ there are few official targets in comparison with England and Wales. The main target for *procureurs* is the 'rate of criminal response', an official figure

³⁶⁰ See chapter 3.

³⁶¹ Jean-Olivier Viout, 'Rapport du groupe de travail chargé de tirer les enseignements du traitement judiciaire de l'affaire dite 'd'Outreau'' (Ministère de la Justice, 2005).

³⁶² Philippe Houillon, 'Rapport de la commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire dite d'Outreau et de formuler des propositions pour éviter leur renouvellement' (no. 3125, Assemblée Nationale, 2006).

³⁶³ Emmanuel Breen (ed), *Evaluer La Justice* (PUF 2002); Cécile Vigour, 'Justice : L'introduction D'une Rationalité Managériale Comme Euphémisation Des Enjeux Politiques' [2006] *Droit et Société* 425; Eric Alt and Marie-Astrid Le Theule, 'La Justice Aux Prises Avec L'éthique et La Performance' (2011) 22 *Pyramides* 137; Cécile Vigour and Antoinette Hastings-Marchadier, 'L'économie budgétaire de la justice pénale' in Jean Danet (ed), *La réponse pénale. Dix ans de traitement des délits* (Presses universitaires de Rennes 2013); Virginie Gautron, 'L'impact des préoccupations managériales sur l'administration locale de la justice pénale française' [2014] *Champ pénal/ Penal field* <<http://champpenal.revues.org/8715>> accessed 29 July 2014; Gaëtan Cliquennois, Hakim Bellebna and Thomas Léonard, 'Management et Système Pénal' (2015) 2 *Droit et Société* 243.

which measures the number of cases which can be prosecuted (‘prosecutable cases’ – where sufficient evidence exists against an identified suspect and there are no legal obstacles to prosecution) against the number of cases which were prosecuted at court or the object of alternatives to prosecution. Resulting from concerns over the number of cases dismissed by public prosecutors in the 1990s,³⁶⁴ it became a performance indicator of the justice system following the 2001 Act reforming the budget structure.³⁶⁵ It is put forward by the Ministry of Justice to promote the efficiency of the *ministère public* and has been increasing constantly since its creation in 1998.³⁶⁶ This statistic is measured through the systematic recording of reasons for dismissals. *Procureurs* are provided with a list of motives for dismissals, such as ‘low degree of harm or disorder caused by offence’, ‘withdrawal of complaint’ or ‘unknown offender’. Each motive is given a code, which will be recorded on the national database. This prompted some *procureurs* to tell me that it was easier to prosecute than to dismiss a case, because a dismissal implied to have to justify oneself.³⁶⁷ However, it is not clear how much pressure is really felt by *procureurs* to avoid dismissing a case. Although some mentioned that the use of certain codes was frowned upon by their hierarchy, they then simply used another code instead. Contrary to what

³⁶⁴ At the time, *procureurs* discontinued around eighty per cent of the cases that were sent to them for a decision: see, for instance, Bruno Aubusson de Cavarlay, René Lévy and Laurence Simmat-Durand, ‘L’abandon Des Poursuites Par Le Parquet’ (1990) III Questions pénales; Laurence Simmat-Durand, ‘Le Parquet et L’opportunité Des Poursuites’ (1994) VII Questions pénales. It should be noted, however, that over half of those discontinued cases were, in fact, unresolved, i.e. no suspect had been found.

³⁶⁵ The *Loi organique relative aux lois de finances* (LOLF) of 1st August 2001 aimed to reform the architecture of the budget in missions, programmes and actions, thus improving efficacy (by obtaining results in accordance with set objectives) and efficiency (by obtaining the best results from available resources). See Vigour and Hastings-Marchadier (n 363).

³⁶⁶ In 2012, 89 per cent of prosecutable cases were given a ‘response’ (Ministry of Justice, Les Chiffres Clefs de la Justice [2013]), compared with only 64.9 per cent in 1998 (Ministry of Justice, Les Chiffres Clefs de la Justice [1999]).

³⁶⁷ On this subject, see Audrey Lenoir and Virginie Gautron, ‘Les Pratiques Des Parquets Face à L’injonction Politique de Réduire Le Taux de Classement sans Suite’ (2014) 3 Droit et Société 591.

happened in England and Wales, they did not have to seek a superior's authorisation before closing a file.

The hierarchical organisation of the French *ministère public* is characterised by a system of loyalty and trust, rather than strict orders demanding disciplined obedience. The necessity to convince colleagues rather than impose decisions from above was deemed as primordial by members of the *parquet*.

I have the duty to convince my colleagues. I have the possibility in some cases to give orders, but for the rest it's best to convince them. [Interview respondent FR8]

It's a participative and modern management, not an authoritarian management. It's easy to be authoritarian, but it doesn't work here, it's even contrary to the law. Even if it could work, if it wasn't contrary to the law, we know it's not really in the mood of the times. If you want a team to give its best, people need to have the possibility to express themselves and they shouldn't permanently live against their own nature. It's subtle. [Interview respondent FR1]

The light-touch character of management in the *ministère public* was also noted by Milburn *et al.*³⁶⁸ It is also illustrated by the fact that an important aspect of the hierarchical control over the decisions of subordinates rests upon annual reports drafted by each *procureur de la République* about the performance of their *parquet* to *procureurs généraux* who themselves draft an annual report to the Minister of Justice. Instead of the hierarchy carrying out inspections or audits into the work of their subordinates, the subordinates are asked to report on their work, demonstrating the strong expectations of trust and loyalty in the hierarchical relationships.

Strict rules of territorial competence also protect local discretion. According to these codified rules, *procureurs de la République* and *procureurs généraux* have their own powers and cannot be substituted by their hierarchy if they do not follow orders. Thus,

³⁶⁸ Milburn, Kostulski and Salas (n 69) 58–59; 105–109.

if a *Procureur de la République* refuses to sign an act they have been instructed to take by their hierarchy, the act cannot be signed by somebody more agreeable to the hierarchy's position if this particular *Procureur de la République* is competent according to the law, e.g. if the crime was committed within their territorial jurisdiction. The *Procureur de la République* could, however, be appointed to another post by their hierarchy, including as part of a disciplinary sanction for ignoring instructions.

These strict rules governing territorial remits have been weakened in recent years through the removal of certain matters from the local to the regional or even national level.³⁶⁹ Since 1986, the Paris court has a national remit for terrorist offences, meaning that all terrorist cases will normally be dealt with in Paris, rather than by local courts (specialised *juges d'instruction* and *procureurs*). Eight regional courts (Bordeaux, Lille, Lyon, Marseille, Nancy, Paris, Rennes and Fort-de-France) were given competence to deal with all cases of organised crime in 2004, on top of the other regional remits they had already gained over the years in economic and financial matters. Most recently, the law of 6 December 2013³⁷⁰ established a new public prosecutor with a national remit for cases of corruption and complex tax fraud. These national or regional remits are concurrent with local jurisdictions and case allocation can ultimately be decided by the hierarchy. Greater control has therefore been given to central authorities to decide on the level (local, regional or national) at which prosecution is most relevant for these categories of cases whose boundaries are often open to interpretation. The vast majority of cases are nevertheless still dealt with at

³⁶⁹ Jean-Paul Jean, 'Les Nouveaux Territoires de La Politique Criminelle' [2007] *Revue de science criminelle* 666.

³⁷⁰ Loi organique no. 2013-1115 of 6 December 2013 *relative au procureur de la République financier*.

the local level, allowing *procureurs de la République* to define a prosecution policy for their local *parquet*.

The important autonomy of individual prosecutors can lead to arbitrariness and makes it difficult for the government to implement its crime policies through internal instructions alone. It partly explains why the first tool used to change prosecution practices in France is legislation, rather than prosecution policy. Thus, whilst in England and Wales violent acts within the family are not specific criminal offences, the French criminal code provides, since 1994,³⁷¹ that the status of spouse or cohabiting partner of the victim is an aggravating circumstance of the offence which has been committed. Whilst an assault which did not result in a serious injury is criminalised at Art R625-1 as a contravention (minor offence) punished by a fine and not imprisonment, article 222-13 makes it a *délit* with a maximum penalty of 3-year imprisonment and a €45,000 fine if the offence was committed by the partner of the victim. A 2006 Act³⁷² extended this aggravating circumstance to civil partners and added that it remains applicable, even after the end of the relationship, when the offence was committed ‘on account of the relationships that existed between the offender and the victim’.³⁷³

The Ministry of Justice published a circular on 19 April 2006 to detail the new provisions of the Act of 4 April 2006 about domestic violence.³⁷⁴ Presenting the new aggravating circumstances available for murder, rape and other sexual assaults, the

³⁷¹ Loi no. 92-683 of 22 July 1992 *portant réforme des dispositions du Code Pénal*. Adopted in 1992 by Parliament, the new criminal Code came into force in 1994.

³⁷² Loi no. 2006-399 of 4 April 2006 *renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs*.

³⁷³ Art 132-80 of the French criminal code.

³⁷⁴ Circular of 19 April 2006 *présentant les dispositions de droit pénal et de procédure pénale de la loi no. 2006-399 du 4 avril 2006 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs* (NOR: JUSD0630054C).

Ministry indicates that '[i]t will obviously be up to *magistrats* of the *parquet* to automatically select those aggravating circumstances in their prosecutions every time they will be established'. The circular also refers to a '*guide de l'action publique*' on domestic violence published on the Ministry's intranet in 2004 and intended for 'all relevant professionals'. The guidance has since been updated and made accessible to the public.³⁷⁵ It is very detailed, including with regards to investigative techniques and evidence that needs to be collected. It also gives clear orientations with regards to the procedural pathway that should be favoured by prosecutors in these matters: public interest dismissals are proscribed, out-of-court disposals 'should be used sparingly for isolated acts, of lesser gravity, committed by a first-time offender, and for cases where the measure seems able to provoke a useful awareness of the acts by their author' and the resort to mediation 'must be absolutely marginal even exceptional'. Despite such detailed guidance, an Act recently passed by Parliament³⁷⁶ had to limit the possibility for *procureurs* to have recourse to mediation in domestic violence cases. The Act's impact study³⁷⁷ recognises that governmental circulars and the '*guide de l'action publique*' on domestic violence, which recommends avoiding mediation, have failed to have any real impact in practice. It concludes that the circular is not sufficiently constraining for *procureurs* and modifies article 41-1 5° CPP to forbid mediation in domestic violence cases, unless the victim expressly demands it.³⁷⁸ This example shows that prosecutorial discretion remains broad and can only really be curbed by legislation. In theory, the successive ministers of Justice should have been able to

³⁷⁵ The latest edition was published in November 2011 <http://www.justice.gouv.fr/publication/guide_violences_conjugales.pdf> accessed 17 July 2014.

³⁷⁶ Loi no 2014-873 of 4 August 2014, *pour l'égalité réelle entre les femmes et les hommes*.

³⁷⁷ <<http://www.senat.fr/leg/etudes-impact/pjl12-717-ei/pjl12-717-ei.html>> accessed 22 July 2014.

³⁷⁸ The *Sénat*, the upper chamber of the French Parliament, had amended this article to forbid any recourse to mediation, without exception, but the *Assemblée nationale* came back to the government's original proposition allowing the victim to opt for mediation.

implement their instructions through the hierarchical organisation of the *parquet*. In practice, however, circulars are not sufficiently authoritative for *procureurs* whose primary allegiance goes to the law.

An important disadvantage of the use of legislation rather than policy to frame prosecutorial discretion is the lack of flexibility and reactivity of the legislative instrument. For example, the aggravating circumstance only apply to couples who are cohabiting and it could not apply in case F-132 where a young man was accused of beating up his girlfriend, because they did not live together at the time.

B. Bureaucracy and managerialism in the CPS

The increasing regulation of prosecutorial discretion in England and Wales saw, in parallel, the rise of managerialism in criminal justice, which has been described by many authors.³⁷⁹ Introducing the private sector's managerial methods to the public sector, it places performance at the heart of the criminal justice system, usually at the expense of professionals' discretion.³⁸⁰ The introduction and development of managerial methods at the CPS further reinforced hierarchical centralisation and reduced the scope for prosecutors' individual discretion.

The segmentation of the prosecution process and the distribution of tasks to different members of staff has been made possible thanks to the systematic recording of CPS

³⁷⁹ Carol Jones, 'Auditing Criminal Justice' (1993) 33 *British Journal of Criminology* 187; Nicola Lacey, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *The Modern Law Review* 534; Ian Brownlee, 'New Labour - New Penology - Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy' (1998) 25 *Journal of Law and Society* 313; Eugene McLaughlin and John Muncie, 'The Criminal Justice System: New Labour's New Partnerships' in John Clarke, Sharon Gewirtz and Eugene McLaughlin (eds), *New managerialism, new welfare?* (SAGE 2000); Lee Bridges, 'Toward a Culture of Complacency – Criminal Justice under New Labour' (2010) 79 *Criminal Justice Matters* 22; Ed Cape, 'Adversarialism "lite": Developments in Criminal Procedure and Evidence under New Labour' (2010) 79 *Criminal Justice Matters* 25; Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.

³⁸⁰ McEwan (n 379) 522.

decisions on the national database following a set format: evidential criteria, public interest, mode of trial,³⁸¹ ECHR,³⁸² charge/plea issue. This standardised recording of decisions also forces prosecutors to demonstrate on file that they have followed the decision-making process defined in the Code for Crown Prosecutors – the first two sections adhere to the two-stage test defined by the Code for Crown Prosecutors – and to justify their decision carefully, especially for matters regulated by a specific policy. In their decisions, Crown Prosecutors I observed discussed at length what evidence was available and whether it was admissible in court, reliable and credible. They rarely dedicated lengthy explanations to the public interest test, often simply writing ‘public interest met’, in line with the Code’s presumption in favour of prosecution. However, when there was some doubt about whether or not it really was in the public interest to prosecute, they detailed their reasons for their choice further. As the Code for Crown Prosecutors is not the only document guiding prosecutorial discretion in the CPS, I observed on numerous occasions prosecutors mentioning in their recorded decisions that they had applied the relevant policy: ‘I have considered and applied the CPS DV [Domestic Violence] Policy, the CPS DV Guidance and the DV Aide Mémoire’, ‘as a perceived racist incident I apply CPS policy of dealing with Race Crimes’, ‘I have assessed the manner of driving in line with the objective criteria set out in CPS policy and guidelines re “prosecuting cases of bad driving”’. Although I only rarely witnessed CPS prosecutors read policies or legal guidance, this does not necessarily mean that it

³⁸¹ Either-way offences are middle-ranking offences which can be tried either in the magistrates’ court or the Crown Court. CPS prosecutors must make submissions to the magistrates’ court about where the defendant should be tried, i.e. whether, on the facts that they have outlined, they believe that the sentence passed if the individual is found guilty will exceed the magistrates’ maximum sentencing powers.

³⁸² The Human Rights Act (HRA) 1998 came into force in 2000 to ensure that the rights contained in the European Convention on Human Rights (ECHR) were directly enforceable in British courts. The HRA makes it unlawful for any public body, including the CPS, to act in a way which is incompatible with any of the ECHR rights incorporated into domestic law by the HRA. CPS prosecutors must therefore ensure that the prosecution service complies with its obligations under the HRA.

only represented token compliance with the policies, as they might already be familiar with the rules defined by the policies. Nevertheless, this appears to indicate their perceived need to mention the policies to satisfy a potential reviewer.

The CPS monitors the exercise of discretion in individual cases closely. CPS Core Quality Standards (CQS) were introduced in 2010, under the leadership of the former DPP, Keir Starmer QC.³⁸³ Compliance with the standards is assessed through a process by which CPS managers evaluate the quality of casework on a dip-sample of case files. The scheme requires CPS managers to answer set questions on each case and decide whether the relevant CQS has been ‘fully met’, ‘partially met’ or ‘not met’. These set questions include: was the correct Code test applied and was the decision compliant with that test? Were the relevant CPS policies applied? Does the decision include proper case analysis and case strategy? Does the decision mention relevant applications and ancillary matters? Does the decision give appropriate guidance and instructions to court prosecutor? Crown Prosecutors receive feedback on each case reviewed by a manager (one or two per month in the individual record I was allowed to consult), and are also given a monthly ‘individual performance record’ which compares each lawyer’s CQS assessments and other targets (e.g. average consultation time for charging decisions) with the ‘Area Lawyer Average’.

The CPS also monitors its performance on a more macro-level, through a list of key priority targets and indicators followed by special audits. During my fieldwork, I was given access to a document entitled ‘Efficiency & Effectiveness Measures 2012/13 Performance’ which listed the key priority targets and highlighted in red, yellow or

³⁸³ An amended set of CQS were published by the DPP in April 2014 <http://www.cps.gov.uk/publications/casework_quality_standards/index.html> accessed 22 September 2014.

green the performance of the area, depending on its deviation or not from targets. In this document, the key priority targets were identified as guilty plea rates and disposals, domestic violence, attrition and trial effectiveness. Each key priority target comprised specific indicators: for example, the ‘attrition and trial effectiveness’ target included the effective trial rate, the cracked trial rate, the ineffective trial rate, the average time from charge to first court listing and the average time from first listing to trial.³⁸⁴ This report was used as a control panel by CPS managers, alerting them to problems and allowing them to look into issues in more detail through targeted audits. Accordingly, the report triggered an audit into cracked and ineffective trials, which looked into the specific reasons for those failures³⁸⁵ and for ‘actions to improve performance’. The report was also accompanied by an ‘Attrition Thematic Final Report’ which summarised the findings of three reviews ‘to examine the following areas of the case file process to establish an understanding of the causes of attrition: investigation, evidential file quality, police supervision of the investigation and file building process, charging/report for summons decisions, administration of the case file process.’³⁸⁶ the first review audited 199 volume crime cases (including criminal damage, assault, public order, drugs, theft, burglary); the second review scrutinised 50 road traffic cases and the third review went through 38 domestic violence cases.

In certain sensitive cases, the decisions made by Crown Prosecutors are systematically reviewed by a senior manager before the decision is made public. In the area I observed, all cases of fatal road accidents were originally reviewed by a specially-

³⁸⁴ An effective trial follows its course on the scheduled date. A cracked trial is a trial at which a guilty plea is entered or the prosecution offers no evidence, rendering the trial unnecessary. An ineffective trial is a trial that does not go ahead on the scheduled date because the parties or the court are not ready, leaving the issue unresolved and a trial still necessary.

³⁸⁵ Court statistics record the reasons for cracked or ineffective trials from the following list: late guilty pleas, witness problems, insufficient evidence, public interest, late service of evidence, CPS not ready, failure to disclose unused material, absence of prosecution witness.

³⁸⁶ Local Policing Support – Attrition Thematic Final Report – October 2012.

trained Crown Prosecutor who recommended whether or not a charge of causing death by dangerous or careless driving would be appropriate. Their recommendation was then referred to a District Crown Prosecutor and even the Senior District Crown Prosecutor who could both suggest amendments to the decision. The decision was further escalated to the Assistant Chief Crown Prosecutor of the area before being announced to the family of the deceased by the original reviewing lawyer who would explain the decision to them. Similarly, cases involving accusations of sexual assaults against a teacher are also escalated to a District Crown Prosecutor and the Senior District Crown Prosecutor before a decision is made. Furthermore, serious, sensitive and complex cases are dealt with at the national level directly. Three specialist casework divisions deal with the prosecution of all cases involving serious crime, terrorism, fraud and other challenging cases that require specialist experience (Special crime and counter-terrorism division, Specialist fraud division and Organised Crime division). Certain media-interest decisions are even reviewed by the DPP herself. For example, the DPP recently reviewed the decision taken in the case of Eleanor De Freitas, a young woman whose death was just days before her trial for perverting the course of justice in relation to an alleged false rape claim.³⁸⁷ Similarly, the decision not to prosecute the parents of Daniel James, who committed suicide, with his parents at his side, at a Dignitas clinic in Switzerland was taken by the then DPP personally.³⁸⁸

This tightening of central control over individual prosecution decisions can be linked to the attempt to reinforce CPS legitimacy.³⁸⁹ There would be no sense in issuing detailed prosecution guidelines if there was no control over their implementation on the ground. The statistics collected by the CPS are made available in CPS reports

³⁸⁷ <http://www.cps.gov.uk/news/latest_news/eleanor_de_freitas/> accessed 15 January 2015.

³⁸⁸ <http://www.cps.gov.uk/news/latest_news/179_08/index.html> accessed 15 January 2015.

³⁸⁹ See chapter 3.

which are presented to Parliament and published on its website, easily accessible by the public at large and the media.³⁹⁰ Their importance should not be underestimated as they allow the CPS to regularly demonstrate their capacity to obtain effective results.

However, the courts' willingness to open prosecutorial decisions to judicial review and reports by the CPS independent inspectorate could also have encouraged greater central control. Although reluctant to interfere with prosecutorial discretion,³⁹¹ courts in England and Wales treat prosecution decisions as susceptible to judicial review if the Crown Prosecutor has failed to act in accordance with the relevant prosecution policy.³⁹² With the proliferation of policy and guidance increasing the risk of litigation, the CPS understandably try to minimise this risk by ensuring that individual decisions conform to policies. Furthermore, the internal control system of the CPS is supplemented by an independent external body, Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI). Established in 2000,³⁹³ HMCPSI carry out inspections into the work of the CPS and other prosecuting agencies. They make recommendations and advise the DPP on the performance of CPS areas and of the CPS as a whole. Many of their reports recommend that recording and monitoring of CPS decisions need to improve, thus advancing the bureaucratisation of the CPS. For instance, they conducted a thematic review of the disclosure of unused material by the CPS in 2000 and recommended, *inter alia*, that prosecutors endorse their opinion whether any material revealed might undermine the prosecution case, and record the

³⁹⁰ <<http://www.cps.gov.uk/publications/reports/index.html>> accessed 30 June 2015.

³⁹¹ *R. v. DPP, ex p. Manning and Another* [2000] 3 W.L.R. 463.

³⁹² *R v DPP ex p C* [1995] 1 Cr App R 136, 141: in this case a CPS decision not to prosecute was quashed because (see at 144) the decision-maker had failed to have regard to one of the matters identified in the relevant part of The Code for Crown Prosecutors.

³⁹³ Crown Prosecution Service Inspectorate Act 2000.

reasons for it on the file, or upon a disclosure record sheet within the file.³⁹⁴ The completion of a separate disclosure record sheet was adopted in the area I observed as a result of HMCPSI report, adding to the list of forms having to be completed by prosecutors when making decisions. In 2012, it commended the CQS monitoring scheme, calling for it to be developed further.³⁹⁵

III. From professional to accomplished technician

Nicolson and Webb list six main characteristics for professions such as law and medicine: use and deployment of skills and technical knowledge; presence of some form of certification of competence; sense of homogeneity with other members of the same profession; organisational autonomy in the delivery of professional work; commitment to high ethical standards and presence of codes of professional ethics.³⁹⁶ Many research studies have documented the rise of the professions and their subsequent evolutions.³⁹⁷ In a 1999 article, Kritzer argues that '[l]awyers increasingly find themselves working not as independent professionals but as employees of bureaucratically organized law firms, corporations, and government.'³⁹⁸ He draws a parallel between what happened to skilled craftspeople during the Industrial Revolution and what is happening to the legal profession in our modern societies:

The rationalization of the production process, combined with the invention of machines, eventually led to the development of the factory.

³⁹⁴ Crown Prosecution Service Inspectorate, 'The Thematic Review of the Disclosure of Unused Material' (CPS, 2000).

³⁹⁵ HM Crown Prosecution Service Inspectorate, 'Thematic review of the CPS Core Quality Standards Monitoring scheme' (HMCPSI, 2012) <http://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/CQSM_thm_Mar12_rpt.pdf> accessed 21 January 2015.

³⁹⁶ Donald Nicolson and Julian S Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press 1999) ch 3.

³⁹⁷ Keith M Macdonald, *The Sociology of the Professions* (Sage 1995); Julia Evetts, 'A New Professionalism? Challenges and Opportunities' (2011) 59 *Current Sociology* 406; Julia Evetts, 'Professionalism: Value and Ideology' (2013) 61 *Current Sociology* 778; Michael FD Young and Johan Muller (eds), *Knowledge, Expertise and the Professions* (Routledge 2014).

³⁹⁸ Herbert M Kritzer, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World' (1999) 33 *Law & Society Review* 713, 713–714.

Industrialists were able to isolate the individual tasks needed for production and then hire workers each with just enough skill to carry out one or several of those tasks. The result was cheaper production of goods, a shift from human capital in the form of skilled craftspeople to industrial capital, and the effective end of many crafts except for highly specialized or artistic applications.³⁹⁹

Applied to the work and organisation of the CPS, the analogy becomes particularly relevant.

A. Routinisation and delegation of casework at the CPS

I have described above the segmentation of the prosecution process into individual tasks and the allocation of these tasks to different members of staff. This organisation of CPS work leads to routinisation. Individual files lose their specificity, as prosecutors concentrate on the task at hand (charging, review for trial, reply to a letter from the defence, etc.), rather than on the final outcome. The multiplication of policies and the standardisation of decision-making also seem an attempt to erase all subjectivity in prosecutorial decisions. CPS prosecutors are at risk of becoming accomplished technicians, simply applying policies and following a standard procedure, rather than independent legal professionals. For some CPS prosecutors I interviewed, policies provide ready-made justifications if their decision is being questioned.

The reality is if you adhere to a policy then if something subsequently goes majorly wrong, at least you know that you've done things in accordance with policy. If you were to step outside the policy and something were to go wrong, that's when you would find yourself in difficulties. [Interview respondent EW28]

I think [CPS policies] are good, especially the Charging Standards around things like assaults (...) If we then get further down the line and the judge says 'well, this should have been section 18, not section 47', we can say 'well, actually we have done this in line with our Charging Standards which is a nationwide document' and it just gives some clarity. [Interview respondent EW20]

³⁹⁹ *ibid* 723–724.

Although many interviewees declared not feeling constrained by the policies or that policies were only common-sense, a slightly different point of view was put forward by a prosecutor I interviewed when she was asked about CPS policies and guidance:

It's very micro-managed. It's almost like you're kind of boxed in by it, in the sense that it removes your discretion. A lot of cases, as a lawyer, are intuitive. You're dealing with human nature after all. And the thing about policies is they tend to kind of channel down a certain aspect and you have to do everything one particular way. And it removes to a degree your discretion, to use your own judgment on a case and say 'look, from personal experience, I can intuitively say this case is going nowhere'. (...) It does produce consistency, that's one thing, and I suppose that's something important in the criminal justice system. But I think you will always have some decisions that fall outside the guidance, which would be an intuitive decision, which would probably be a correct estimation of where the case is going but, at the end of the day, because it doesn't fit within the policy, it will be considered the wrong decision. [Interview respondent EW1]

The fragmentation of CPS casework into several differentiated tasks allows for the delegation of some of these tasks to personnel who are not legally qualified. Financial considerations have pushed the CPS to 'maximis[e] the use of paralegal staff'.⁴⁰⁰ On the Crown Court team, paralegals do all the administrative work on file, but reviewing case files and representing the prosecution in court is strictly reserved to qualified lawyers. In the magistrates' court team, however, many prosecutorial tasks are not carried out by solicitors or barristers, but by staff who are not legally qualified. Thus, the vast majority of cases where a not guilty plea has been entered are reviewed by paralegal officers for trial, rather than lawyers. Reviewing cases for magistrates' court trials involves making sure that all the necessary evidence has been sent by the police and weighing the strengths and weaknesses of each case. Paralegal officers also deal with correspondence from the defence, the witness care bureau, the police and the

⁴⁰⁰ 'Optimum Business Model and Paralegal Career Family Structure', in Crown Prosecution Service, 'Annual Report and Resource Accounts 2010-2011' (2011) <http://www.cps.gov.uk/publications/reports/2010/optimum_business_model.html> accessed 14 April 2014.

court. Even prosecuting cases at court is not the exclusive preserve of CPS lawyers. In the magistrates' court, Associate Prosecutors (AP) – rather than Crown Prosecutors – are empowered to represent the CPS for most hearings. APs are CPS employees authorised to review and present 'straightforward' cases at magistrates' courts or even, for some of them, to undertake trials involving non-imprisonable summary offences. Although they undergo some training on legal issues,⁴⁰¹ they are not legally qualified. According to the CPS Inspectorate, APs represented the CPS in almost 29 percent of magistrates' court sessions in 2013-14.⁴⁰²

This delegation of large chunks of casework to paralegal officers led to lawyers simply filling the gaps between what non-lawyers were authorised to do. In the office I observed, Crown Prosecutors thus rotated between the magistrates' court team and the Crown Court team (and sometimes the charging team too). This organisation led to some difficulties, in particular with regards to the preparation of magistrates' court trials. Reviews before trials were conducted by paralegals, however, they were not authorised to make decisions on cases. Instead, they gave an oral summary of the case to a Crown Prosecutor, summing up what they thought of the case, whether they thought there was enough evidence to prosecute or whether additional evidence would be needed, and whether they thought ancillary applications were appropriate (bad

⁴⁰¹ See chapter 6 for more details on AP training.

⁴⁰² HM Crown Prosecution Service Inspectorate, 'CPS advocacy strategy and progress follow-up' (2015) 6.

character,⁴⁰³ hearsay,⁴⁰⁴ special measures⁴⁰⁵). Crown Prosecutors had to make any relevant decision, such as discontinuing a case or changing the charges and deciding what unused material should be disclosed to the defence. Some Crown Prosecutors told me that they reviewed the case again before making any decision, which led to some duplication of work. However, some decisions – in particular in cases which appeared solid from the paralegal review – were made purely on the basis of the oral summary from the paralegal who reviewed the case. Only if the paralegal officer expressed some doubts about the prosecution case did Crown Prosecutors have a closer look. Given that paralegal officers, although they have a long experience in the CPS,⁴⁰⁶ have little training to carry out legal reviews, this is problematic, especially since cases are not filtered by a lawyer, but divided up by administrators.

I don't really understand the criteria for what's dealt with by paralegal officers and what's dealt with by reviewing lawyers. [This Crown Prosecutor goes on to explain that she sometimes deals with motoring cases whilst paralegal officers deal with domestic violence cases.] I just can't quite see the logic behind the way it works. I would have thought the better use of the paralegal officers is to deal with the more straightforward matters: the motoring, as long as they stay straightforward, public order offences, minor assaults... and let the lawyers in the unit deal with the more serious cases: domestic violence, racially aggravated cases, serious public order, things like that. [Interview respondent EW16]

⁴⁰³ Bad character evidence encompasses evidence of previous convictions and other evidence amounting to 'reprehensible conduct' (Criminal Justice Act 2003, s.112). It cannot be automatically adduced under English law of evidence, but must be relevant to the case to be admissible. The parties must make an application to the court for permission to present bad character evidence at trial. It is often used to prove propensity to commit like-offences and untruthfulness.

⁴⁰⁴ Hearsay evidence is a statement not made in oral evidence in criminal proceedings (Criminal Justice Act 2003, s.114). It differs from direct evidence which is given under oath (with potential criminal liability for perjury if the testimony is subsequently proven false) and may be cross-examined. A statement reported in hearsay is not generally subject to these safeguards. For example, if a witness reports what somebody else told them, the person making the original statement was not testifying under oath and was not subject to cross-examination. This is not normally admissible under English law of evidence but the Criminal Justice Act 2003 provides several exceptions to the rule. Again, the parties must apply to the court for authorisation to adduce hearsay evidence.

⁴⁰⁵ 'Special Measures' are a series of provisions that help vulnerable and intimidated witnesses give their evidence in court and can help relieve some of the stress associated with giving evidence. For example, screens may be made available to shield a witness from the defendant. Each party must apply to the court for special measures to be made available for the witnesses it calls to testify.

⁴⁰⁶ The three paralegal officers I interviewed had each more than 25 years' experience at the CPS.

Although this Crown Prosecutor does not appear to be aware of it, this distribution of the work could be explained by the fact that minor road traffic offences are often dealt with by summons.⁴⁰⁷ Summons are issued by the police without CPS authorisation and only come to the CPS attention if cases are contested. The review of the case prior to trial is therefore the first opportunity for the CPS to review the case. Conversely, cases that have been charged are prosecuted by the CPS from the first hearing at the magistrates' court and should therefore have been reviewed at this stage. It should be noted, however, that such reviews are usually conducted by Associate Prosecutors, rather than fully qualified solicitors.⁴⁰⁸ Only if the Associate Prosecutor or the paralegal officer reviewing a case identifies it as too complex will a Crown Prosecutor be asked for their input.

B. The status of magistrat as protection of procureurs' autonomy

Although employed by the state, French *procureurs* are not civil servants (in contrast with CPS prosecutors) but *magistrats*.⁴⁰⁹ As such, they find themselves in a paradoxical position: they are part of the judiciary whose independence is constitutionally protected, but are also part of a hierarchy with the Minister of Justice at the top. Their status of *magistrat* appears to empower *procureurs* to act independently from their hierarchy in certain cases. As *magistrats*, they see themselves as subservient to the rule of law first and foremost. This accountability to

⁴⁰⁷ A summons is a written order to attend a court to answer an allegation. It is an alternative to a charge to start a prosecution.

⁴⁰⁸ See chapter 6.

⁴⁰⁹ There is a direct line of management from the lowest grade of public prosecutor in a local CPS office up to the national head of the prosecution service, the DPP. Thus, section 3 POA describes the prosecutorial functions it lists as 'Functions of the Director', not Crown Prosecutors, and section 1 (6) states that 'every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director'. During the parliamentary debate, some members of the House of Lords suggested giving a special status to Crown Prosecutors to protect them from pressures, some going as far as proposing a status 'comparable to that of a circuit judge' (HL Deb 29 November 1984, vol 457, col 1061 [Lord Elystan-Morgan]. See also HL Deb 29 November 1984, vol 457, col 1021 [Lord Elwyn-Jones]). The government categorically rejected this suggestion and insisted Crown Prosecutors were civil servants just like any other.

the law is dominant in the professional discourse of *magistrats*. The compendium of ethical obligations of *magistrats*⁴¹⁰ issued by the CSM in 2010 provides in its preamble that: ‘As members of the judicial authority, *magistrats* draw their legitimacy from the law, which requires them to be independent and impartial, principles also imposed on the other powers. Disregarding these imperatives would compromise public confidence.’ The tension between this accountability to the law and hierarchical subordination was expressed clearly by one *procureur* I interviewed:

Procureur (referring to the hierarchical structure of the *parquet*): well, the hierarchical functioning is clear in a *parquet*, there is a head, the Code says it, but at the same time, we are not in an administrative system of transfer of powers or signatures. ***Magistrats don’t get their power from the head of the parquet but from the law.*** (Emphasis added) [Interview respondent FR1]

Procureurs I interviewed were almost unanimous in assuring me that they would refuse to carry out an act demanded by their superior if they disagreed with it, even giving me examples of occasions when they had actually decided not to follow an order.

Procureur: Personally, I believe that my status as *magistrat* means that if I really disagree and I have a moral dilemma on what I’m asked to do, I must tell my superior and my superior can always deal with the case himself. I have a duty to be loyal which means that when I am going to make a decision which I know goes against what my manager would have decided, I have a duty to inform him and if he disagrees with me, he can always take the file back.

[He went on to describe an occasion in his former post where he had a disagreement with his superior and refused to carry out a direct order.]

We receive instructions telling us to do this rather than that, I follow them, and it doesn’t bother me. But, where we do have the status of *magistrat* is when I think – and I hope to be able to carry on exercising my role like this – is to be able to say: ‘Here I can’t [do as his superior has asked]. I morally cannot do it. And I won’t do it’. Then, the *Procureur [de la République]* does what he feels like, maybe I’ll be disciplined for not respecting the instructions! Personally I think... when it’s explained

⁴¹⁰ Conseil supérieur de la magistrature, *Recueil des obligations déontologiques des magistrats*. 2010 (Dalloz 2010) <<http://www.conseil-superieur-magistrature.fr/recueil-des-obligations-deontologiques-des-magistrats>> accessed 22 March 2012.

properly... I did discuss it afterwards with my previous *Procureur* [*de la République*] and she understood: she asked me once, then twice, she saw I wasn't going to do it, she understood the moral dilemma I had. [Interview respondent FR7]⁴¹¹

Procureurs interviewed by Mouhanna expressed similar views⁴¹² and those interviewed by Hodgson considered their accountability to the courts more important than their accountability to their hierarchy.⁴¹³

This relative independence of subordinates from their direct hierarchy is further enabled by the fact that their appointment, career progression and discipline matters are dealt with centrally, by the Ministry of Justice, in consultation with the CSM. The head of the local *parquet* I observed explained to me that, although she carried out appraisals of her staff by giving them a performance mark, she had no influence over who came to work in her *parquet* and was not in a position to dismiss any of her subordinates, by contrast to the power of Chief Crown Prosecutors (CCP) in England and Wales to hire or dismiss Crown Prosecutors. Furthermore, this ability to disobey orders from their hierarchy is officially recognised in article 5 of the Ordonnance of 22 December 1958⁴¹⁴ regulating the status of the *magistrature* which sets out the subordination principle, but immediately adds: 'in court, their speech is free.' This means that *procureurs* must follow their hierarchy's instructions in written decisions, but are free to 'make such oral submissions as [they] believe to be in the interest of justice.' (Art 33 CPP). This principle was illustrated in my own fieldwork, when I attended weekly meetings of the local *parquet*. At one of these meetings, the

⁴¹¹ The exact same view was expressed by other *procureurs*: FR3, FR4, FR8, and FR9.

⁴¹² Mouhanna, 'Les Relations Police-Parquet En France : Un Partenariat Mis En Cause?' (n 94) 513.

⁴¹³ Hodgson, 'Hierarchy, Bureaucracy, and Ideology in French Criminal Justice' (n 283) 238–239.

⁴¹⁴ Ordonnance no 58-1270 of 22 December 1958 *portant loi organique relative au statut de la magistrature*.

Procureur de la République reminded her subordinates of the national policy for prison sentences defined in a recent circular from the Minister of Justice.

I'm going to forbid submissions for prison sentences below six months!⁴¹⁵
(...) You might not have realised, but we have a new government who clearly indicated that they didn't want short prison sentences to be requested. (...) Find something else, community work, whatever! (...) Personally, I think heavy fines are more effective sentences.

This prompted a real debate between members of the *parquet* who clearly disagreed with their superior. In the end, she had to relent:

Procureur de la République: Well, I don't care what you say at the hearing.

Substitut: You just said you want to forbid us to do this!

Procureur de la République: I know, but I respect the Constitution: as long as your written submissions comply, I don't mind.⁴¹⁶

The meetings were clearly seen as an opportunity to have an open debate about different themes and to give one's opinion, even when disagreeing with the *Procureur de la République*. Of course, freedom of speech only applies at court and the vast majority of prosecutorial decisions are in fact taken before the trial. Since they are in writing, they must conform to hierarchical decisions. Nevertheless, the mere existence of this possibility reflects the central belief that individual *procureurs* are legitimate in applying the law and making decisions in the public interest, even when it goes against direct hierarchical orders (potentially from elected politicians). This accountability to the law was also recognised by Parliament when it decided to strictly restrict the use of mediation for domestic violence cases by law, an admission that policies were not sufficient. Coupled with the strong belief in 'individualisation' or 'adaptation' of decisions to the circumstances of specific cases in the French criminal

⁴¹⁵ In French law, public prosecutors ask for conviction or acquittal and suggest a sentence in their submissions to the court.

⁴¹⁶ This extract from my fieldwork was also used in the methodology chapter to illustrate the open-ended character of direct observations.

justice system, it helps protect the individual discretion of *procureurs* to a large extent, in tension with the official discourse of centralised hierarchy and equality.

Nevertheless, failures to reform the appointment and promotion process of *procureurs* means that doubts over their impartiality in high-profile political scandals remain. Recently, in a case involving the interception of communications of former President Nicolas Sarkozy, both the Minister of Justice and the Minister of the Interior denied having been informed of the procedure, whilst Sarkozy accused the socialist government of using the criminal justice system for political gains. Furthermore, ECtHR decisions challenging the characterisation of the *procureur* as judicial officer could mean a split of the *magistrature* and/or a reduction of *procureurs*' powers. Finally, access to prosecution policy is difficult, as it is contained in scattered circulars published in chronological order, rather than by subject on the Ministry's website. It is impossible to know, just looking at a circular, whether it presents the current policy or whether its provisions have since been repealed by later circulars or even Acts of Parliament. This lack of transparency coupled with the lack of accountability for prosecutorial decisions could undermine public confidence. Since their status of *magistrats* is the main basis for their legitimacy claim, *procureurs* could be forced to amend this claim in the future.

Conclusions

The prosecution process at the CPS has become akin to an assembly line, with different members of staff carrying out individual tasks on each case at specific stages of the process. This organisation of the workload means that each decision will be reviewed at a later stage by a different prosecutor. Managers also perform quality checks on

individual decisions to make sure that policies are applied properly. This segmentation and rising bureaucratic accountability contribute to the evolution of the profession of CPS prosecutor. A far cry from the traditional image of the lawyer as an autonomous professional, CPS prosecutors sometimes feel like mere cogs in bureaucratic machinery, simply applying standard policies to individual cases. Some of their workload has even been delegated to unqualified members of staff to make further efficiency savings, further developing the metaphor of the assembly line. In an industrial factory, workers on the assembly line have just enough skills to carry out the specific task assigned to them, but do not have the expertise to make the whole item on their own. Similarly, Associate Prosecutors and paralegal officers are not qualified to make all prosecutorial decisions.

CPS employees are held closely to account for their decisions, but the segmentation of the process means that they lack an overview of the whole process and this can induce a feeling of disempowerment for prosecutors who have little influence on the final outcome of cases. As outcomes come from several decisions taken by different members of staff, any unsuccessful outcome can rarely be traced back to a particular individual. As a result, Crown Prosecutors did not feel responsible for those failures. Paradoxically, the accountability of prosecutors is greater for individual decisions than for final outcomes. Although all these measures are designed to ensure accountability and efficiency, they result in greater inefficiencies taken together as CPS prosecutors are discouraged to discontinue weak cases as early as possible, instead keeping them in the system longer than necessary.

The contrast with French prosecutors could not be starker. Although the French criminal justice system is traditionally described as highly hierarchical and bureaucratic, data I collected paint a different picture. The status of *procureurs* as

magistrats allows them to have broad discretionary powers, as policies are not strictly enforced. Although targets do exist, there is no audit culture comparable to that existing in England and Wales, which could potentially enable an evaluation of what went wrong if required, as the reasons for decisions are not recorded. The lack of transparency in prosecution policies noted in the previous chapter, coupled with deficient accountability processes and the current debates around the unity of the *magistrature* could ultimately threaten the legitimacy of *procureurs*.

Chapter 5 – Reviewing cases in the prosecutor’s office

Public prosecutors are tasked with reviewing cases investigated by the police in order to decide whether to prosecute or not. Empirical studies have shown that, in practice, the prosecution decision is largely determined by the police in both jurisdictions. Despite formal independence from the police, previous empirical studies have demonstrated that the CPS is powerless to challenge the police-constructed case.⁴¹⁷ Having complete control over what evidence is collected and which questions are asked, the police remain able to define the prosecution decision for the most part. In France, the supervision of investigations by a judicial officer – the *procureur* or the *juge d’instruction* – is supposed to prevent police malpractice and avoid the construction of a case against the main suspect through systematic disregard of exculpatory evidence. In practice, however, empirical research has revealed that judicial supervision ‘is essentially distant, retrospective and bureaucratic’⁴¹⁸ and the investigation of crime is often a police-dominated process.

Several reforms have taken place since data was collected for these studies and the aim of this chapter is to evaluate the impact of these changes on the relationship between police investigators and public prosecutors. Whilst both criminal justice systems expect public prosecutors to review evidence collected by the police neutrally, different legal structures and traditions underpin this goal. I will show how the principle of strict separation between investigative and prosecuting functions has been fully embedded in CPS professional culture and largely explains CPS prosecutors’ reactive attitude towards criminal investigations. Different legal structure and tradition

⁴¹⁷ McConville, Sanders and Leng (n 39).

⁴¹⁸ Hodgson, *French Criminal Justice* (n 62) 246; See also Mouhanna, *Polices judiciaires et magistrats* (n 65); Bastard and Mouhanna (n 67).

mean that French *procureurs* take a more cooperative stance in investigations, but the closeness between police officers and *parquets* has recently been criticised and prompted calls for *procureurs* to keep their distance from investigations to ensure their impartiality, in a move akin to a re-formulation of the Philips principle.

In the second part of this chapter, I will examine the impact of these legal structures and traditions on the relationship between public prosecutors and investigators in each system and depict how the CPS is the least powerful party in their asymmetric relationship with the police, which fuels tensions and resentment between the legal actors with no equivalent in France due to different structures of authority. Whilst in England and Wales, the allocation of the functions of investigation and prosecution to two separate entities is supposed to ensure a balance of powers, public prosecutors have authority over police investigations in France. Finally, whilst fully objective reviews of police investigations by public prosecutors remain an inaccessible objective, I will show how public prosecution services can regain some influence over the police and their investigations, in particular through national policies agreed with the police, as well as local policies and inter-agency cooperation.

I. Neutral reviews: the impossible task of public prosecutors

A. *The limits of CPS reviews of investigations*

1. *The centrality of the Philips principle in the CPS ethos*

The Royal Commission on Criminal Procedure formulated the ‘Philips principle’ in its 1981 Report which was at the root of the creation of the CPS.⁴¹⁹ According to this principle, investigation and prosecution are separate functions and should be exercised

⁴¹⁹ Philips (n 26).

by independent institutions. In support of this divide, the Commission mentioned in particular the reluctance of police investigators to abandon a case despite its weaknesses once they had invested time and resources in investigating it (para 6.24).

The CPS was established to ‘make the conduct of prosecution the responsibility of someone who is both legally qualified⁴²⁰ and is not identified with the investigative process’ in the interests of fairness (para 7.3). The police remained in charge of investigations, but lost the power to prosecute cases in court to the newly created CPS.

This attempt at strict task division still forms part of the CPS ethos today: ‘the police have got their job to do, and I think we have ours’ [interview respondent EW25]. The influence of the Philips principle on CPS prosecutors’ perception of their relationship with the police can be seen in the fact that many of them believe it was important for CPS prosecutors to ‘keep their distance’ from the police [interview respondent EW24]. Just as justice must not only be done, but must be seen to be done, many believed that the CPS had to be seen to be independent from the police. Thus, a public prosecutor whose role involved regular meetings with police officers was embarrassed when she was invited to some drinks with these officers in front of me, although she told me afterwards that ‘it’s not because you’re friendly with them that you’re not independent’. Other CPS prosecutors I interviewed expressed the belief that CPS prosecutors should not socialise with police officers:

To be honest, I try to keep a certain professional distance from them. So I have relatively minimal contact with them. I know a lot of other prosecutors don’t and they’re on first name terms with the police and have a lot of contact with the police. I’m not convinced that’s a good idea really. I think you should keep a certain distance from them, keep your objectivity. And there are ways of communicating to the police, you’re really meant to go through the case builder, that’s what they’re there for.

⁴²⁰ As explained in the previous chapter, the CPS employee reviewing the police case is not always legally qualified, as paralegals and Associate Prosecutors play a central role in the CPS decision process. See chapter 6 for further details.

(...) The danger of being too friendly with the police is that you do lose your objectivity. [Interview respondent EW19]

Somewhat departing from the strict partition advocated by the Philips Commission, several official reports under New Labour recommended that the CPS and the police develop closer working relationships and that CPS prosecutors should be based at police stations.⁴²¹ For some time, CPS prosecutors were thus working at police stations, but this experiment had been stopped in the area I observed when I started my fieldwork due to budget cuts. Some prosecutors were particularly wary of public perceptions of CPS sharing the police working space.

I mean if you go back maybe five or six years, CPS officers were based in police stations and I always think that gave the wrong impression. Even though I still think they were independent, I think outwardly it gave the wrong impression. [Interview respondent EW18]

Some prosecutors reported feeling pressurised by police officers whilst working at the police station and preferred reviewing cases over the phone as it allowed them to be ‘just that little bit more detached’ [interview respondent EW1]. By contrast, others preferred working at the police station arguing that it allowed them to build trust with police officers and to develop their local knowledge. They contended that it did not affect their independence:

[E]ven when we were working daily with the officers, I don’t think it affected anything, I just think it helped you explain why you were needing additional stuff, why you were making the decisions you were. Because they knew you, they trusted you. It didn’t alter anything I did because I knew that I might bump into them round the corner when I was making coffee or in the loo. [Interview respondent EW23]

An on-paper review is often perceived by CPS prosecutors as the best safeguard for impartiality and the police are seen by the CPS as being too emotionally attached to cases. Yet, CPS prosecutors risk reducing their decisions to purely technical and

⁴²¹ Narey (n 41) 3; Glidewell (n 42) 127–128.

bureaucratic ones. Thus, a charging lawyer told me that it was difficult to tell a police officer who had been working on a case for three months that it was going nowhere. She argued that it was easier to be detached, when studying the file on paper without meeting the protagonists, ‘to forget they are people, but just witness, defendant, victim’. Her opinion was echoed by other prosecutors I interviewed:

I think that the police can get too involved. They know that X is, or they think he is, doing burglary, so once they capture him they’re more likely to think he has done it, than looking at it from slightly... a step or two away, which is how the court would look at it... from an independent point of view rather than the police local knowledge, information that’s not necessarily evidence that you can use, it’s just hearsay and what people in the locality say, whereas we’ve got to look at the evidence. [Interview respondent EW2]

Because, obviously, police officers are dealing with the victims, they’re looking at it a bit more from an emotional angle, whereas we aren’t, we’re looking at it purely from a legal point of view and I think you have to have that emotional detachment to a degree. Without being completely unemotional! You know, people are victims of crime and we’re here to do the best for them. But we have to apply the rules and we can do that more if we’re not emotionally involved in the cases. [Interview respondent EW20]

These comments echo the views expressed by French *procureurs* who similarly believe they bring a different point of view to the investigation. However, whilst *procureurs* would offer this more neutral perspective as the investigation is ongoing, CPS prosecutors only intervene once the police consider the investigation complete.

2. *The essentially reactive role of the CPS*

This insulation of the investigating and prosecuting functions means that, in the vast majority of cases, the CPS are only asked for their input once the police consider that the investigation is finished. Research conducted shortly after the establishment of the CPS shows that, contrary to expectations,⁴²² the new independent prosecution service

⁴²² The Philips Commission recommended a strict separation between the investigation and prosecution functions to be entrusted to two equally powerful institutions: Philips (n 26).

remained in a subordinate position to the police, because the latter retained total control over many key decisions.⁴²³ Although there have been some attempts at reform over the past thirty years, the police still control the CPS workload. Contrary to French investigators who must report all crimes to the *parquet*, English and Welsh police officers are able to drop cases if they consider that no crime has been committed, that there is not sufficient evidence or that it is not in the public interest to prosecute. Furthermore, the police have the power to divert cases away from the criminal justice system through alternatives to prosecution, such as cautions. As a result, CPS prosecutors actually make decisions in a limited number of criminal cases. In fact, their caseload is in constant decrease: whilst in 2005-06, the CPS prosecuted over a million cases in the magistrates' courts,⁴²⁴ their caseload fell to just over 640,000 cases in 2013-14.⁴²⁵ This decrease could be due to the early involvement of prosecutors and more cases being dropped prior to charge,⁴²⁶ but the main contributing factors are controlled by the police: lower levels of recorded crime, fewer arrests, and/or more offenders cautioned or dealt with by way of a fixed penalty notice.

Academic commentators have long believed that one of the main reasons for CPS weakness was its late involvement in the proceedings and the fact that the police retained the power to charge, i.e. to initiate proceedings.⁴²⁷ CPS prosecutors receive cases which have already been listed for the first hearing at the magistrates' court and have to decide whether or not to continue with the prosecution. They can decide to

⁴²³ McConville, Sanders and Leng (n 39) 141.

⁴²⁴ Crown Prosecution Service, Annual Report and Resource Accounts 2007-2008, Annex A – Casework Statistics <http://www.cps.gov.uk/publications/reports/2007/annex_a.html> accessed 3 July 2015.

⁴²⁵ Crown Prosecution Service, Annual Report and Resource Accounts 2013-2014, p. 84 <http://www.cps.gov.uk/publications/docs/annual_report_2013_14.pdf> accessed 3 July 2015.

⁴²⁶ See below.

⁴²⁷ McConville, Sanders and Leng (n 39); Brownlee (n 45); White (n 20); Hodgson, 'The Changing Role of the Crown Prosecutor' (n 45); Lewis (n 45).

carry on with the prosecution unchanged, discontinue the prosecution or amend the charges. However, researchers recognise that prosecution momentum built up after a case had been charged, pointing out that '[d]ropping cases on grounds of weakness will antagonize the police and may lose a successful conviction, since (...) the great majority of cases, weak or strong, are disposed of by guilty pleas'.⁴²⁸ Yet the police rarely consult the CPS for investigative advice prior to charging as noted by successive official reports⁴²⁹ and empirical research studies,⁴³⁰ even when CPS prosecutors were based at the police station, in an attempt to remedy this issue.⁴³¹

The potential for the CPS to influence the investigation through investigative advice should not be overstated however. In my own fieldwork, I observed the police asking the CPS for investigative advice in just two instances over four months of fieldwork. The first (case EW-361) was dealt with by the CPS Rape and Serious Sexual Offences (RASSO) team. The investigation was well under way by the time the police requested CPS advice: the victim's allegations were over a year old, the police had collected evidence (forensics, social care, education and medical records, witness statements, computer search, etc.) and the suspect had already been interviewed. Having submitted a file of evidence to the CPS, the police made specific queries regarding evidence to which the CPS prosecutor replied in detail, in particular with regards to further allegations made by the victim, a 7-year old child. In the second instance (case EW-360), the police submitted files of evidence to the CPS prior to arresting any suspect in a large undercover drugs operation. Undercover officers had posed as drug users

⁴²⁸ McConville, Sanders and Leng (n 39) 146.

⁴²⁹ Runciman of Doxford (n 40) 72; Narey (n 41) 3; Glidewell (n 42) 94–95; Auld (n 43) 409; Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary, 'Joint Inspection of the Provision of Charging Decisions' (Criminal Justice Joint Inspection 2015) 25 <<http://www.justiceinspectorates.gov.uk/cjji/inspections/joint-inspection-of-the-provision-of-statutory-charging/>> accessed 21 August 2015.

⁴³⁰ McConville, Sanders and Leng (n 39) 142.

⁴³¹ Hunt and Baldwin (n 49).

and had secretly filmed several transactions with dealers, some of whom had been identified by the police. However, the primary aim of the police in these cases appeared not to be the acquisition of investigative advice – the investigation was almost finished – but to offer the CPS the possibility to carry out an early review to speed up the charging decision later on due to the high volume of cases. As can be seen from these examples, the police rarely consult the CPS during the investigative phase and when they do, the CPS scope for input is limited and dictated by the police.

Since 2006, the police must obtain CPS authorisation before charging in some cases. It was seen by many commentators as heralding a new era for public prosecutors by freeing them from the constraints of police prior charging.⁴³² In practice, however, granting the CPS power to authorise certain charges has not fundamentally altered the dynamic of the relationship between police and CPS. In the cases I observed, almost half of the charges were authorised by the CPS as per the police's suggestion; over 10 percent of the charges were authorised, but were altered by the CPS; just over 20 percent were discontinued and in over 15 percent of cases the CPS asked for further information. The charge remains inherently a police act, even if CPS authorisation is needed in certain cases. In practice, this allows the police to simply bypass the CPS without much consequence.⁴³³ During my fieldwork, CPS staff told me that the police sometimes undercharged cases to avoid having to request CPS authorisation. For instance, offenders were charged with basic offences instead of the specific offences

⁴³² Brownlee (n 45); White (n 20); Hodgson, 'The Changing Role of the Crown Prosecutor' (n 45); Lewis (n 45).

⁴³³ In May 2015, inspectorates found that over a third of charging decisions made by the police in their sample should have been referred to the CPS for authorisation: HMCPSI and HMIC, 'Joint Inspection of the Provision of Charging Decisions' (Criminal Justice Joint Inspection 2015) 4 <http://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2015/05/CJJI_PSC_May15.pdf> accessed 20 August 2015.

of racially aggravated crime because hate crime offences can only be charged with CPS authorisation.

On other occasions, the police simply charged the offender without prior CPS authorisation. A CPS prosecutor thus described case EW-245 as ‘a mess from beginning to end’ and ‘complete rubbish’ due to the police failure to request pre-charge advice: despite having been given a harassment warning for incidents with an elderly relative, the defendant went to their address and started banging on the door, shouting and asking for money. The police were called and the defendant was abusive towards them, with one officer reporting being racially abused by the defendant. The domestic nature of the incident should have warranted CPS advice before any charge was laid, but the police decided to charge the defendant with harassment without seeking such advice. They also charged her with a public order offence, but omitted the racial element despite the defendant’s admission in interview. Furthermore, the harassment charge only covered one incident, which could not constitute a course of action as per the legal definition of the offence. Although failure by the police to ask for CPS authorisation before charging renders the charge illegal, defence lawyers have no way of knowing whether or not the charge was authorised, since CPS reviews are not included in the bundle of evidence disclosed to them. Furthermore, the CPS can rectify the illegality by authorising the charge a posteriori.

Crucially, there is still a strong cultural expectation of the CPS that the police set the premise of their decisions, even when they do not decide what the charges are:

[T]he police only come to us when they have already pre-assessed [the case] and consider that there is enough evidence to charge. It’s really a question of whether we agree. [Interview respondent EW4].

In most instances I observed, CPS prosecutors were provided with a finished product from the police. The police send files to the CPS once they consider the investigation

completed. They send a full file of evidence including a police summary, key witness statements, interview notes,⁴³⁴ record of previous convictions (for the suspect and witnesses if applicable), CCTV footage or notes,⁴³⁵ photographs, medical report, etc. The form the police have to complete to submit a case to the CPS asks them which charges they would like to have considered by the charging lawyer. The CPS therefore has an essentially reactive role – to agree with the police or not. They can ask the police to carry out further investigations and, according to statistics I was allowed to consult, charging lawyers in the area I observed requested the police to gather further evidence in about 17 percent of cases at the time of my fieldwork. However, since the police consider the investigation is finished when they send the case to the CPS for authorisation to charge, requesting further evidence is already perceived as disagreeing with the police. Almost thirty years after the CPS creation and despite some limited reforms, prosecutorial decision-making is still marked by police dominance which stems from their complete control over criminal investigations.

Although the CPS has been criticised for following the police uncritically and failing to assert its independence,⁴³⁶ the vast majority of CPS prosecutors consider that their lack of involvement in investigations guarantees their objectivity and they do not wish to be able to require the police to carry out investigations, nor do they want to be able

⁴³⁴ A full transcript of the interview is only requested for Crown Court cases, after the first hearing at the magistrates' court.

⁴³⁵ If applicable, CCTV footage is included in the police file. However, it is not included prior to the charging decision. The DPP's charging guidance specifies that a copy of the footage should be included in the pre-charge file only when CCTV is the sole evidence to be relied upon. Otherwise, police are instructed to simply summarise the content and identify the offender and/or the offence.

⁴³⁶ McConville, Sanders and Leng (n 39) 124–147; John Baldwin, 'Understanding Judge Ordered and Directed Acquittals in the Crown Court' [1997] *Criminal Law Review* 536, 544–545. In 2003, HM Crown Prosecution Service Inspectorate reported: 'In some CPS Areas, we found that some lawyers were failing to take a robust and proactive approach with the effect that inappropriate charging was not being addressed at the earliest stage.' HM Crown Prosecution Service Inspectorate, 'Report of the Thematic Review of the Justice Gap' (2003) 46 <<http://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/JusticeGapReport0103.pdf>> accessed 20 August 2015.

to meet witnesses or defendants. To the question of whether they wished the CPS would be involved earlier on in the investigation and have supervisory powers over it, most CPS prosecutors showed clear reluctance.

It's not our function, it's not our function; we don't have an investigative role. It's for them to investigate and for us to evaluate the evidence. I mean, when we get advice files, we can tell them what evidence is missing and what we would need to make the case stronger. It's a matter for them how they go and do that. I think our roles would merge and we would lose our independence if we were investigating as well. So, whilst sometimes it is frustrating, no, I don't want to be able to do that. [Interview respondent EW9]

I'm not convinced it would [be a good thing]. I think there probably are two different functions for the state: one is to investigate crime; the other is to prosecute it. And I'm not convinced that the state needs to have the same organisation doing both which is effectively what would happen if we were involved at an early stage or might happen.(...) I think the earlier you get involved, the less independent you become because it becomes a joint operation. And I think when you aren't involved early, or when the police have developed their own tactics, you can bring an independence of mind to it. [Interview respondent EW25]

This strict separation of the investigating and prosecuting functions is not, however, applied equally across the CPS. National specialist casework units and area complex case units work in close collaboration with the police. Prosecutors are involved at the earliest opportunity, 'to create a complementary prosecution team that will see a case through to the end, regardless of whether or not it generates a criminal prosecution.'⁴³⁷

This approach has had some success and it prompted one prosecutor in favour of more CPS power over the police to say that special unit prosecutors do not understand the problems he is facing:

If you spoke to my equivalent at, for example, a special casework division where they are involved in very very serious, high-profile work, if I said to, you know, one of their lawyers 'oh the police don't bring me the evidence that I ask them to', they wouldn't know what I was talking about. Because they do very much joined up, planned arrest, planned surveillance, planned operations, so they work hand in glove with the

⁴³⁷ HMCPSI, Report on the Inspection of the Organised Crime Division of CPS Headquarters, September 2009, p. 13.

police. But at my level, you know for such a volume crime, we're getting the cases once the police have made the decision to charge not before, so...
[Interview respondent EW22]

B. The reality of supervision of investigations by procureurs in France

In France, where police investigations are supervised by the *procureur* in theory, such a strict separation between investigation and prosecution functions does not exist. Jeanne argues that the French and English/Welsh systems share the objective of impartiality of criminal justice actors, however, the actors whose impartiality needs safeguarding vary.⁴³⁸ Historically, prosecution took place prior to investigation by the *juge d'instruction* in France, whilst investigation always preceded prosecution in England and Wales. Therefore, according to Jeanne, the French code of criminal procedure aimed to ensure the impartiality of the *juge d'instruction* when it introduced a principle of separation of functions between prosecution and *instruction* (Art 31 and 49 CPP), whereas the English/Welsh system is concerned with the objectivity of the public prosecutor.⁴³⁹ The *instruction* procedure is lengthy and resource-intensive and the Act of 8 December 1897 provided for the representation of the suspect by a defence lawyer during the *instruction*. In order to avoid the formalities associated with *instruction* and speed up the disposal of cases, *procureurs* developed preliminary investigations outside of any official frame during the nineteenth century, before being legalised by Parliament in 1958.⁴⁴⁰ The development of police investigations under the supervision of the *procureur* – prior to or instead of the formal investigation by the *juge d'instruction* – eroded the principle of separation between *instruction* and prosecution functions in France, but did not lead to the birth of a new principle

⁴³⁸ Nicolas Jeanne, 'Police et CPS : De Quelques Paradoxes Résultant de La Séparation Des Autorités Répressives' (2011) 1 Archives de politique criminelle 133.

⁴³⁹ *ibid.*

⁴⁴⁰ Xavier Moroz, 'Les Initiatives Procédurales Des Parquets Au XIXème Siècle' (2003) 1 Archives de politique criminelle 85.

divorcing the investigation function now detained by the police and the prosecution function.

Nowadays, the *instruction* procedure is only used in a residual number of cases and most cases are investigated by the police under the supervision of the *procureur*. *Procureurs* are expected to play a much more active role in criminal investigations which they supervise. The police are required by law to report all formal complaints to the *parquet*. However, the proportion of offences discovered through police activities is in constant augmentation in comparison to offences reported to the police by victims or witnesses⁴⁴¹ which gives more opportunity for the police to shape prosecutors' workload. Nevertheless, the *Code de Procédure Pénale* (CPP – Code of criminal procedure) details all instances in which the police must inform the *procureur* of their investigations. In custody cases, article 63 CPP requires the police to inform the *procureur* that a person has been arrested and is kept in police custody 'from the start' of the *garde à vue*. In the area I observed, the police faxed through the notice of *garde à vue* which included the identity of the person, the time of arrest and the suspected offence (i.e. the reason for arrest). Hodgson rightly notes that such practice means an absence of any kind of contemporaneous supervision.⁴⁴² However, this allowed the *procureur* to check the criminal record of the individual 'to know who they are dealing with', since the police do not have access to official criminal records in France, only *magistrats* can access it. I also observed that *procureurs* rang the police to check on the progress of the investigation when the police had not reported back to them between 12 and 24 hours from the start of the *garde à vue*.

⁴⁴¹ Gildas Roussel, Virginie Gautron and Philippe Pouget, 'La Coordination Entre Forces de Police et Justice Dans Le Traitement Des Délits' in Jean Danet (ed), *La réponse pénale. Dix ans de traitement des délits* (Presses universitaires de Rennes 2013) 26–29.

⁴⁴² Hodgson, *French Criminal Justice* (n 62) 167–169.

Once the police had carried out the first investigations, they rang the duty prosecutor to provide an oral report. In non-custody cases, articles 54 and 74 CPP require the police to inform the *procureur* ‘immediately’ of any offence committed recently (*flagrant délit*) and of all cases of suspicious death or where the causes of death are unknown. The police can also conduct investigations in older offences with or without the authorisation of the prosecutor (preliminary investigation), but must then report to the *procureur* within 6 months (Art 75-1) or as soon as a suspect is identified (Art 75-2).⁴⁴³ The authorisation of the *procureur* is also mandatory for certain investigative acts, such as some house searches, arrest of reluctant witnesses, geolocation,⁴⁴⁴ etc.

This role of *procureurs* in police investigations stems from their role as freedom guardians and their duty to check the legality and the proportionality of the investigation. It also means that the *procureur* is kept informed of a high number of existing investigations and the police do not contact them only at the end of the investigation solely to obtain a prosecution decision. Furthermore, police investigators do not openly suggest a possible outcome to the *procureur*, although they might guide the prosecutor’s decision towards their preferred conclusion in a more oblique way.

The introduction of *traitement en temps réel* (TTR) means that the *procureur*’s supervision of the police investigation takes place primarily over the phone. In the majority of cases, the *procureur* makes their decision on prosecution following the oral police report. The complete file will be transmitted to the *parquet* later, but the *procureur* does not have access to it at this stage. The duty prosecutor sometimes asks

⁴⁴³ However, the *Cour de cassation* considers that the failure to inform the *procureur* has no effect on the validity of the investigative acts carried out by the police (Crim., 1st December 2004, no. 04-80.536, Bull. crim. no. 302; Dalloz 2005, 1336, note Lennon).

⁴⁴⁴ This can be done through a request to mobile phone operators to follow the owner of a phone or find out where the phone was when a call was made. Alternatively, a tracker can be placed on a car or an item to follow its future moves.

the police to fax or email some documents prior to taking their decisions. However, this is more likely in more serious cases, in particular when the *procureur* considers opening an *instruction*. Thus, in the case of an incident in a care home in which an employee was in police custody for attempted murder following an argument with a colleague in which he threw knives at him, the *procureur* asked the police to fax the witness statements and the interviews with the suspect. He then decided to prosecute for assault, rather than for attempted murder, as he did not have any evidence to suggest intention to kill. Furthermore, a charge of attempted murder would have meant the mandatory opening of an *instruction* which the *parquet* wanted to avoid, due to its resource-intensive nature, considering the assault was admitted and no further investigation was necessary.

Procureurs also have the possibility to ask for the full file to be sent over by post before taking any decision. However, this defeats the objective of the TTR to avoid delays in decision-making. During my fieldwork, *procureurs* asked for the paper file to be sent to the *parquet* mainly when they considered discontinuing the case. Since cases received by post were allocated to different *procureurs* depending on the nature of the crime (economic and financial offences, offences against property, or offences against the person) or on the characteristics of the suspect (juveniles), this often meant that a different, more specialised, *procureur* would review the paper file and make a final decision on it. Some *procureurs* complained that duty prosecutors requested the transmission of the file on too many occasions, burdening colleagues with files where a quick decision of discontinuance should have been made over the phone. This behaviour illustrates the reluctance of some *procureurs* to take the responsibility to discontinue cases. In an alleged arson of a stolen car, the *procureur* clearly told the police over the phone that she did not think it was possible to charge the suspect with

any offence, stating: 'it's not your fault, but don't hope to get a prosecution with what you've got'. She ordered the police to release the suspect, but instead of immediately discontinuing the case, she asked them to send the file over to the *parquet*, telling them that they would be contacted if the reviewing *procureur* found something when reading the file. This example is also an illustration of the cooperative relationship that exists between the *parquet* and police investigators.

The *procureurs* I interviewed were aware of the possibilities for the police to manipulate them through the oral report and mentioned seeing cases at court where the report given to them over the phone did not exactly reflect what they read in the file. One prosecutor I interviewed argued that, since the paper file eventually reaches the *parquet* before the hearing, public prosecutors are able to check the file of evidence. However, it should be noted that it is not possible to change the decision to prosecute at this stage. The only remedy is for the prosecutor to ask the court for an acquittal. Furthermore, it has been noted by previous studies⁴⁴⁵, and confirmed by my own observations, that the file is put together and shaped by the police. Interviews with the suspect are not transcribed verbatim and CCTV footage is not available for review. This gives ample opportunity for the police to construct the case, so that it corroborates their vision of the facts.⁴⁴⁶ In one instance I observed, the defence lawyer criticised the police at the hearing for claiming that CCTV footage was 'unusable' for the investigation in an incident involving police officers and four juveniles in a public square by a train station. Whilst the defendants were charged with assaulting the officers, they alleged that they actually had been assaulted by the officers. The police

⁴⁴⁵ Field, 'Judicial Supervision and the Pre-Trial Process' (n 194); Mouhanna, *Polices judiciaires et magistrats* (n 65); Hodgson, *French Criminal Justice* (n 62).

⁴⁴⁶ Hodgson, *French Criminal Justice* (n 62) 190–208.

had seen the footage, but it had not been seen by any *magistrat*, nor defence lawyer, to decide for themselves.

Both Mouhanna and Hodgson noted the relationship of trust that existed between *procureurs* and investigators.⁴⁴⁷ In a subsequent study conducted with Benoit Bastard, Mouhanna argues that the TTR further weakened the reality of the *parquet*'s supervision over investigators: 'The essentially oral – and very brief, a few minutes – character of conversations between police officers and *procureurs* leaves few traces (...). The *procureur* has very little time to think and to immerse himself in cases. And he does not wish to, preferring to trust the police officer, in a context of strengthened cooperation between the institutions'.⁴⁴⁸ They conclude that it is the police 'who impose the rhythm and the priorities of the *parquet*',⁴⁴⁹ contrary to the theory of judicial supervision. A *procureur* I interviewed also underlined the importance of trust between *procureur* and police officer, particularly under the TTR, in order to deal with cases in an efficient manner:

A lot of things are actually based on trust. Phone duty has taken such proportions, that it's obvious that it cannot be managed without trust. If every time we have a case, we ask for the file to be sent to us by post, so that we can check what's in it, because we don't trust the officer who is reporting to us, it becomes unmanageable! [Interview respondent FR2]

The professional discourse of public prosecutors insists on cooperation with the police to achieve a common goal (the truth) and on each agency bringing something different to the file:

I think it's first collaborative work because for me we all want the same thing, we all want to establish the truth. [Interview respondent FR9]

⁴⁴⁷ Mouhanna, 'Les Relations Police-Parquet En France : Un Partenariat Mis En Cause?' (n 94); Hodgson, 'The Police, the Prosecutor and the Juge D'Instruction' (n 63).

⁴⁴⁸ Christian Mouhanna and Benoit Bastard, 'Procureurs et Substituts : L'évolution Du Système de Production Des Décisions Pénales' (2010) 1 Droit et Société 35, 46.

⁴⁴⁹ *ibid* 47.

I believe that we're here to prepare a file for trial and we have this vision of what the file will become in court, which police officers don't always have. (...) we're here to remind them constantly that we need this vision, that someone external to the investigation must have the file elements presented clearly, without having to do research outside of the file. That's the whole problem with maps in files, with using Google map to visualise the location well, with statements describing the scene of crime... very basic things! (...)

All prosecutors I interviewed acknowledged the police investigative skills: 'The investigators are trained to investigate. Usually, their training is very good, we can't question it and we don't have that' [interview respondent FR9]. But they claimed that the prosecutors' input was their legal expertise and their experience of court hearings:

We cannot ask the investigators, police officers or gendarmes, for more than they can give. There is knowledge that they cannot have, in particular at the legal level. It's our job to bring them legal knowledge. They have other skills, in particular at the investigative level. So, we must bring added value and we're at the end of the chain to determine what will be the result of the investigation. [Interview respondent FR6]⁴⁵⁰

In order to carry out their role in supervising investigations, *procureurs* ask questions of police officers to clarify aspects of the police oral summary and probe the quality of the investigation. In case F-93, a stolen car had been set on fire and the police had found a blood trace which matched the DNA of the suspect. They had brought him into the police station to interview him, but he had denied any involvement. The police reported to the prosecutor who asked whether the blood trace had been found on the pavement or on the car. Since the blood had been found on the pavement, it could not serve as evidence that the suspect had stolen the car, let alone set it on fire, and the *procureur* refused to charge. In another case where three suspects were arrested for assaulting police officers following a roadside check, the *procureur* asked several questions to understand where each protagonist was, in particular whether the suspects

⁴⁵⁰ Similar views were expressed by FR4 and FR9.

were still in the car at the time of the alleged assault to ensure that the police version of events was coherent.

Recent legislative reforms have granted a growing role to defence lawyers during police investigations supervised by *procureurs*.⁴⁵¹ Defence lawyers are now present throughout police detention and can also assist suspects who attend the police station voluntarily.⁴⁵² Field and others have argued that the participation of defence lawyers could potentially permit fairer decisions, thanks to a greater diversity of influences on the construction of the file.⁴⁵³ However, I did not observe defence lawyers bringing information to the attention of the *parquet* following their presence in police detention. *Procureurs* I interviewed refuted the possibility that defence lawyers had any input into their decision to prosecute or not, claiming that defence lawyers took an adversarial stance and held back information likely to undermine the prosecution case until the court hearing, in order to obtain an acquittal for their client. This means that French prosecutors – just like their Anglo-Welsh counterparts – are wholly reliant on the information provided to them by the police to make their decision.

The neutrality of *procureurs* in reviewing police investigations has recently been questioned in an official report to the Ministry of Justice. In its 2014 report, the commission chaired by Lyon's *Procureur Général* Jacques Beaume claimed that 'the boundaries between the powers of the investigators and those of the *parquet* have progressively been blurred', particularly due to the TTR practice and the

⁴⁵¹ For a recent empirical study, see Blackstock and others (n 160); see also Dimitrios Giannouloupoulos, 'Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance' (2013) 24 Criminal Law Forum 291; Dimitrios Giannouloupoulos, "'North of the Border and Across the Channel": Custodial Legal Assistance Reforms in Scotland and France' [2013] Criminal Law Review 369.

⁴⁵² Loi no 2014-535 of 27 May 2014, *portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil, du 22 mai 2012, relative au droit à l'information dans le cadre des procédures pénales*.

⁴⁵³ Field, 'Judicial Supervision and the Pre-Trial Process' (n 194); Field and West (n 194).

multiplication of contacts between investigators and prosecutors leading to ‘involuntary or unconscious collusion’, sometimes transforming the *procureur* into a ‘super police officer’.⁴⁵⁴ The commission explains how, from the mid-1990s, the police hierarchy started to concentrate on strategic and organisational issues, leaving the investigation of crimes to lower-ranking police officers. Following the withdrawal of the police hierarchy from the day-to-day management of investigations, the *procureur* became the first and only manager of individual investigations. This concern was echoed by public prosecutors in my own study:

Procureur: The negative effect [of TTR] is that we put the investigators in a state of dependency, of maybe excessive subordination in some cases. When I started in the job, I would say that the head of the investigation would bring his solution and it was about saying yes or no, roughly to rubber stamp or not. Nowadays, the relationship between the *magistrat* of the *parquet*, head of the investigation, and the investigator exists at each stage of the process, every request requires an authorisation, virtually every house search... it means that we considerably reduced the scope for initiative of the investigator. Hence the multiplication of phone calls, hence saturation, as you might have observed, on two different phone lines. This is the inevitable consequence of the loss of autonomy of investigators in carrying out criminal investigations. Maybe they used to have too much in the past, maybe we can deplore that they don’t have enough currently.

Researcher: Do you feel like it’s reinforced the control of the *parquet* or not necessarily?

Procureur: It reinforced it for simple cases, for cases which are easy to deal with. I’m not sure that, for more complex criminality... (...) currently investigations target street criminality, [which is] easy to deal with. Maybe that’s what has been favoured in the *traitement en temps réel*, to the detriment of a more sophisticated, more elaborate criminality, which we still deal with through the post but which maybe escapes more... a more elaborate criminality which necessitates more meticulous investigations and which comes under *instruction*. [Interview respondent FR6]⁴⁵⁵

The Beaume Commission recommended a clarification of the *procureur*’s powers, suggesting that directing the police does not mean directing each investigation on a daily basis. It proposed the abolition of the power of prosecutors to conduct

⁴⁵⁴ Jacques Beaume, ‘Rapport Sur La Procédure Pénale’ (Ministère de la Justice 2014) 27–28.

⁴⁵⁵ Similarly FR8.

investigative acts themselves, recognising that it is never exercised in practice. It asserted that '[t]he role of the *parquet* is not to direct the daily proceedings of all investigations, but to ensure the control of the legality of the means employed by the police, of the proportionality of investigative acts to the offence and to the suspected offender, of the opportunity to lead the investigation in a certain direction, finally of the quality of its content'.⁴⁵⁶ This comment chimes with Hodgson's remark that the aim of *procureurs* in supervising the police investigation 'is not to monitor closely the work of the police', but that supervision is mainly 'concerned with the *outcome* and the *form* of the police investigation, rather than with the *method*' (original emphasis).⁴⁵⁷ The Beaume Report underlines that 'there is a doubtless incompatibility in purporting to control an act to which one participated personally'.⁴⁵⁸ Although no explicit reference is made to the Anglo-Welsh system in the Report, this last sentence echoes the principle of separation between prosecution and investigation first formulated by the Philips Commission in England and Wales.

In both jurisdictions, public prosecutors rely on the police to assess the demeanour of witnesses and suspects. This allows them to assess the credibility of witnesses and provides some insight into the personality of the suspect. CPS prosecutors in particular often asked the police: 'how do they come across?' In England and Wales, the willingness of witnesses to attend court and their credibility is a decisive factor for public prosecutors. Cases in which the police told the CPS that the victim was not willing to attend court almost always resulted in a decision to drop the case. In France where the attendance of witnesses at court is rarely considered necessary, *procureurs* were more interested in the level of remorse shown by the suspect. This helped them

⁴⁵⁶ Beaume (n 454) 29.

⁴⁵⁷ Hodgson, *French Criminal Justice* (n 62) 151.

⁴⁵⁸ Beaume (n 454) 29.

to determine whether an out-of-court disposal could be considered. Thus, in case F-143 of theft from several cars involving four suspects, the *procureur* asked: ‘what was their behaviour with you? Did they express some remorse?’ The police officer replied: ‘they realise they’ve made a serious mistake’. The *procureur* then decided: ‘since they’re not known and it’s not too serious because there is no criminal damage [the cars were all unlocked], we’ll do *compositions pénales*.’ On the contrary, when the police reported the obnoxious behaviour of a suspect at the police station in case F-4, the *procureur* decided to send him for a *comparution immédiate*. These often purely subjective assessments demanded from the police by public prosecutors allow police officers to shape the opinion of public prosecutors, by presenting the suspect or witnesses in a positive or negative light. The use of the suspect’s behaviour as a factor to determine the case disposition pathway can be linked to the general belief in French legal culture that the sentence (which is largely influenced by the chosen prosecution pathway) should be adapted to the personality of the accused. A show of remorse is perceived as a sign that rehabilitation will be possible and therefore that an alternative to prosecution and a mild sanction are appropriate responses from the criminal justice system. Conversely, a more aggressive behaviour towards law enforcement institutions is seen as indicating a deeper involvement in criminal activities and therefore requiring a more severe sanction.

In both jurisdictions, despite different legal structures, public prosecutors often fail to provide an effective neutral filter between investigations and the courts in order to weed out weak cases. In England and Wales, the ‘Philips principle’ has become part of the ideology of CPS prosecutors who make a clear distinction between their role and that of the police. Many believe that they have to keep a certain distance from police investigators to protect their impartiality. Furthermore, being removed from the

investigation and making decisions according to paper files are perceived as guarantees of objectivity, as it allows them to remain emotionally detached from the cases they examine. By contrast, the French system expects greater involvement of *procureurs* in criminal investigations. Yet voices are being heard to limit this involvement to protect their impartiality as investigation supervisors. In both jurisdictions, despite all the guarantees of neutrality, it is not reasonable to expect public prosecutors to provide a different viewpoint on the investigation than that of the police. This role can only be properly fulfilled by defence lawyers, as public prosecutors rely on the police for their information.

II. Public prosecutors and police: the paradox of hierarchical authority

According to Damaška, Anglo-Saxon criminal justice procedures are shaped by a coordinate model of authority in which independent power centres balance one another as a result of a horizontal division of authority.⁴⁵⁹ It appears that the Philips Commission sought to find this balance of powers in proposing the creation of a public prosecution service institutionally independent from the police and with no power to direct or supervise investigations: '[t]he system is therefore one which depends upon co-operation, with checks and balances operating within a framework in which all are seeking the same objective.'⁴⁶⁰ Whilst CPS prosecutors only have meagre powers over police investigations, French prosecutors direct the investigation and can require the police to collect evidence. Yet empirical research has shown that they do not use these powers to monitor closely the work of the police in practice.⁴⁶¹ Instead, they perceive

⁴⁵⁹ Mirjan Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 The Yale Law Journal 480.

⁴⁶⁰ Philips (n 26) 7.8.

⁴⁶¹ Mouhanna, *Polices judiciaires et magistrats* (n 65); Hodgson, *French Criminal Justice* (n 62); Bastard and Mouhanna (n 67).

themselves as collaborating with the police and describe strong professional ties with police officers, despite some inevitable tensions.

A. Tension and resentment between CPS and police

As reported by Ashworth, '[i]n the early years, the police missed few opportunities to criticise the CPS when things went wrong'.⁴⁶² This can be attributed to the fact that prosecution powers were taken away from the police and given to the CPS when the public prosecution service was created, causing some resentment in police ranks as many in the police felt that the CPS dismissed cases that they wanted to see prosecuted. Yet these tensions have persisted to this day, as illustrated by a recent high profile case. In April 2015, the DPP announced that, although there was enough evidence to charge Lord Janner, a former MP, with several child sex offences, it was not in the public interest to prosecute him because he has dementia. This prompted Leicestershire police who had investigated the case to publish on its website a statement from one of the victims describing the decision as a 'disgrace' and to issue a statement saying that they were considering challenging the DPP's decision through judicial review.⁴⁶³

Arguably, the potential for these tensions is built up within the system, as many CPS decisions imply agreement or disagreement with the police. However, there is also a deep lack of trust between the police and the CPS. Referring to police officers, one CPS prosecutor told me 'you often get the sense that they're up to something'

⁴⁶² Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 257, 260; See also Julia Fionda, 'The Crown Prosecution Service and the Police: A Loveless Marriage?' (1994) 110 *Law Quarterly Review* 376.

⁴⁶³ Rajeev Syal and Sandra Laville, 'Police consider challenge to CPS ruling not to charge Janner over abuse allegations', *The Guardian*, 16 April 2015 <<http://www.theguardian.com/law/2015/apr/16/lord-janner-will-not-be-charged-despite-evidence-of-child-abuse>> accessed 22 June 2015.

[interview respondent EW3]. Several CPS prosecutors reported being pressured and even bullied by investigators when they were based at the police station.

The disadvantage of [being based at the police station] is basically the police can exercise pressure on you. You might have two or three officers and you try to kind of explain your reasoning and they're sort of asking you questions and challenging your decisions there and then, which can be quite, I suppose, intimidating. If you've got two officers who are determined to get a charge and disagree with your decision, that makes it harder. [Interview respondent EW1]

(...) when you're just one prosecutor in a police station... and there are some big police stations and you're just buried in that little room somewhere... with quite senior officers and often you would... they often seem to come in groups when it's a bad case. You can often tell how bad a case is by the number of police officers who come to see you. If there's one, it's probably a good case and then it just goes down from there. Sometimes I had three or four officers come in and... They don't deliberately intimidate you, but it's just because they're there and it makes it... At the end of the day, it didn't influence me. If I thought a case was bad, I'd just say no and if they get upset about it then tough! But it's still not always a great experience. And you do get the occasional officer who does behave quite childishly and gets upset if you're saying no. [Interview respondent EW3]

The lack of police trust in the CPS and the pressures they exercise on public prosecutors were demonstrated when the police attended court purely to hear the decision of the court or to ask the CPS representative to request a specific outcome. Thus, in case EW-232 where the defendant was charged with seven counts of burglary and criminal damage, a police officer attended the first hearing at the magistrates' court 'to assist the prosecutor'. The CPS Associate Prosecutor prosecuting the case told him that he did not need his help, but promised to inform him of the outcome. He later rang him to let him know that the defendant pleaded guilty to all charges, was committed to the Crown Court for sentencing and remanded in custody in the meantime. In case EW-238 where two defendants were charged with taking a vehicle without the owner's consent, two police officers attended court and requested the CPS representative to apply for curfew orders for both defendants as bail condition. They explained that the two defendants had been arrested several times for burglaries in

recent weeks, but had not been charged due to insufficient evidence. Although she later told me that she did not like it when police officers attended court (‘waste of time and money’), the associate prosecutor agreed to follow the police advice and applied for curfew orders. Far from demonstrating the police confidence in CPS ability to prosecute cases at court, the practice of attending court in those cases was clearly perceived as an interference by CPS prosecutors who understandably resented being told how to do their job by police officers.

The division of tasks between police and CPS is sometimes unclear and leads to reciprocate blaming, with each agency refusing to take responsibility for some decisions. Thus, many CPS prosecutors were under the impression that the police were sometimes trying to cover their back by referring cases to the CPS that they could have discontinued themselves, in particular in domestic violence cases.⁴⁶⁴ One CPS prosecutor commented that police officers wanted ‘to be able to blame the CPS when explaining the decision to the victim’. This was illustrated by case EW-33 of serious domestic violence assault in which the CPS prosecutor clearly suggested that he suspected the police of attempting to cover their backs in his written advice:

(...) however I have to say, frankly, that the case should never have been referred to the CPS in this state to start with (...). If the police didn’t think it was evidentially sound or that further enquiries were pointless (as well they might be) – then they should have [dropped] it. There’s no requirement for all [domestic violence] cases to come to CPS for decision. It is only where the decision requested is ‘for a charge’, not ‘not to charge’; i.e. only – where a charge is wanted, the investigation is complete and the evidence is there (...) I got the impression (perhaps wrongly) through further discussion that what the police really wanted was for me to take the decision to ‘NFA’ [No Further Action] this and in so doing circumvent the need to expend any more time on it. However, that’s not our role. Frankly there are numerous enquiries that could be made here. (...) I don’t propose to seek all that now (...) then, having specifically been asked for

⁴⁶⁴ This view is supported by a recent Inspectorates’ review of charging decisions: Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary (n 429) 33.

advice by police, I'm not just going to 'drop it' without getting 'something' better. (...) (original emphasis)

CPS prosecutors told me of cases in which the police orally admitted to them that there probably was not enough evidence to charge. In case EW-119, the complainant had complained to the police that the suspect had been released without charge. The police referred the case to the CPS for a charging decision, although the suspect had already been told that he was not going to be prosecuted. The charging lawyer explained his position to the police over the phone: 'you've already taken the right decision, we're not here just to give you backup (...) No, I'm afraid that you have taken a decision, you've now had a complaint, and it's for you and your supervisors to deal with that complaint. (...) It's not the purpose of the charging team to deal with this, or the CPS as a whole.' These cases clearly illustrate the contrast with France where *procureurs* are responsible for all cases and where such attempts to shift blame from one agency to the other would therefore not be successful. Instead, both agencies in France felt they had a stake in cases, fostering a more collaborative relationship.

Attempts to rigidly define separate spheres of responsibility for the police and the CPS seem to be doomed to fail. The dependence of the CPS on the police does not subside once court proceedings have started, despite the CPS being given full responsibility for prosecutions at court and disclosure of evidence to the defence, as they do not have direct access to evidence. In cases resulting from the undercover drugs operation mentioned earlier (case EW-360), the CPS prosecutor believed that several defendants pleaded not guilty at the first hearing at the magistrates' court because the police had forgotten to include the still from the video showing the involvement of the defendant in the drugs transaction in the advance disclosure file. Having had to give the photo from the prosecution file to a defence lawyer who asked to speak to his client again in

view of this new element, the prosecutor commented that it was ‘stupid’ as this was the main piece of evidence.

The CPS is also supposed to be responsible for disclosing to the defence evidence that the prosecution is not relying on. However, it is wholly reliant on the police to fulfil its disclosure duties. As it is the police role to gather evidence, CPS prosecutors have to rely on the police assessment of the evidence to decide whether or not it could undermine the prosecution case or support the defence case. Thus, for cases triable in the magistrates’ courts, prosecutors only had a list of unused evidence. Although they could request for the evidence to be sent to them, I always saw them rely only on the list when deciding which evidence should be disclosed to the defence during my observations. Furthermore, for Crown Court trials, the CPS have to ask for the police to produce evidence to be presented to the jury, such as maps, diagrams, plans, etc.

This was explained by one Crown Advocate:

(...) the police have a large role in producing relevant materials for the jury. So, in homicides, they will often produce electronic presentations or videos or maps... It’s all from the police, we just really act as a go-between to that extent but we have to get the police to produce the things that we think would be useful. We don’t create evidence here, that’s all... So we have to get the police to do it, even where... you might think the prosecutor wanted to produce his own documents, the police have to do that for us effectively. [Interview respondent EW25]

The dependence of the CPS upon the police is keenly felt by CPS lawyers who are aware that their work is mediated through the police, in particular in communication with victims, but also with the media.⁴⁶⁵ This prompted a Crown Advocate to say that ‘everything [the CPS] do is channelled through the police’ [interview respondent EW24].

⁴⁶⁵ The police regularly issue press releases or read statements outside of court which are reported in the media more widely than CPS own media communications.

CPS policy and guidance requires prosecutors to ask the police for their opinion before discontinuing cases.⁴⁶⁶ It claims that such consultation ‘provides an opportunity for the police to provide additional information that may affect the prosecutor’s decision, such as additional witness statements that resolve evidential problems; or background information not included on the file that may have a bearing on the public interest.’⁴⁶⁷ It is interesting that the police are not expected to have transferred all information in their possession to the CPS in the first place.

Police are also able to formally challenge decisions made by CPS prosecutors, such as charging and plea decisions. In those appeal cases, the case is escalated within both institutions: police investigators can query the CPS decision with their line manager who can then ask a CPS District Crown Prosecutor to review the decision. Thus, a CPS manager explained to me:

On pre-charge advice cases, if the police don’t like the decision by the lawyer, then they will appeal to me, either [about] the level of charge or if they’re not charging at all. (...) I don’t get that many appeals for charges really. I do get a lot of appeals for decisions over at the Crown Court when we’re accepting pleas. (...) [The police] can’t appeal, but if it’s at court, they’ll ring and say ‘we’re not happy about something’ or ‘we don’t really want this to happen’, etc. (...) [interview respondent EW20].

As a result, CPS prosecutors constantly need to justify their decisions to the police. In effect, this leaves the CPS accountable to the police in a way the police are not accountable to the CPS, markedly altering the balance of the relationship between the two institutions.

⁴⁶⁶ This is different from the earlier comment about police attempting to cover their back by referring cases to the CPS for charging advice that they should have dropped. In the present case, the CPS has to consult the police if they consider discontinuing a case after it has been charged.

⁴⁶⁷ CPS Legal Guidance on Termination of Proceedings <http://www.cps.gov.uk/legal/s_to_u/termination_of_proceedings/index.html#a09> accessed 22 June 2015.

CPS prosecutors take into account the possibility for the police to appeal their decisions and often consult their line manager beforehand if they believe that their decision might antagonise the police. As opposed to their French counterparts who are often forthright with police officers, they are usually very diplomatic in their interactions with the police, employing a soothing tone and trying to diffuse the tension, often emphasising that they do not blame the police for their mistakes: ‘it’s not your fault’, ‘the police, through no fault of their own I hasten to say’, ‘I mean no disrespect to the officer in charge in saying this. We all make mistakes’, ‘Can you not see where I am coming from? The prosecution case is undermined (...) Bad character on its own is not enough (...). You know them all and you have a better feeling of the case. I only come at it from an evidential point of view (...). You can appeal, I won’t take it personally (...) I’m sorry about it, I did take another opinion (...). You can bail him again, you have seven days or so to appeal’. These commendable efforts to foster good working relationships with the police given the CPS dependence on police cooperation to carry out their role effectively can, however, undermine the independence of the prosecution authority in cases where the individual CPS prosecutor is not robust enough. In the following snippet of conversation with a police officer, a CPS charging lawyer dithered and failed to take a clear line; she spent a lot of time on the phone attempting to convince the officer that there was no case, but also suggested to leave the door open for the police to charge themselves:

I just don’t think we can get to the bottom of what actually happened (...) I can write up that there is not enough evidence for dangerous driving. Can you charge due care without coming to us? (...) I don’t think there is enough evidence for due care. (...) I can’t see how we can prove that anyone was driving dangerously or even that anyone was driving without due care. (...) I’m going to say there isn’t enough evidence for dangerous driving. (...) Do I also add that I wouldn’t charge due care? (...) What I’ll do is write it up and say that there isn’t enough evidence for dangerous driving and then you can consider whether or not you want to charge for

due care. (...) No, I suppose you probably can't charge due care then, that would be abuse of process, wouldn't it? (...) I'll write it up and you can speak to me if you think I've missed anything or you can speak to my line manager (...) if we perhaps could have a statement about exactly where the road markings are (...) and then you could re-interview [X] about due care (...). I'm sorry about this (...). [case EW-78]

Although the Philips Commission sought to separate clearly the investigating and the prosecuting functions, allocating them to two separate entities independent from each other, those stages of the process cannot be clearly separated in practice. Earlier research studies have demonstrated that the CPS is entirely reliant on the police-constructed case to make their decisions.⁴⁶⁸ During my fieldwork, I observed that not only is it still the case nowadays, but also that the police do not relinquish control of the file following the investigative stage; instead, their role extends all the way to trial. The Runciman Commission professed to avoid frictions between the police and the CPS by refusing to give powers to the latter to direct the investigation: having heard that the German police 'sometimes resent having to carry out the prosecutor's directives', the report claims that 'such resentment is likely to apply in any system where the prosecution service is given effective responsibility in the investigation stage'.⁴⁶⁹ I argue that, although tensions exist, the relationship between police services and public prosecutors is far more agreeable in France where the police are subordinate to the public prosecutor.

B. The cordial relationship between investigators and prosecutors in France

In France, *procureurs* take a collaborative stance to their relationship with the police. They believe that they are working together towards a common goal: the discovery of the truth. By contrast with England and Wales, there is a clear distribution of tasks with ultimate responsibility to *procureurs*, thus minimising any potential for

⁴⁶⁸ McConville, Sanders and Leng (n 39).

⁴⁶⁹ Runciman of Doxford (n 40) 72.

reciprocal blaming, although tensions also arise between *procureurs* and investigators in France. Thus, *procureurs* in the area I observed partly blamed the bad quality of police investigations for the low conviction rate in the area: the national acquittal rate was around 6 percent, but it was 13 percent in the area I observed. This is despite the fact that *procureurs* are the ones who decide whether a police case can be prosecuted or not; they – not the investigators – are the gatekeepers to the criminal justice system. *Procureurs* also got annoyed when police leaked information to the press on ongoing investigations. According to article 11 CPP, all investigations must remain secret; only the *procureur* can decide to make information public ‘in order to avoid the spreading of fragmented or inaccurate information’. *Procureurs* I interviewed also perceived some resentment from the police with the idea that *magistrats* are too lenient with the criminals they arrest.

Generally, relationships are good, but investigators always think that the *magistrat* is the one who releases people. Sometimes, (...) they would like to be rewarded for the work they’ve done and we can understand this, it’s fully legitimate, but – and that’s why we’re two separate bodies – we don’t see things like that at all. A sentence is not a reward, not at all, whereas they would like that. (...) I did several placements in police and gendarmerie and often, after one or two days, when they realised they could trust me and they could speak, they would blame me for this. I could always feel a sort of tension, we’re not always welcome (...). They explained it to me: they worked hard on their files and the *parquet* had released the suspect and they didn’t understand why. [Interview respondent FR9]

Procureur: (...) globally, there is very little display of bad faith. This is something that was happening a bit a few years ago. Five or six years ago, there was more ideology by some who were saying: ‘the police do their job and the judicial authority undo the work the police do’. This discourse has diminished a lot.

Researcher: Why? Why did it diminish or why did it appear in the first place?

Procureur: I would say it’s political (...) Yes, it’s a political concept, all this. From the unions as well within the police. [Interview respondent FR3]

The ‘political’ aspect of these tensions came mainly from the difficult relationship that existed (and arguably still exists) between the former President of the Republic, Nicolas Sarkozy, and the *magistrature*. In several media-interest cases, Sarkozy was quick to criticise *magistrats* for their decisions which were perceived as too lenient.⁴⁷⁰ In October 2015, several police unions called for demonstrations against ‘incoherent judicial decisions’ enabling the release of ‘violent people and criminals’.⁴⁷¹ Despite these frictions, there is no widespread lack of trust as in England and Wales. All *procureurs* insisted on the importance of trust and loyalty in their relationship with investigators. Several had an almost romantic view of this relationship.

I worked in very small jurisdictions where relationships could quickly become... I won’t say familiar, but quite friendly because you speak to a limited number of people, because often the base is closer to you than the hierarchy. It’s surprising, but that’s why I was telling you earlier that some would like us to be their hierarchy because sometimes we might understand them better than their own superiors. [Interview respondent FR2]⁴⁷²

I’d say it’s a relationship of proximity. We see it when we go to police stations – be it police or gendarmerie – no matter what they have to say about... they’re not happy about this or that... you are their prosecutor, it’s the *parquet* who goes out, it’s the representative of the *Procureur* and there’s a link which is particular between the *parquet* and the police. No matter the tensions that there might be on each side, this link is there, this link exists, you are *their* prosecutor [original emphasis]. (...) There is something in this relationship which is quite inexplicable actually, almost a form of attachment I would even say! You are *their* prosecutor, there is respect. [Interview respondent FR7]

⁴⁷⁰ See Audrey Fournier, ‘Les Juges, Boucs émissaires de Nicolas Sarkozy’ *Le Monde* (Paris, 7 February 2011) <http://www.lemonde.fr/societe/article/2011/02/07/les-juges-boucs-emissaires-de-nicolas-sarkozy_1476180_3224.html> accessed 1 December 2015.

⁴⁷¹ See the police unions’ press release <<http://www.unitesgppolice.com/police-justice-la-rupture>> and Laurent Borredon, ‘Place Vendôme, Les Policiers Vent Debout « Contre Des Décisions de Justice Incompréhensibles »’ *Le Monde* (Paris, 14 October 2015) <http://www.lemonde.fr/police-justice/article/2015/10/14/place-vendome-les-policiers-manifestent-contre-des-decisions-de-justices-incomprehensibles_4789450_1653578.html?xtmc=manifestation_police&xtcr=69> accessed 1 December 2015.

⁴⁷² Similarly, see Hodgson’s example of a small area, in which police and gendarmes regularly visited the *parquet* to seek advice and to discuss cases on which they were working: Hodgson, *French Criminal Justice* (n 62) 163.

This atmosphere of amiability in which *procureurs*' visits to the police station take place is also described by Hodgson in her 2005 study.⁴⁷³ Usually announced in advance, those visits are perceived by both police and *parquet* as an opportunity to strengthen their relationship, rather than an act of surveillance.

These cordial relationships are fostered by the light-touch supervision of *procureurs* over police investigations. It mirrors the management style of their own hierarchy⁴⁷⁴ and is also partly due to practical constraints. Whilst public prosecutors direct criminal investigations, police officers are under the control of their own hierarchy – headed by the Minister of the Interior who is represented by *préfets* at the regional level – for crime prevention and the maintenance of public order in general (e.g. policing a demonstration). This can lead to contradictory orders from each side of this double hierarchy as the necessities of judicial investigations conflict with other policing priorities, in particular in terms of allocation of resources.⁴⁷⁵ Whilst the cost of criminal investigations (in particular of technical and scientific analyses) is borne by the courts and not the police as opposed to the English system, police bosses retain full control of staff resources. This led some to suggest that police investigators should be placed under the sole authority of the Ministry of Justice.⁴⁷⁶ *Procureurs* I interviewed were very aware of these potential conflicts of interests and of the limits it imposed on their own powers over police investigations.

Anyway, this direction [of the police] comes up against a double hierarchy which means that the police depend more on the Ministry of Interior than

⁴⁷³ *ibid* 157–158.

⁴⁷⁴ See chapter 4.

⁴⁷⁵ On this double hierarchy, see for instance Hodgson, *French Criminal Justice* (n 62) 93–99; Jean-Pierre Dintilhac, 'Le Contrôle Du Parquet Sur La Police Judiciaire' (2011) 1 Archives de politique criminelle 29; Roussel, Gautron and Pouget (n 441); Camille Miansoni, 'Le Procureur de La République Dirige-T-Il La Police Judiciaire ?' [2013] AJ Pénal 374; Christian Mouhanna, 'Les Limites Effectives Du Pouvoir Du Parquet Sur La Police' (2013) 2013 AJ Penal 388.

⁴⁷⁶ Gildas Roussel, 'Le Rattachement de Services de Police Judiciaire Au Ministère de La Justice' [2013] AJ Pénal 378; See, contra., Syndicat des commissaires de la police nationale, 'Police Judiciaire - Justice : "La Complémentarité N'exige Pas L'intégration"' [2013] AJ Pénal 381.

on the Ministry of Justice. From this, our direction comes up against the direction from their own hierarchy. It is out of the question – and the *parquet* doesn't have the means – to behave like the police hierarchy. (...) Yes, it would be a bit like the captain of a ship which would be the *commissaire* who ensures the direct operating of the machine and the admiral who is in his office and points to the direction where the ship should go, then it's for the captain to make it work. That's it. [Interview respondent FR3]

We're not their direct hierarchy, they have a double hierarchy, it's not only us, so first they're stuck... it's quite a tricky position, so I think we should always put ourselves in their shoes (...) and see that we can ask them to do stuff and that, on the other side, their hierarchy can say: 'no, that's not possible, we don't have the resources'. I think we should keep this in mind. [Interview respondent FR9]

One *procureur* likened police officers with children of divorced parents who choose who to speak to depending on the answer they seek, explaining that 'they complain to their hierarchy when they are not happy with a decision of the *parquet* and come to the *parquet* when they want to cover their backs with their hierarchy.'

III. (Re)gaining influence through policies

I have underlined the limited role given to the CPS within the Anglo-Welsh criminal justice system and previous research studies have shown that neither the CPS nor French *procureurs* can be fully independent from police investigations. Nevertheless, police and public prosecutors are forced to cooperate in order for criminal justice systems to function. In this section, I argue that public prosecutors influence the way police investigations are conducted, perhaps not so much through the screening of individual cases as anticipated by legal reformers, but more effectively through the issuance of general policies.

A. Implementing local and national policies in France

The power of direction enjoyed by French *procureurs* has long allowed them to disseminate national and local policies to police officers and thus to influence the work

police do on criminal investigations. Nowadays, communication between *parquets* and police services in their area often takes the form of emails sent to police chiefs and directly forwarded to police investigators. Topics range from updates on recent case-law (e.g. Cass. crim. 27 May 2015, no. 15-81142, on the consequence of failing to inform the suspect of the location of the alleged offence), to reminders of the circumstances in which the authorisation of the *parquet* must be sought or instructions regarding the arrest of illegal immigrants. The local *parquet* I observed also organised annual training sessions for investigators. This is an opportunity to remind them of local permanent instructions⁴⁷⁷, but also to tackle common mistakes in summons paperwork identified by *procureurs*. In addition, public prosecutors used this opportunity to define the concept of ‘admission’ which is a mandatory requirement in order to send a case to the CRPC (guilty plea) or *composition pénale* procedures. *Procureurs* insisted that the admission must be unambiguous, thereby attempting to improve the oral reports they get from police officers. The training session used several examples of actual paperwork found in existing files compiled by police officers. *Procureurs* told me that delivering such training was effective in correcting common mistakes, but regretted that attendance was not mandatory, making it difficult to reach police officers who believe that they do not need further training.

As explained in chapter 3, regular meetings have been set up with representatives of different agencies and local authorities including public prosecutors who have an important role in crime prevention. These meetings are co-chaired by the *procureur* and the *préfet*.⁴⁷⁸ Close cooperation with *préfecture* services are described as key by public prosecutors I interviewed due to the double hierarchy under which police

⁴⁷⁷ See Chapter 4.

⁴⁷⁸ The *préfet* is the representative of the government in a region and, consequently, the head of regional police forces.

investigators operate. The head of the local *parquet* underlined the importance of a good working relationship with the *préfecture*,⁴⁷⁹ as they share the direction of the police, saying: ‘if they have two bosses, it’s like they have no boss. The ideal situation is when you can show a united front with the *préfet*.’ She insisted that these partnerships were very important for the *parquet*.

There are big decisions taken during meetings and that’s changed because now we work in close cooperation with the *préfet*. The police need to see that there is no difference between the *procureur* and the *préfet*, so that there is only one voice. It depends on the local understanding which can be more or less good. For the past 10 or 15 years, we’ve grown much closer to the *préfets*, so now we roughly go in the same direction. [Interview respondent FR8]

This was especially true since she noticed a greater involvement of *préfets*, and through them of the Interior Minister, in criminal investigations in recent years. Similarly, *procureurs* interviewed for a 2010 study described *préfecturale* authorities as ‘interventionist’.⁴⁸⁰ The development of this close cooperation between *procureurs* and *préfets* can be uncomfortable for public prosecutors due to the close links between *préfets* and the government and the clear political dimension of their function. As some judges consider this cooperation with a representative of the executive power to be a compromise of principle, it is understandable that some *procureurs* feel torn between two authorities.⁴⁸¹ Yet, in my own fieldwork, *procureurs* pointed out that they have become the spokespersons of all *magistrats* and argued that they defend the actions of the courts during regular meetings organised at the local level.

There’s a central question today of whether we are going to separate the corps [of the *magistrature*] in two. I am fully opposed to this, but globally colleagues in the sitting judiciary are very much in favour of it. They don’t understand that we are their protective screens, as long as we behave like *magistrats* and not as super-*préfets* or judicial *préfets* and that we keep our

⁴⁷⁹ On the relationships between *procureurs* and *préfets*, see Benjamin Blanchet, ‘La Robe et L’olivier. Les Rapports Entre Le Procureur et Le Préfet’ [2010] *Revue Française de Droit Administratif* 1187.

⁴⁸⁰ Milburn, Kostulski and Salas (n 69) 133–135.

⁴⁸¹ *ibid* 135–137.

distances from the police. For example, in the monthly meetings with police and *préfecture*, it happens that some court decisions are commented upon. In this case, the *Procureur de la République* must be strong enough and *magistrat* enough to remind people of some principles, in particular that court decisions shouldn't be commented upon but conformed with. (...) As long as we keep this stand, we are protective screens for our sitting judiciary colleagues to remind people of freedom of speech, freedom of decision, independence, autonomy and all that. [Interview respondent FR1]

There is thus a form of accountability of public prosecutors for court decisions in general. These meetings serve to agree common local policies, but also to forge a mutual understanding of each agency's work in order to improve cooperation. By explaining judicial decisions to the police and other local agencies, *procureurs* hope to foster good relationships, so that their decisions are accepted, even when police investigators disagree with them.

B. Adopting common policies with the police in England and Wales

Despite the Philips principle of strict separation between the investigation and prosecution functions, the CPS has attempted to influence the work of the police, in particular with regards to charging. Selecting the charges to be laid before the court clearly is a prosecuting task. Yet the power to charge remained with the police in England and Wales following the creation of the CPS, one of the major 'largely unacknowledged compromises'⁴⁸² in the Philips principle. Even before the CPS started to operate, it was predicted that the police power to initiate prosecution would undermine the ability of the CPS to weed out weak cases.⁴⁸³ McConville *et al* showed that prosecution momentum developed once the police had decided to charge a case.⁴⁸⁴ However, the CPS gained some purchase over the charging decision by drafting with

⁴⁸² White (n 20) 154.

⁴⁸³ McConville (n 206); Sanders, 'Arrest, Charge and Prosecution' (n 203).

⁴⁸⁴ McConville, Sanders and Leng (n 39) 126–127 and 141–142. It had already been demonstrated before the establishment of the CPS that it was easier for prosecutors to discontinue a case before it had been charged than after: Mansfield and Peay (n 29) 87.

the Association of Chief Police Officers (ACPO)⁴⁸⁵ common Charging Standards for several criminal offences detailing which offence should be charged in what circumstances. The first set of Charging Standards on offences against the person was implemented in 1994.⁴⁸⁶ The Charging Standards define the criteria to apply to decide the level of charge applicable to the case (i.e. common assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm). They must be complied with by all police officers and CPS prosecutors and promote unity in charging approaches between the two agencies.

The 2001 Auld review attributed late guilty pleas to overcharging by the police and failure by the CPS to remedy it at an early stage and concluded that '[m]uch of the problem is due to the fact that the police, not the Crown Prosecution Service, initiate prosecutions.'⁴⁸⁷ In response, the Criminal Justice Act 2003 gave the DPP the power to issue guidance on charging which police officers and prosecutors must comply with. In 2007, the first edition of the Director's Guidance on Charging required the police to seek CPS approval in all cases, minus a few exceptions. The vast majority of CPS prosecutors I interviewed believed it was right for the CPS to be involved at an early stage and decide the charges, as their hands are then tied by the chosen charge. It is indeed difficult to alter the charges after the first plea hearing which is often attended by Associate Prosecutors rather than fully qualified lawyers.⁴⁸⁸ However, the 2011 and 2013 editions of the charging guidance reversed the principle: Crown Prosecutors are now expected to make charging decisions only in cases not allocated to the police. These changes closely followed the announcements made in two speeches by Theresa

⁴⁸⁵ ACPO has been replaced by the National Police Chiefs Council (NPCC) from April 2015.

⁴⁸⁶ Fionda and Ashworth (n 339) 897; Ashworth (n 462) 272.

⁴⁸⁷ Auld (n 43) 10, paras 35–37.

⁴⁸⁸ See Chapters 4 and 6.

May to the Police Federation⁴⁸⁹ in 2010 and 2011 in which the Home Secretary promised to return certain charging decisions to the police.⁴⁹⁰ The sequence of events raises questions as to the independence of the CPS from the Home Office. As noted by Fionda and Ashworth, '[i]t is desirable that all parts of the system should have a coherent policy, but who should call the tune?'⁴⁹¹ Section 37A of PACE gives power to the DPP to issue guidance on charging, not to the Home Secretary, but it seems that the guidance is nevertheless strongly influenced by the Home Office.

Despite the rollback of CPS powers over charging decisions, it should be noted that the DPP's Guidance on Charging still has to be complied with by police officers. This means that both CPS prosecutors and police officers apply the same standards when deciding to charge. This is supposed to limit the tensions which persist around charging with police officers being dissatisfied when the CPS drop cases that they want to see charged. Applying the same criteria to the charging decision improves mutual understanding and increases the chances of agreement between the two agencies, as opposed to them following two different policies. The guidance also incorporates the National File Standard agreed with ACPO which specifies the material required to provide sufficient information for the prosecutor to make meaningful decisions. Inevitably, the National File Standard, in turn, influences the collection of evidence as police officers must ensure that all required evidence is provided to the CPS for decision.

⁴⁸⁹ The Police Federation of England and Wales is a staff association for all police constables, sergeants and inspectors. It was established by the Police Act 1919 as an internal representative body for the police.

⁴⁹⁰ Theresa May, Home Secretary's speech to the Police Federation, 19 May 2010 <<https://www.gov.uk/government/speeches/police-reform-theresa-mays-speech-to-the-police-federation>>; Theresa May, Home Secretary's speech to the Police Federation, 18 May 2011 <<https://www.gov.uk/government/speeches/home-secretarys-speech-to-the-police-federation>> accessed 13 June 2014.

⁴⁹¹ Fionda and Ashworth (n 339) 903.

In the area I observed, the manager of the Rape and Serious Sexual Offences (RASSO) team built on this initiative by negotiating at the local level the material he wanted to have on case files and even organised training workshops with police officers to explain what is meant by ‘key evidence’:⁴⁹²

The police understanding of a key witness was not always the same as ours. And so, a lot of the thrust of these workshops was actually to make sure we’re all on the same page in approaching the investigation and explaining why, when we ask for certain things, why we’re asking for them. [Interview respondent EW28].

Again, this initiative attempted to build a common understanding of certain concepts to improve relationships with police officers, so that they understand why their cases are dropped by the CPS and how they can build stronger cases. This CPS manager also checked every file addressed to his team for charging authorisation to make sure that all the evidence was included before allocating the file to a prosecutor. This had repercussions on police investigations as police officers had to make sure they had collected all requested evidence before they submitted a file to the CPS.

Almost all CPS managers I interviewed told me that they had very good relationships with the police at senior level, but added that there were frictions with some officers on the ground.

With the senior officers, it [the relationship with the police] is very good. The officers on the ground, as across the business, some of them, we have good relationships, some of them not so good, because they tend to have a very one-sided view of things, whereas, with senior officers, they would take a much more balanced prosecution team approach. The officers on the ground are very much more focused on... more involved in individual cases, to the extent that perhaps they lose their impartiality. [EW28]⁴⁹³

⁴⁹² Director’s Guidance on Charging, section 27.

⁴⁹³ Similarly EW20, EW26, and EW27.

General discussions with the police, both at national and local levels, could therefore be a more promising avenue for the CPS to gain influence over the conduct of investigations and ensure fairer prosecutorial decisions.

The local area also organised joint audits with the police to identify what had gone wrong on certain files, such as domestic violence cases, and to develop local strategies to remedy specific issues. In replacement of the culture of reciprocate blame that exists between the CPS and the police, these audits attempted to create a culture of cooperation and, rather than stopping at the sterile blame allocation, to define commonly agreed solutions for future cases. Furthermore, these audits generally involved the participation of individual Crown Prosecutors, rather than CPS managers, thus promoting better mutual comprehension between police officers and public prosecutors on the ground.

Conclusions

In both jurisdictions, public prosecutors are tasked with neutrally reviewing police investigations in order to decide whether or not to prosecute cases. Previous research studies showed that this task is only imperfectly performed by public prosecution services as police investigators are largely able to influence the prosecution decision since they control the collection of evidence. Whether public prosecutors have supervisory powers over police investigations or not, it is almost impossible for them to challenge or go beyond the parameters set by the police, despite recent reforms in each jurisdiction. This is not to say that the role of a public prosecutor, independent from the police, is completely ineffective and that police officers should directly decide whether to prosecute or not. Having to report to legally qualified external

agents and receiving advice/orders from them represents an important accountability channel for the police and thus has an impact in filtering out obviously weak cases and strengthening others. However, it is also clear that public prosecutors cannot fulfil the function which might be properly carried out by a defence lawyer in providing a different viewpoint on the investigation than that of the police.

Since public prosecutors fully depend on the police to collect evidence and to bring cases to them, there is an original imbalance in the relationship. The Anglo-Welsh model consists of two wholly independent agencies, with no hierarchical link between them, whilst the French model gives public prosecutors the power to supervise police investigations. In this chapter, I showed that the Anglo-Welsh model resulted in serious tensions between the public prosecution service and the police, with little trust and a tendency to blame each other for mistakes or failings. By contrast, the French model has a clearer responsibility structure which appears to lead to more trust and cooperation between legal actors.

Finally, if providing wholly neutral reviews of individual cases does not seem to be possible, public prosecutors can help shape police investigations through general policy and guidance and through the provision of training to police officers. These provisions allow public prosecutors to foster better relationships with the police in limiting the dissatisfaction felt by police officers when seeing cases dropped that they would have wanted to see prosecuted. They provide an important channel for explanatory and cooperative accountability to the police in which public prosecutors explain the bases for their decisions, but also attempt to bring police processes closer to their own by defining common criteria. They are designed to improve mutual comprehension of the work of each agency and define common solutions, instead of letting mistrust take hold.

As well as deciding whether to prosecute a case or not, public prosecutors have become more and more involved in deciding the final outcome of cases. In the next chapter, I analyse the influence of public prosecutors in case disposals in both jurisdictions under study.

Chapter 6 – Case disposals in ‘cash-strapped’ criminal justice systems

Modern criminal justice systems have all introduced pared down procedures designed to speed up the disposal of cases and reduce costs, in particular when the offence is admitted by the defendant. McEwan argues that the convergence of European criminal justice systems does not happen through the adoption of adversarial features into inquisitorial systems or vice versa, but by each system abandoning its traditional ideals to embrace the new priority: efficiency.⁴⁹⁴ In a 1998 article, Lynch argued that the American criminal justice system departs from adversarial ideals in practice and resembles more closely the image that many American lawyers have of inquisitorial systems: one in which official agents administratively decide who is worthy of criminal punishment.⁴⁹⁵ Although guilt is still formally determined in court, ‘[t]he substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor’⁴⁹⁶ in the vast majority of cases where the defendant pleads guilty. Existing literature has identified efficiency concerns in the criminal justice process as detrimental to the rights and interests of those accused of crime,⁴⁹⁷ but little research has been done on the way prosecution services participate and are impacted by it.

Whilst the budget dedicated to the judicial system in France has increased significantly over the past 40 years,⁴⁹⁸ it remains relatively low in comparison with other European

⁴⁹⁴ McEwan (n 379).

⁴⁹⁵ Gerard E Lynch, ‘Our Administrative System of Criminal Justice’ (1998) 66 *Fordham Law Review* 2117, 2121.

⁴⁹⁶ *ibid* 2123.

⁴⁹⁷ Cape (n 379); Erik Luna and Marianne Wade, ‘Prosecutors as Judges’ (2010) 67 *Washington and Lee Law Review* 1413.

⁴⁹⁸ Vigour and Hastings-Marchadier (n 363) 413.

countries. According to the European Commission for the Efficiency of Justice (CEPEJ), France was classed in 37th position out of 45 countries for the expenditure allocated to its judicial system (courts, legal aid and prosecution services) in proportion of its GDP in 2012, compared with England and Wales in 17th position.⁴⁹⁹ However, all agencies in the English and Welsh criminal justice system have seen their budgets cut in recent years. The CPS saw its budget cut by almost 25 percent between 2009-10 and 2014-15, with further cuts planned for 2015-16.⁵⁰⁰ Although its workload has decreased – due, in part, to some transfers of prosecution powers in the magistrates’ courts to the police –,⁵⁰¹ the CPS still had to find substantial efficiency savings in recent years. Furthermore, a more general movement towards greater efficiency is at work in the Anglo/Welsh criminal justice system as a whole.⁵⁰² Thus, official reports in recent years have all had regard to the efficient use of resources in the criminal justice system.⁵⁰³ Concerns over the performance of the criminal justice system have also developed in France.⁵⁰⁴

In this chapter, I examine the impact of the drive for efficiency on criminal prosecutions in France and in England and Wales. As identified by Lynch, guilty pleas are the principal way in which Anglo-American systems have moved away from

⁴⁹⁹ CEPEJ, ‘Report on “European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice”’ (2014) <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf> accessed 6 July 2015.

⁵⁰⁰ Crown Prosecution Service, ‘Annual Report and Accounts 2014-15’ (2015) 74.

⁵⁰¹ Whilst in 2005-06, the CPS prosecuted over a million cases in the magistrates’ courts, their caseload fell to just over 640,000 cases in 2013-14: Crown Prosecution Service, Annual Report and Resource Accounts 2007-2008, Annex A – Casework Statistics <http://www.cps.gov.uk/publications/reports/2007/annex_a.html>; Crown Prosecution Service, Annual Report and Resource Accounts 2013-2014, p. 84 <http://www.cps.gov.uk/publications/docs/annual_report_2013_14.pdf> accessed 3 July 2015.

⁵⁰² Brownlee (n 379); McLaughlin and Muncie (n 379); Bridges (n 379); McEwan (n 379).

⁵⁰³ Runciman of Doxford (n 40) 4–5; Narey (n 41); Glidewell (n 42); Auld (n 43) 395–399; Leveson (n 352).

⁵⁰⁴ Breen (n 363); Vigour (n 363); Alt and Le Theule (n 363); Vigour and Hastings-Marchadier (n 363); Gautron (n 363); Cliquennois, Bellebna and Léonard (n 363).

adversarial ideals and the centrality of trial to a system in which guilt is adjudicated by public prosecutors, rather than judges. In the first section, I analyse the use of guilty pleas as routine disposals for England and Wales, but show that their use has remained limited in France, principally due to the inquisitorial ethos of French prosecutors and defence lawyers. In the second section, I argue that the criminal justice process has become akin to an administrative process in each jurisdiction, focusing on the role of prosecutors in this development. This bureaucratisation is characterised in both jurisdictions by discontinuity in prosecutions and delegation of ‘routine’ cases to less qualified staff.

I. Guilty pleas: a routine disposal?

Guilty pleas allow for the disposal of cases without the examination of the prosecution case at trial following an admission by the defendant and therefore usually result in efficiency savings. In the adversarial ideal-type, the judge is limited by their role as an umpire and thus cannot go beyond what the parties present to them. The decision by the accused not to contest the prosecution case removes the need for each party to present evidence. Whilst guilt is still formally determined by the court as it can reject the plea, the court does not need to adjudicate guilt by hearing all evidence in a full trial. Although there was always the possibility for a suspect to plead guilty in Anglo-American courts, this was rarely used and was actually discouraged by judges until the 19th century.⁵⁰⁵ Langbein argues that guilty pleas were introduced in 19th century common law procedure because ‘the rise of adversary procedure and the law of evidence injected vast complexity into jury trial and made it unworkable as a routine

⁵⁰⁵ Albert W Alschuler, ‘Plea Bargaining and Its History’ (1979) 13 Law & Society Review 211.

dispositive procedure.’⁵⁰⁶ His analysis is supported by other authors who contend ‘that the guilty plea system emerged to displace jury trials when professionals, police and lawyers, entered the fray and set the system right, i.e. with due regard to notions of cost efficiency and justice.’⁵⁰⁷ Plea bargaining has never been an open practice in England and Wales, but took place in the shadows of the criminal justice system with informal deals being struck between prosecution and defence, encouraged by the Court of Appeal’s guidance on sentencing discount for those pleading guilty.⁵⁰⁸ Sentence reductions in exchange for a guilty plea were only given a statutory footing by section 48 of the Criminal Justice and Public Order Act 1994 with a system of graduated discounts depending on the timing of the guilty plea.

By contrast, in the inquisitorial model, the judge does not only have an adjudicative role, but has a duty to actively seek the truth. In these circumstances, the role of inquisitorial judges would not allow a simple confession by the accused to remove the judicial power to investigate the facts of the case and to decide on the guilt of the accused. Rooted in inquisitorial tradition, continental Europe resisted for many years the introduction of a formal guilty plea procedure. However, the ever-growing burden on criminal justice systems overcame this resistance. All Western criminal justice systems have now adopted a simplified form of disposal for criminal cases, based on a confession by the accused. In France, a formal guilty plea procedure called the

⁵⁰⁶ John H Langbein, ‘Understanding the Short History of Plea Bargaining’ (1979) 13 Law & Society Review 261.

⁵⁰⁷ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining : A True History* (Hart Publishing 2005) 327.

⁵⁰⁸ The Runciman Commission estimated that the usual discount ranged between 25 and 30 percent: Runciman of Doxford (n 40) 110.

‘comparution sur reconnaissance préalable de culpabilité’ (CRPC – procedure on prior recognition of guilt) was introduced in 2004.⁵⁰⁹

As I will discuss in this next section, guilty pleas have become a routine disposal method in England and Wales and have been criticised as incorporating inadequate safeguards for the accused. Meanwhile, the use of the CRPC remains circumscribed in France, with less pressure on the accused to plead guilty due to different systemic risks for prosecutors.

A. The widespread use of guilty pleas in England and Wales

1. A procedure subject to limited checks

In England and Wales, defendants pleaded guilty in over 70 percent of cases prosecuted by the CPS in 2013-14.⁵¹⁰ Efforts to reduce the cost of criminal procedures have led to greater pressures on defendants to plead guilty. Defendants are thus encouraged to plead guilty through the prospect of receiving a reduced sentence.⁵¹¹ Sentencing guidelines recommend discounts of one third if the guilty plea was entered ‘at the first reasonable opportunity’, one quarter where the plea was only entered once a trial date had been set, and one tenth where the plea was entered ‘at the door of the court’ or after the trial had begun.⁵¹² In 2011, the government considered increasing the maximum reduction for a guilty plea to 50 percent, but the proposal has since been

⁵⁰⁹ See Saas (n 230); Pierre-Jérôme Delage, ‘La Comparution Sur Reconnaissance Préalable de Culpabilité : Quand La Pratique Ramène à La Théorie’ [2005] *Recueil Dalloz* 1970; Pierre-Jérôme Delage, ‘Les Obscures Pratiques Du « Plaider Coupable »’ [2007] *Recueil Dalloz* 58; Pierre-Jérôme Delage, ‘Résistances et Retournements - Essai de Synthèse Du Contentieux Relatif à La Procédure de « Plaider Coupable »’ [2010] *Revue de science criminelle* 831; Jacqueline Hodgson, ‘Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice’ in Erik Luna and Marianne Wade (eds), *The prosecutor in transnational perspective* (Oxford University Press 2012).

⁵¹⁰ Crown Prosecution Service, ‘Annual Report and Accounts 2013-14’ (2014) 85-87 <http://www.cps.gov.uk/publications/docs/annual_report_2013_14.pdf> accessed 13 July 2015.

⁵¹¹ Section 144 of the Criminal Justice Act 2003 leaves the level of the sentencing discount at the discretion of the court, but courts must follow sentencing guidelines.

⁵¹² Sentencing Council, ‘Reduction in Sentence for a Guilty Plea: Definitive guideline’ (2007) 5 <http://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf> accessed 13 July 2015.

abandoned.⁵¹³ Furthermore, the Criminal Justice Act 2003 changed the rules laid down by the Court of Appeal in *R v Turner*⁵¹⁴ which prohibited judges to give any advance indication of sentence. A defendant is now permitted to request an indication of the maximum sentence the judge is minded to pronounce, if they were to plead guilty at that stage. The Royal Commission on Criminal Justice argued that '[t]he primary reason for the sentence discount is to encourage defendants who know themselves to be guilty to plead accordingly and so enable the resources which would be expended in a contested case to be saved'.⁵¹⁵ However, the sentencing discount is widely regarded by academic researchers as an instrument of powerful pressure which might induce innocent defendants to plead guilty.⁵¹⁶ The risks were also clear to the Court of Appeal in its decision in *R v Goodyear*⁵¹⁷ which attempted to regulate advance indications of sentence by judges:

A judge should never be invited to give an indication on the basis of what would appear to be a 'plea bargain'. He should not be asked or become involved in discussions linking the acceptability to the prosecution of a particular plea or bases of plea and the sentence which might be imposed and he should not be asked to indicate levels of sentence which he might have in mind depending on possible different pleas.⁵¹⁸

The pervasiveness of guilty pleas was illustrated in my own fieldwork by the comments of a Crown Advocate I interviewed:

[T]here is a huge culture in Britain of pleas and offences being resolved on the day of trial. I would say (...) 60 percent of all cases listed for trial

⁵¹³ Andrew Porter and Tom Whitehead, 'Plan to Halve Jail Terms for Guilty Pleas Scrapped' *Daily Telegraph* (London, 20 June 2011) <<http://www.telegraph.co.uk/news/uknews/law-and-order/8587607/Plan-to-halve-jail-terms-for-guilty-pleas-scrapped.html>> accessed 2 October 2015.

⁵¹⁴ [1970] 2 QB 321.

⁵¹⁵ Runciman of Doxford (n 40) 110.

⁵¹⁶ See, for example, John Baldwin and Mike McConville, *Negotiated Justice: Pressures to Plead Guilty* (Robertson 1977); Belloni and Hodgson (n 44) 141–144; Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentencing Rewards' [2000] *Criminal Law Review* 895; Russell D Covey, 'Signaling and Plea Bargaining's Innocence Problem' (2009) 66 *Washington and Lee Law Review* 73; Fiona Leverick, 'Sentence Discounting for Guilty Pleas: An Argument for Certainty over Discretion' [2014] *Criminal Law Review* 338, 339–340; Mike McConville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar 2014) 98–110.

⁵¹⁷ [2005] EWCA Crim 888.

⁵¹⁸ *Ibid.* para 67.

will plead guilty on the day of trial, either to the offence that they've been charged or to some lesser offence. So there is a big culture here of still doing that, so everybody is geared up to it. It's still very much part of the DNA of the system. [Interview respondent EW25]

Potential plea deals are considered from the start of the process, as CPS lawyers authorising charges are asked to contemplate which pleas would be acceptable to the prosecution. For instance, in a case where she authorised charges for breach of a restraining order and for possession of cannabis, the CPS lawyer commented in her advice that, although a plea to both charges was preferable, she recommended accepting a plea to the breach of restraining order alone if the suspect refused to plead to the drugs offence.

The reason is that, if he admits the breach [of restraining order], he should get a higher sentence for that than he would for low level simple possession of class B, and, if he now denies the drugs notwithstanding his admissions, we'd still have to prove the drugs formally via forensics at both financial cost and cost of delay. [Case EW-125]

Indicative of the sensitivity of plea bargaining in the Anglo-Welsh system and of the central role played by prosecutors, there is detailed policy and guidance on guilty pleas and plea bargaining. The Code for Crown Prosecutors, para 6.3, expressly forbids overcharging to put pressure on a defendant to plead guilty. Paragraphs 9.1 to 9.6 regulate the acceptance of guilty pleas to reduced charges more specifically and reminds prosecutors of what they should take into account when considering pleas: public interest, views of the victim, court's sentencing powers, etc. The Attorney General has also published guidelines for the legal profession 'on the acceptance of pleas and the prosecutor's role in the sentencing exercise' which were lastly revised in 2009 and which must be followed by CPS prosecutors.

The main safeguard to ensure the accuracy of guilty pleas is the defence lawyer. However, other studies have demonstrated the weakness of such safeguards with

defence lawyers pushing their clients to plead guilty in practice.⁵¹⁹ Although I did observe some Crown Court cases, the majority of my court observations took place at the magistrates' court. Plea bargaining took place at court and was usually initiated by defence lawyers, rather than by the CPS. Defence lawyers would approach the CPS representative prior to the hearing or during a break (e.g. when the court retired to make their decision). For example, in case EW-140 where a defendant was charged with common assault on his partner, the defence lawyer approached the CPS representative at court to ask whether she was prepared to accept a plea on part of the facts. The CPS representative responded favourably as she wanted to avoid trial where a seven-year old witness would have had to give evidence. She told the defence lawyer that she wanted an admission to a serious enough assault, so that the sentence could reflect the seriousness of the facts. In the end, the defendant entered a guilty plea on the basis of a defence statement admitting to all facts as set in the prosecution file, except for a headlock. Whereas in France, the public interest role of the *procureur* requires them to check the veracity of the defendant's admission, I never observed CPS representatives expressing any doubt over the admission or carrying out such checks. It is clearly perceived as the defence lawyer's role in an adversarial system.

Although a highly regulated area, there is little accountability in practice for plea bargaining and court disposals. As explained earlier, the CPS is often represented by an Associate Prosecutor (AP), rather than a Crown Prosecutor, at magistrates' court hearings. Although authorising APs to engage in plea negotiations would be consistent with efficiency, this is theoretically outweighed by concerns to ensure that major legal decisions and those around case disposal are taken only by Crown Prosecutors. When

⁵¹⁹ Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994); Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013).

reviewing a file, Crown Prosecutors will indicate which pleas would be acceptable. If there is no authority on file, APs must always seek authorisation prior to accepting a plea. However, I have observed on several occasions that APs breach procedure by accepting pleas without prior authorisation by a Crown Prosecutor in practice. This is driven by the practical reality of magistrates' courts' listings. Where an offer to plead guilty to a lesser offence than charged is made by the defence but there is no authority on file for APs to accept it, it is not practical for them to ask the court for time to consult with a superior by phone.

Even when a District Crown Prosecutor was on duty to answer queries from APs at court, which was every day in the area I observed, APs confirmed in interviews that practical constraints meant they had to bend the rules.

We're not meant to accept any basis of plea. (...) That's a technicality. The thing is you've got to use your common sense over there because, to a certain degree, you just have to, otherwise you'd be stopping every two minutes to make a phone call to the office. [Interview respondent EW10]

Several APs told me in interviews that, with experience, they knew which pleas were acceptable. They were confident that their managers would back them up when they returned to the office.

We're quite lucky that our management back us up completely. Basically, you can make decisions at court, even though you're probably not supposed to make decisions at court, but you can in the knowledge that you're going to be backed up on it. Because clearly, we're all stretched, there's not enough staff, you can't always get hold of somebody. They might be talking to someone else and you might only be allowed to stand the case down for five minutes.(...) I think when you've been in the job long enough you know what would rock the boat and what wouldn't. [Interview respondent EW6]

As can clearly be seen in this last comment, resource constraints limiting the availability of CPS lawyers are also part of the reason why APs do make decisions at court instead of asking for prior authorisation from a lawyer as they are legally

required to, along with the reality of court listings which preclude APs being given the time to ring the office. Importantly, this is done with the full knowledge of managers. During a team meeting I attended, managers explained that there were not enough lawyers to carry out file reviews. Such file reviews could sometimes have been requested by the CPS representative in court, for example to decide whether a plea was acceptable or not. The manager pleaded for a drop in the number of such requests. Although he acknowledged that APs were not supposed to make the decisions to accept pleas or not, he admitted knowing that they made some and said that he was 'grateful' that they did, thus further underlining the unworkable nature of the procedure in place for APs.

Even when the AP is able to consult with a CPS lawyer to obtain authorisation, the impact of this as a form of supervision is limited. In practice, it is unlikely that the CPS lawyer will be able to review the file fully before giving their advice. It is therefore likely that they will take their decision on the summary that the AP will give them orally. In other words, even when lawyers are consulted, the influence of the AP on the decision should not be underestimated. Furthermore, social pressures can push Crown Prosecutors to support the decision favoured by APs who are their colleagues, as illustrated by the following example from my field notes.

A defendant, sectioned in a mental health institution, was alleged to have assaulted another patient. She had no previous convictions, but had been cautioned previously. Having negotiated a plea on a lower basis than alleged by the prosecution case, the defence lawyer argued before the court that this type of incident should not be criminalised. The magistrates questioned whether a prosecution was in the public interest. As the AP prosecuting the case in court explained, the case had been brought to court through police summons, which meant that it had not been reviewed by a CPS lawyer. The magistrates asked her to ring the CPS office to take instructions from a lawyer on whether to pursue the matter further. The AP resented this, as she argued that she had already accepted a plea on a lower basis and that, in her experience, such cases were prosecuted so that the incident could be noted on the defendant's record, in case she

committed a more serious offence in the future. As the magistrates nonetheless insisted that she made that phone call to ask for instructions, she complied, but reported back to court that the CPS wanted to pursue the matter further. Afterwards, she told me that she had urged the Crown Prosecutor who answered her call to back her up, as she felt she would have looked stupid in court otherwise. The Crown Prosecutor acceded to her request. [Case EW-176]

The need for responsiveness at court and efficiency outweighs concerns over controversial plea deals. Importantly, a guilty plea counts as a successful outcome for the CPS as it boosts the conviction rate. It is also more difficult to review such decisions as they are taken at court, in the heat of the moment and will not be reviewed by others later in the process, since the case is finalised.

2. The pressures on the accused to plead guilty as early as possible

It is clear that an increase in the guilty plea rate would mean great savings for the CPS: the DPP indicated that '[t]he average cost to the CPS to prepare a case for guilty plea in the magistrates' court is around £160. The average cost to prepare a trial is around £850. And, of course, there is the time factor: it takes a good deal longer to prepare a case for trial than it does to prepare a case for a plea.'⁵²⁰ However, an increase in the guilty plea rate is not a target for Crown Prosecutors. Instead, the focus has been on the timeliness of these guilty pleas. In November 2010, following the Spending Review, Her Majesty's Inspectorate of Constabulary (HMIC) suggested solutions to reduce waste in the Criminal Justice System. It clearly stated that late guilty pleas were part of the problem:

The majority of defendants plead guilty (67%), but 41% do so late in the day, when large quantities of paperwork have been prepared and duplicated by agencies, the hearing has been scheduled and victims and witnesses have arrived in court to give evidence. A conservative estimate of the cost of this additional nugatory work is in the region of £150 million.

⁵²⁰ Keir Starmer QC, 'Challenge and opportunity – DPP's address to the London Justices' Clerks' Society', 11th March 2011, <http://www.cps.gov.uk/news/articles/challenge_and_opportunity/> accessed 15h May 2013.

The money saved by a 25% reduction in late guilty pleas could fund Victim Support for one year.⁵²¹

The DPP endorsed this idea of timely pleas in saying: ‘Now, most cases – the vast majority of cases – are guilty pleas. That means that we need to get those cases on and disposed of as swiftly as possible, and I’m a big fan of the work that’s being done in Liverpool, with the Early Guilty Plea Scheme, where the aim is to have just one hearing to dispose of a case.’⁵²²

During my fieldwork at a CPS office, I was given access to a document entitled ‘Efficiency & Effectiveness Measures 2012/13 Performance’. It detailed CPS ‘key priority targets’. One of them was entitled ‘Guilty plea rates and disposals’ and detailed the average number of hearings for contested cases and for guilty pleas in the area. The national target for the average number of hearings for guilty pleas is 2.1. The area I was observing was well within the target at 1.98. Also a ‘key priority target’ is ‘Trial effectiveness and timeliness’. Within this section, the ‘cracked trial rate’ is a local indicator and the target is 30 percent. A cracked trial is a case listed for trial but where a guilty plea is entered or the prosecution offer no evidence. The area I observed was well above the target at 47.74 percent of cracked trials. As a result, the reasons for cracked trials were scrutinised in more detail, showing that late guilty pleas were the main reason for cracked trials (26.44 percent of cracked trials). Thus, although the guilty plea rate in itself is not a prosecutorial target, prosecutors are told to improve the timeliness of guilty pleas.

⁵²¹ HMIC, ‘Stop The Drift: A Focus on 21st-century Criminal Justice’ (2010) 4 <<http://www.hmic.gov.uk/publication/stop-the-drift/>> accessed 14 May 2013.

⁵²² Video interview by Keir Starmer QC <http://www.cps.gov.uk/news/articles/dpp_discusses_impact_of_spending_review_on_cps/> accessed 14 May 2013.

Prosecutors seem to have integrated this and their attitudes to guilty pleas are in phase with these targets. Thus, when a senior judge complained to a CPS manager that there were not enough guilty pleas in drugs cases following an undercover investigation (case EW-360), Crown Prosecutors did not consider that it was their job to put pressure on the defence to plead guilty, even when they thought the prosecution case was very strong and it would be in the defendants' interests to plead guilty, with one prosecutor saying: 'You can't tell defence lawyers how to do their job'. However, another prosecutor said to me: 'It is very frustrating to have to go through all this work for the defendant to plead guilty at PCMH [Plea and Case Management Hearing].' The Early Guilty Plea (EGP) scheme has been designed to answer these concerns of timeliness of pleas at the Crown Court, but it does not take into account the fact that late or inadequate disclosure by the prosecution can also have an effect on the timeliness of pleas.

The EGP scheme was introduced by the Senior Presiding Judge for England and Wales.⁵²³ The rationale for the EGP scheme is to secure a guilty plea at an early stage in the process rather than on the day of trial. This may result in some saving of CPS/police resource and it could be argued that there are also benefits for defendants who will spend less time on remand and will receive a sentence discount. It is also contended that it reduces the anxiety of victims and witnesses by early notification that the case is not contested or that their evidence is not required. Pilots were run in several areas before the scheme was rolled out across the whole country in 2012. The DPP stated that: 'As a large proportion of cases committed and sent to the Crown Court result in guilty pleas, the scheme (...) aims to identify these at an early stage,

⁵²³ See <<http://www.justice.gov.uk/downloads/legal-aid/early-guilty-plea-scheme.pdf>> accessed 1 August 2013.

separate these cases into bespoke Early Guilty Plea Courts and expedite the plea and sentence, thereby producing a just, expeditious and cost effective outcome. (...) It also, especially, prevents unnecessary police and CPS file build in preparing a trial file.’⁵²⁴

In their research partly based on interviews with defendants, Hedderman and Moxon suggest that ‘[i]t seems that decisions to plead guilty were largely based on a realistic assessment on the chances of acquittal, and the potential benefits in terms of sentence severity.’⁵²⁵ This ‘realistic assessment’ is not possible without sufficient information on the prosecution file. Hedderman and Moxon found that ‘over a third of those questioned said that there had been some change in the charges against them after the case was committed to the Crown Court, of whom almost two thirds said that they had had one or more charges dropped or less serious charges substituted.’⁵²⁶ Although disclosure rules have changed since this study was conducted,⁵²⁷ its conclusions are still relevant today. It shows that timeliness of guilty pleas is not simply a defence issue, but might also result from inadequate prosecution disclosure or a deal being offered by the CPS late in the day. The EGP scheme attempts to remedy some of these problems, but important issues remain as it could add further pressure on the accused to plead guilty.

⁵²⁴ Keir Starmer QC, ‘Police Superintendents’ Association of England and Wales Annual Conference 2010 Lecture’, 15 September 2010 <http://www.cps.gov.uk/news/articles/dpp_s_annual_lecture_to_the_police_superintendents__2010_conference/> accessed 15 June 2013.

⁵²⁵ Carol Hedderman and David Moxon, ‘Magistrates’ Court or Crown Court? Mode of Trial Decisions and Sentencing’ (Home Office 1992) Home Office Research Study No. 125 25.

⁵²⁶ *ibid* 23.

⁵²⁷ The prosecution’s duty of disclosure was given statutory force by the Criminal Procedure and Investigations Act (CPIA) 1996. The disclosure regime is governed by the CPIA, the Codes of Practice, the Criminal Procedure Rules, the Attorney General’s Guidelines on Disclosure, and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases. The police and CPS have agreed procedures to enable them to fulfil their disclosure duties and these are set out in the Director of Public Prosecution’s Guidance on Charging (fifth edition 2013), the National File Standard and the CPS/ACPO Disclosure Manual.

The EGP scheme encourages the CPS to have a more proactive role in plea bargaining. It is mainly targeted at either-way offences not suitable for summary trial and is linked to the abolition of committal hearings at the magistrates' courts. After the first hearing at the magistrates' court and if it was decided that the case was not suitable for summary trial, the file is given to a Crown Advocate for review instead of going directly to the Crown Court team for a committal file to be prepared. The Crown Advocate reviews the charges and should check what pleas would be acceptable to the prosecution. They then telephone the defence solicitor to speak to them about it. The EGP scheme therefore encourages communication between defence and prosecution about plea bargaining. The idea is to encourage defence and prosecution to discuss possible pleas at an early stage and not to wait until the last minute, i.e. at trial, to have this discussion. The problem is that, at this stage, the defence does not have full disclosure of the prosecution file. They only receive initial disclosure before the magistrates' court hearing. The Crown Advocate also only has the initial file as the full file from the police will be received later on. This means that this form of plea bargaining, which takes place by telephone discussion, occurs between people who have not got all the cards in hand to make a fully informed decision. Clearly, this could potentially be quite detrimental to the accused. In particular, neither the Crown Advocate, nor the defence solicitor have access to fully transcribed interviews of the defendant at the police station, instead relying on notes taken by the police during the interviews. Similarly, they do not have any of the unused material. All these documents will be sent later on by the police to the CPS who will then disclose all relevant material to the defence.

B. The limited use of guilty pleas in France

The transplant⁵²⁸ of a form of guilty plea procedure in France can clearly be linked to an effort to increase efficiency in the criminal justice system and reduce delays between the commission of an offence and the disposal of the case. The circular issued by the Ministry of Justice for the application of the 2004 law clearly states that the new ‘guilty plea’ procedure ‘should allow a better management of criminal cases, giving criminal courts more time to dedicate to the most complex cases’.⁵²⁹ When presenting the procedure to defendants, a *procureur* thus explained: ‘This procedure should save me time and should give you a lower sentence. It’s a win-win situation.’ Yet, almost ten years after its introduction to French criminal procedure, the CRPC procedure is far from becoming a routine disposal pathway for criminal cases. Just over 65,000 cases – 10 percent of all cases prosecuted by *procureurs* – were dealt with through the CRPC procedure in 2013.⁵³⁰ The stark contrast in the use of the guilty plea procedure with England and Wales can partly be explained by the statutory restrictions to the CRPC, but also by different legal culture and practices.

1. A highly regulated procedure

The CRPC is a formal procedure with important statutory safeguards for the suspect. The decision to deal with a case through the CRPC procedure is taken by the *procureur* following the police investigation. Although article 495-7 CPP provides that the defence can request the use of the CRPC, the decision in all cases I observed was

⁵²⁸ When it presented the bill introducing the CRPC in French law, the government clearly stated that it was ‘inspired by Anglo-Saxon guilty plea procedures’: Bill no. 784, *portant adaptation de la justice aux évolutions de la criminalité*, registered before the *Assemblée Nationale* on 9 April 2003 <<http://www.assemblee-nationale.fr/12/projets/pl0784.asp>> accessed 15 July 2015.

⁵²⁹ Circular of 2 September 2004, *Présentation des dispositions de la loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité relatives à la procédure de comparution sur reconnaissance préalable de culpabilité* (NOR: JUSD0430176C).

⁵³⁰ Ministère de la Justice, ‘Les Chiffres Clefs de la Justice 2014’ (Ministère de la Justice 2014) 14 <http://www.justice.gouv.fr/art_pix/1_stat_livret_final_HD.pdf> accessed 4 July 2015.

initiated by the *procureur*. Several factors can account for this: French defence lawyers gained greater access to police investigations only recently and tend to approach the defence role as a more passive and restricted role than their Anglo-Welsh counterparts; and lawyers advising suspects at the police station are unlikely to continue representing them at court.⁵³¹ This prevents them from playing a more proactive role prior to trial, such as making representations to the *procureur* in favour of a specific procedural path.

The suspect must admit the offence for the procedure to apply, but a confession during the police interview did not automatically trigger a CRPC. In my fieldwork, *procureurs* used the procedural options at their disposal following a grading scale, depending on the seriousness of the offence and the suspect's criminal record.⁵³² The most minor offences were thus dealt with through alternatives to prosecution, in a progressive range going from *rappel à la loi*, restorative measures (such as mediation and reparation) and up to *composition pénale*. More serious offences were prosecuted through, in ascending order, *ordonnance pénale*, CRPC, traditional *correctionnel* hearing and *comparution immédiate*. In this context, the CRPC represented but one middle-ranking response, amongst a wide variety of possibilities. This is well illustrated by case F-215 in which two men in a car had been arrested by the police.

The driver had been found in possession of two grams of cannabis and dealt with by

⁵³¹ Blackstock and others (n 160) 332–335; see also Yann Msika, 'Plaider Coupable et Rôle de L'avocat à Pontoise et Ailleurs' [2005] AJ Pénal 445. It should be noted that police station advice is often undertaken by accredited advisors, rather than fully qualified lawyers in England and Wales. Therefore, it is likely that the person representing the defendant in court will not have assisted them at the police station. However, the case will be dealt with within the same firm and the lawyer at court should have access to all the information gathered at the police station, which is not the case in France where the case might be dealt with by a different firm altogether.

⁵³² The determination of prosecutorial decisions according to a grading scale was anticipated by Pradel in 2004 (Jean Pradel, 'Vers Un "Aggiornamento" Des Réponses de La Procédure Pénale à La Criminalité ; Apports de La Loi N° 2004-204 Du 9 Mars 2004 Dite Perben II. Première Partie' [2004] La Semaine Juridique 821), and it was observed by Danet and others in their 2013 empirical study: Sylvie Grunvald, 'Les choix et schémas d'orientation' in Jean Danet (ed), *La réponse pénale dix ans de traitement des délits* (Presses universitaires de Rennes 2013).

ordonnance pénale under the permanent directives issued by the *parquet* to the police. The passenger had been found in possession of almost 100 grams and the police rang the *procureur* for her instructions. The *procureur* decided to summon the passenger for a CRPC as she explained that ‘a stronger response’ was needed than for his friend, as ‘it’s not normal to have the same response for someone who has two grams and someone who has 95 grams’.

The determination of prosecutorial decisions according to a grading scale of responses is influenced by the legislation framing the CRPC procedure. Firstly, the procedure can only apply to adults and not juveniles who do not have capacity to contract in French law. Secondly, the Act of 9 March 2004⁵³³ limited it to *délits* with a maximum penalty of five years or under, although this was extended in 2011⁵³⁴ to all *délits*, except assaults and sexual offences carrying a term of imprisonment of five years or more. The resort to CRPC is also influenced by the sentence likely to be imposed to the defendant. The CRPC allows the public prosecutor to offer a sentence to a defendant who admits the offence. The proposed sentence cannot be superior to one year in prison or half of the maximum penalty. If the defendant accepts the sentence, it must then be validated by a judge.

Procureurs usually asked the police whether the suspect had made a confession in interview and relied on their assessment of the admission when deciding to summon a defendant for a CRPC hearing. Pressures on suspects to confess at the police station have been well documented long before 2004⁵³⁵ and there is no suggestion that they

⁵³³ *Loi* no. 2004-204 of 9 March 2004, *portant adaptation de la justice aux évolutions de la criminalité*.

⁵³⁴ *Loi* no. 2011-1862 of 13 December 2011, *relative à la répartition des contentieux et à l’allègement de certaines procédures juridictionnelles*.

⁵³⁵ Hodgson, ‘The Police, the Prosecutor and the Juge D’Instruction’ (n 63); Mouhanna, *Polices judiciaires et magistrats* (n 65); Hodgson, *French Criminal Justice* (n 62).

have been amplified since the introduction of the CRPC.⁵³⁶ In any case, the *procureur* must check the reality of the admission when they meet the defendant to offer a sentence. Furthermore, the presence of a defence lawyer is mandatory for the CRPC to go ahead. This verification by the *procureur* was not simply perfunctory in the cases I observed. Thus, in case F-26 where the defendant was charged with drink driving, the *procureur* asked the defendant whether he admitted the offence, but the defendant declared that, although he had indeed been drinking, he was at home and not in his car when the police arrested him.

Procureur: So, you don't admit drink driving then.

Defence lawyer: well, it depends what sentence you're offering.

Procureur: No, no. The law says that the person has to admit the offence first, before a sentence is offered. If they don't admit, we don't go any further.

The *procureur* then refused to carry on with the CRPC procedure and sent the case to trial.

The *procureur's* decision to apply the CRPC procedure is not irrevocable and *procureurs* were willing to reconsider it when they believed that the abbreviated procedure was not appropriate to deal with the case, as a full hearing was necessary. For instance, in case F-28, a defendant was charged with assault with a weapon against his employer and the decision had been made to deal with the file through a CRPC. However, the *procureur* realised that the assault took place in the context of a highly difficult relationship between the defendant and the victim of the assault. The defendant reported to the *procureur* that he was harassed and had even been sexually assaulted by his employer, causing his reaction. The *procureur* told him that he did

⁵³⁶ The opposite might actually be true since defence lawyers have been permitted to attend police interviews from 2011. Prior to that, they were only able to offer a 30-minute consultation to suspects. See Blackstock and others (n 160).

not think the case could be dealt with properly in a CRPC and advised the defence lawyer to request a psychological report for her client as the case was sent to trial.

Unlike in adversarial legal systems, bargaining on charges does not happen, although *procureurs* sometimes decided to ignore an allegation and charge only the offence that the suspect admitted, in order to proceed to a CRPC. For example, in case F-101, a suspect had been arrested following an altercation in a car park where she was alleged to have used pepper spray against the victim and to have damaged her car. As the suspect admitted the assault, but not the criminal damage, the *procureur* decided to summon her to a CRPC only for the assault. However, I did not observe defence lawyers attempting to negotiate the charges faced by their clients. The legislation regulating the CRPC does not refer to negotiations and the ministerial circular accompanying the 2004 act clearly excludes it.⁵³⁷ Although he insists that the law provides for a ‘*plea without bargaining*’, Pradel admits that this might be tempting for the legal actors in practice.⁵³⁸ In my own fieldwork, negotiations between the *procureur* and the defence took place on the sentence. Typically, the *procureur* first proposed a sentence before the defence lawyer mitigated for their client. A discussion on the sentence would then engage, not simply between the *procureur* and the defence lawyer, but often with the active participation of the defendant. The transparency of the French procedure contrasts widely with my observations in England and Wales in which the discussions only took place between the CPS representative and the defence lawyer, in the absence of the defendant. Contrary to English defendants, French

⁵³⁷ Circular of 2 September 2004, *Présentation des dispositions de la loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité relatives à la procédure de comparution sur reconnaissance préalable de culpabilité* (NOR: JUSD0430176C).

⁵³⁸ Jean Pradel, ‘Vers Un “Aggiornamento” Des Réponses de La Procédure Pénale à La Criminalité ; Apports de La Loi N° 2004-204 Du 9 Mars 2004 Dite Perben II. Première Partie’ [2004] *La Semaine Juridique* 821.

defendants have therefore full knowledge of the discussions that take place between the prosecutor and their lawyer and can intervene if they believe their interests are not properly represented by the defence lawyer.

In a case of drink driving, the *procureur* offered a suspended prison sentence of one month, a €100 fine and the suspension of the driving licence for 12 months. The defence lawyer asked to reduce the length of the licence suspension. The *procureur* announced that it would mean increasing the fine in exchange. He proposed a 9-month suspension and a €1,000 fine. The defendant said that he was happy to pay more in order to reduce the suspension, because he had never taken his children on holiday and had planned to take them this summer. The *procureur* made the following final offer: 2-month suspended prison sentence, €1,500 fine and a suspension of the driving licence for six months. It was accepted by the defendant. [case F-35]

The negotiation is wholly anticipated by *procureurs*. Thus, one *procureur* told me that he purposefully asked for a high sentence in case F-32 to be able to negotiate it down, as he knew the defence lawyer was good. One *procureur* systematically factored negotiating room in his first offer to the defence as became apparent in the following case:

The defendant was charged with driving whilst under the influence of cannabis. The *procureur* started by offering him a hundred fine days at €6: this meant that the defendant had to pay €600 or spend a hundred days in prison.

Defence lawyer: Okay, no problem!

Procureur (puzzled): Err... well, I'm offering 100 fine days at €5 actually.

[The *procureur* then realises that he forgot to add an 8-month suspension of the defendant's driving licence.]

Defence lawyer: I did think that you were being lenient!

[After some negotiating, a 7-month suspension is agreed. The defendant leaves the room.]

Procureur [to the defence lawyer]: Don't tell me you agree [with my offer], there's an automatic 25 percent reduction [on the sentence originally offered]! [case F-274]

The deal struck between the *procureur* and the defence has to be validated by the judge. The *Conseil constitutionnel* requires that the judge must check that the

defendant ‘has admitted freely and sincerely to be the perpetrator of the offence’.⁵³⁹

The necessary agreement of the judge was used by *procureurs* in their negotiations with the defence.

The defendant was charged with benefit fraud. After having checked that the defendant admitted the offence, the *procureur* asked him about his personal situation. The defendant explained that he was not working as he had been injured in a car accident.

Procureur: My first thought for your sentence was a €1,500 fine, but I understand that your income is not sufficient, so I offer €500.

The defence lawyer tried to negotiate the amount of the fine down. The *procureur* accepted to reduce it to €400, but warned that he would not go any further down because he had to justify the sentence to the judge afterwards. [case F-30]

It is not clear whether there was an agreement between judges and *procureurs* on the appropriate sentence bracket for this type of offence dealt with through a CRPC. Pradel argued when the CRPC was introduced that such agreements were likely to be concluded⁵⁴⁰ and their existence was confirmed by Grunvald in her contribution to Danet *et al*’s 2013 empirical study.⁵⁴¹

2. *A less attractive procedure for French prosecutors*

As I have shown, the disposal rate of cases through CRPC is much lower than guilty plea disposals in England and Wales. Furthermore, greater safeguards are offered to defendants who are under less pressure to plead guilty. This relative lack of interest of *procureurs* in guilty plea disposals compared to their English and Welsh counterparts can be explained by cultural factors, but also by different systemic incentives. In the CRPC, the public prosecutor is ‘party, judge, and sentencer’⁵⁴² all at the same time.

⁵³⁹ *Conseil constitutionnel*, Decision no. 2004-492 DC of 2 March 2004, para 111.

⁵⁴⁰ Pradel, ‘Vers Un “Aggiornamento” Des Réponses de La Procédure Pénale à La Criminalité ; Apports de La Loi N° 2004-204 Du 9 Mars 2004 Dite Perben II. Première Partie’ (n 538).

⁵⁴¹ Grunvald (n 532).

⁵⁴² Hodgson, ‘Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice’ (n 509) 127.

The judicial status of *procureurs* as *magistrats* was put forward to justify this intrusion of the prosecutor in the adjudication function: ‘Without any doubt, the *procureur de la République* has important powers at his disposal since he has got the initiative of this procedure and determines the sentence that he will propose. But let’s not forget that the *procureur* is a *magistrat*, a natural defender of liberties just like judges (...)’.⁵⁴³ It could explain why *procureurs* in the above examples did not behave in a purely adversarial manner. Their professional culture and ideology of acting in the public interest means that they do not believe it appropriate to leave all protection of the interests of the accused to defence lawyers.

More importantly, systemic pressures on public prosecutors are different in each jurisdiction and this leads to different perceptions of the adequacy of guilty plea disposals. Although the CRPC was designed to accelerate the disposal of criminal cases, it still takes almost five months on average to dispose of cases through the CRPC procedure after the decision to prosecute, according to a recent study by the Ministry of Justice.⁵⁴⁴ One *procureur* confided that she was not convinced by the efficiency gains: ‘There is the *procureur* in one room and the judge in another, dealing with the same files. If they were in the same room, it would be the same as a normal hearing.’ This comment reflects the abbreviated form of trials in the *tribunal correctionnel* where *délits* are judged. In England and Wales, the trial is the opportunity for the parties to test their opposing accounts through the cross-examination of witnesses. Involving a lay jury at the Crown Court, hours of preparation by investigators and lawyers on each side and the presence of several

⁵⁴³ Jean Pradel, ‘Défense Du Plaidoyer de Culpabilité. À Propos Du Projet de Loi Sur Les évolutions de La Criminalité’ [2004] *La Semaine Juridique* 169.

⁵⁴⁴ Valérie Carrasco and Louise Viard-Guillot, ‘Les Durées de Traitement Des Affaires Pénales Par La Justice’ (Ministère de la Justice 2015) Infostat 134 1
<http://www.justice.gouv.fr/art_pix/stat_Infostat%20134%20def.pdf> accessed 4 July 2015.

witnesses make the English and Welsh trial particularly resource-intensive. Its outcome is also difficult to predict due to the high number of unknowns. CPS prosecutors often commented that it was best to accept a plea to a lower charge, as it was ‘not worth going to trial’. The incentives for CPS prosecutors to negotiate with the defence and obtain a guilty plea are therefore far greater than for French prosecutors. The incentives for the defence are also greater in England and Wales with a guaranteed sentence discount, the possibility to lower the charge and the uncertainty of an acquittal.

By contrast, the dossier compiled by the police under the supervision of the *procureur* forms the basis of the trial in France and witnesses are rarely called to testify in court.⁵⁴⁵ Whilst in England and Wales, the prosecution file is perceived as a partial account that must be confronted by the defence version for the truth to emerge, in France, the case dossier is seen as the result of a more neutral investigation supervised by a judicial officer tasked with collecting both incriminatory and exculpatory evidence. It is therefore much more difficult for the defence to contest the content of the file. In the following example, the overwhelming influence of the written dossier on the trial is obvious, as the defendant is struggling to contest police statements.

A defendant charged with use of cannabis was summoned for a CRPC, but failed to attend. His case was heard by a single judge in a ‘normal’ hearing. The judge read his criminal record and summed up the case against him, before letting the accused speak.

Defendant: I had cannabis in my pocket, but it wasn’t for me. It was for a friend, I was just helping him out. I have stopped smoking.

Judge: You said in interview that it was for your own use, did you lie to the police?

[The public prosecutor asks for the defendant to be sentenced to 60 fine days at €10.]

⁵⁴⁵ Different traditions preside over the most serious cases tried at a *cour d’assises*, where witnesses are usually called to testify before a jury composed of *magistrats* and lay jurors.

Defendant: I have a lot of debt. I have almost stopped smoking. I've stopped these mistakes now.

Judge: Anything else?

Defendant: Yes, I'd like to say something about the circumstances of my arrest. The police say I changed direction and that's why they stopped me. That's not true, I didn't change direction, I was always going left.

Judge: Didn't you try to avoid the police check?

Defendant: No, not at all, I hadn't seen them.

Judge: I find it hard to believe.

Defendant: They also wrote that I gave them the cannabis voluntarily, but I didn't. My jacket was in my car and they just took it and checked the pockets without asking me.

Judge: Are you suggesting that police officers lied? It's not the subject now anyway.

[The judge convicted the defendant and followed the *procureur's* sentencing demands in full.] [case F-57]

As a result, there are less risks involved for public prosecutors to go to trial in France, compared to England and Wales. Representation by a defence lawyer is mandatory for the CRPC, defendants can waive their right to a lawyer in the traditional *correctionnel* trial. The defence lawyers I observed were often legal aid lawyers, but they usually had several weeks to prepare the CRPC hearing with their client⁵⁴⁶ and most of them refused to take on a file at the last minute, often pressing for the hearing to be adjourned. The adjournment was usually accepted by *procureurs* unless the case had already been adjourned several times. However, the cost of the lawyer is borne by defendants unless they qualify for legal aid. *Procureurs* did not perceive this to be an issue and simply sent defendants who were not represented to trial, as can be seen in the following examples.

⁵⁴⁶ A career in criminal law rarely holds much prestige among French lawyers and even criminal law specialists do not dedicate all their time to criminal cases, but around 40 per cent of their caseload generally consists of non-criminal matters. See Hodgson, *French Criminal Justice* (n 62) 155; Blackstock and others (n 160) 92.

Two defendants were charged with handling stolen goods. They applied for legal aid, but did not qualify and they did not want to pay for a lawyer.

Procureur: Not a problem, I'll just ask you to sign to say that you don't accept the CRPC. [case F-139]

In another case, the defendant was a farmer charged with driving unlicensed. He refused to have a lawyer. The *procureur* did not try to explain why a lawyer might help, simply saying: 'Okay, you'll be tried at 11am'. [case F-140]

In practice, *procureurs* issue two summonses to the accused for the same day: one for the CRPC and one for a trial.⁵⁴⁷ This way, if the CRPC is not successful, the case can still be disposed of on the same day. I observed on a number of occasions pressures being exercised by prosecutors to convince defendants to forgo the CRPC procedure and accept being tried without a lawyer.

The *procureur* met three defendants in separate cases who did not have a lawyer. He asked: 'Do you want to be tried at 11am without a lawyer?' Two of the defendants said that they did not have enough resources for a lawyer. The *procureur* did not tell them that they could have a lawyer for free if eligible for legal aid. They agreed to be tried at 11am. One of them came back a few minutes later saying that he spoke to the duty lawyer who told him that he could have legal aid because he was on benefit.

Defendant: I know your time is precious, so I don't want to bother you.

Procureur: No, no, you have a right to a lawyer, it's not about what bothers me, so we can give you another date to come back for a CRPC.

Defendant: Will it change anything to the sentence I get?

Procureur: No, it's the same.

Defendant: Ok, I'll be tried at 11am today then.

Procureur: Are you sure?

Defendant: Yes, then it's over.

The last defendant seemed reluctant to be tried at 11am without a lawyer. He asked for a new CRPC date. He seemed unsure what to do. The *procureur* left the room to see the other two defendants out. In his absence, the defendant asked the clerk if she thought he should take a lawyer. She replied that she could not advise him.

⁵⁴⁷ The practice was ruled as illegal by France's highest courts (CE, 11 May 2005 and CE, 26 April 2006; Cass. crim., 4 October 2006, no. 05-87.435, Bull. crim. 2006, no. 244), but was supported by Parliament through a change in the legislation in *Loi* 2009-526 of 12 May 2009.

Defendant (thinking out loud): If I'm tried today, then it'll all be over with.

The clerk confirmed this. I knew that, as an observer, I should not have intervened, but I could not help myself and I told him that it might be best for him to get a lawyer. He finally got his new date. The *procureur* came back and the clerk explained that the defendant was hesitating.

Procureur: He should just have accepted to be tried at 11am.

Clerk: Well, I did my best. [case F-282]

In these cases, the *procureurs'* actions were evidently not in keeping with the image of a neutral *magistrat*, acting in the public interest and protecting defence rights, but were more consistent with an adversarial mindset. Although I believe it is unlikely that the *procureur* manipulated the defendants to prevent them from exercising their right to a lawyer, the perspective of disposing of these cases as quickly as possible, rather than having to deal with them at a later date, probably played a central role in his actions.

II. The role of public prosecution services in the bureaucratisation of criminal justice

Limited budgets, coupled with the political appetite for a systematic response to all criminal acts, have led public prosecutors to standardise the disposal of cases. In England and Wales minor cases are disposed of in a quasi-administrative fashion at court with rare legal contestation and the delegation of prosecution work to non-lawyers. In France bureaucratisation is also happening, but mainly away from the courtroom. A hallmark of this bureaucratisation is delegation to unqualified staff. This delegation also appears to enable further standardisation, as more individualised treatment is reserved for cases dealt with by *procureurs* directly.

A. Delegation and discontinuous prosecution in England and Wales

In England and Wales, minor criminal offences are dealt with in a quasi-administrative and speedy fashion. This has been achieved through the bureaucratisation of courtroom process, particularly in the magistrates' courts, which reflects the perception that those are routine, straightforward cases that have to be processed through the system. The bureaucratisation of case disposals at the magistrates' court can be seen in the way defendants are processed through the court, rather than being active participants in their own cases.⁵⁴⁸ This is especially true when defendants are represented by a lawyer. Aside from confirming their name, address and date of birth, and entering their plea, defendants have a very limited input. In fact, any participation on their part is actively discouraged by legal professionals who discuss the case between themselves.⁵⁴⁹ Thus, a defendant who had entered a not guilty plea to harassment asked the court whether he could speak on several occasions, but was told to ask his lawyer questions after the hearing if he did not understand anything (case EW-157).⁵⁵⁰ Rather than being treated like individual people with different personalities and needs, defendants are considered as cases that have to be processed through the system.⁵⁵¹

The routinized nature of cases is reinforced by the participation of professional legal actors, such as judges, court clerks, prosecutors and defence lawyers. The absence of contestation of the prosecution case by the defence is assumed, as any discussion of law is cut out and standard forms are completed to ensure efficient case management. Since Crown Prosecutors are rarely present at court, defence lawyers are often only in

⁵⁴⁸ Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 189).

⁵⁴⁹ For an analysis of the 'lawyerisation' of the adversarial trial, see John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003).

⁵⁵⁰ See also McConville and others (n 519) 172–173.

⁵⁵¹ See Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 189) 235.

contact with Associate Prosecutors who do not have the powers to make decisions on law. This means that legal issues cannot be resolved at court. Instead, defence lawyers have to write to the CPS to query legal aspects of a case. Since Crown Prosecutors are not allocated to specific cases, defence queries, along with other communications from the police or witness care bureaux, are received centrally. They are read and dealt with in the first instance by paralegals who decide whether or not a new ‘lawyer task’ needs to be created to answer the query. Crown Prosecutors allocated to the CPS magistrates’ court team are given a list of tasks across several files to deal with. The defence query will therefore be dealt with by someone unfamiliar with the case or the issues involved in it. A similar system is in place for urgent queries in Crown Court cases. Despite their lack of knowledge of the case in its entirety, these lawyers are asked to answer legal queries from the defence. This can lead to inefficiencies, with Crown Prosecutors reviewing cases which have already been reviewed by other colleagues, or to mistakes with decisions made without all relevant information.

The criminal justice process of England and Wales is segmented into several phases. Following the police investigation and the charge, all cases start with a first hearing at the magistrates’ court. The majority of cases are finalised there, but the most serious ones are sent to the Crown Court for trial and/or sentence. A 1994 study of criminal defence lawyers⁵⁵² showed how criminal defence firms, largely reliant on legal aid, organised themselves to maximise their profits by delegating most of the work to unqualified staff. As a result, defendants ‘experience discontinuous representation of a substantial character, [their] case passing through different hands at each ‘moment’ of the system – at the police station, at office interviews, at bail and remand hearings,

⁵⁵² McConville and others (n 519).

at trial and sentence.’⁵⁵³ As I showed previously,⁵⁵⁴ the CPS has adopted a similar organisation with different and more or less qualified members of staff dealing with an individual case at different stages of its progress through the process, rather than being assigned to cases from beginning to end. This organisation also applies in court where different members of staff prosecute cases at different court hearings.

Associate Prosecutors (AP), rather than Crown Prosecutors, represent the CPS at most hearings in magistrates’ courts, despite not being legally qualified. APs are selected amongst CPS staff who have ‘experience of casework within the criminal justice system or of lay presentation’⁵⁵⁵ and ‘a working knowledge of criminal law and its application, magistrates’ courts procedure and the criminal justice system’.⁵⁵⁶ Typically, they have worked for a number of years for the CPS as administrative or paralegal staff. In the CPS office I observed, several APs had been working for the CPS for over 25 years, none of them had less than seven years’ experience at the CPS. Once selected, they undertake a two-week training programme: the first week is a foundation course in legal principles and the second week is an advocacy course. They have to pass an independent assessment of competence before being authorised to practice as an AP. They also undertake further training for bail applications, youth courts, and domestic violence.

Accredited and regulated through the Chartered Institute of Legal Executives, APs used to be called designated caseworkers and Section 53 of the Crime and Disorder Act 1998 increased their powers beyond the presentation of bail applications to the

⁵⁵³ *ibid* 41. It should be noted that changes to legal aid payments, in particular the tendering of legal aid contracts, have pushed defence firms to change their organisation.

⁵⁵⁴ See Chapter 4.

⁵⁵⁵ Crown Prosecution Service, ‘Annex D – Associate Prosecutors Training and Selection’, in ‘CPS Annual Report and Resource Accounts 2010-2011’ <http://www.cps.gov.uk/publications/reports/2010/annex_d.html> accessed 6 July 2015.

⁵⁵⁶ *Ibid*.

conduct of certain criminal proceedings in magistrates' courts. They were renamed Associate Prosecutors under the Criminal Justice and Immigration Act 2008 and represent the CPS at 'straightforward' hearings in the magistrates' courts. They present the prosecution case to magistrates and make representations on mode of trial, bail, and sentencing. APs also prosecute cases in the youth court where they can present grave crime arguments, so that the case is committed to the Crown Court. Specially trained APs, known as Level 2 Associate Prosecutors (AP2s), are permitted to prosecute trials in summary only, non-imprisonable offences, and other contested cases. The work delegated to APs therefore includes almost all advocacy work at the magistrates' court, with Crown Prosecutors being confined to the (rare) trials and case reviews in the office.

The obvious benefit for the CPS in allocating staff to specific stages in the process rather than to cases and in delegating prosecutions at magistrates' court hearings to APs is the prospect of processing more cases with the same or even fewer staff. This is particularly valuable in a context of budget cuts. Already in 2008, Sir Ken Macdonald QC, the DPP at the time, stated: 'The current economic environment means that public bodies have to become leaner and smarter. The CPS has already begun this work.'⁵⁵⁷ He added: 'This means that we are always looking for ways to do things more effectively and efficiently.'⁵⁵⁸ One of the ways the CPS profess to save money is by 'maximising the use of paralegal staff'.⁵⁵⁹ Employing APs, rather than

⁵⁵⁷ Ken Macdonald, 'CPS Annual Report and Resources Accounts 2007-2008' 3 <<http://www.cps.gov.uk/publications/docs/annualreport08.pdf>> accessed 7 July 2015.

⁵⁵⁸ Ibid.

⁵⁵⁹ 'The responsibility for continuous improvement in the coming year lies primarily with the 13 Areas, which will be looking to further increase efficiency by reducing the number of administrative tasks that need to be undertaken and maximising the use of paralegal staff to support our prosecutions', 'Optimum Business Model and Paralegal Career Family Structure', in 'CPS Annual Report and Resource Accounts 2010-2011' <http://www.cps.gov.uk/publications/reports/2010/optimum_business_model.html> accessed 7 July 2015.

qualified solicitors or barristers to prosecute in court, is cheaper and also frees up lawyers to do other work. Thus, the National Audit Office noted in a 2006 report that ‘[i]n 2004-05, magistrates’ courts scheduled only enough cases to occupy designated case workers for 60 per cent of their time; increasing this to 80 per cent would release the equivalent of 33 lawyers for other work and achieve savings of £2.3 million.’⁵⁶⁰ Another advantage is that it provides new career progression opportunities for non-legal staff at the CPS.

Although managerial advantages are clear, the fragmentation of prosecutions and delegation to non-legally qualified staff leads to further bureaucratisation of the process. The prosecution process in the CPS is centralised with different members of staff, in different parts of the country⁵⁶¹ and with different levels of qualification working on the case at various points of the process. Standard forms – called Hearing Result Sheets – have to be completed, so that colleagues who will deal with the case at a later stage are informed of the outcome of the hearing. When the CPS used paper files, the staff member dealing with the hearing simply endorsed the file with their comments for their colleague at the next stage of the process. However, following the move to digital files, a separate form now has to be completed. It should be added to the court bundle by CPS administrative staff, although this was not always the case.

As repeat players of the system, defence lawyers and court clerks help smooth the process for APs. This became clear in case EW-262 where a defendant charged with criminal damage and harassment was not represented in court and was determined to

⁵⁶⁰ National Audit Office, *Crown Prosecution Service: Effective Use of Magistrates’ Courts Hearings* (Stationery Office 2006) 4 <<http://www.nao.org.uk/wp-content/uploads/2006/02/0506798.pdf>> accessed 7 July 2015.

⁵⁶¹ For instance, charging advice is now predominantly provided by CPS Direct, a national structure with prosecutors based throughout England and Wales, working from local CPS offices or their own homes.

contest the prosecution case. After he entered not guilty pleas, the AP decided to apply for special measures for the complainants, to stop the defendant from cross-examining them himself if he was not represented at trial. Asked why she wanted to make this application, she justified it by the nature of the allegations, but the District Judge pressed her for more details. She read the charges, but the judge was not satisfied this was a proper application for special measures. The court's legal adviser tried to come to her rescue by telling her the criteria for such application. The judge asked the AP to provide specific reasons in support of her application to forbid the defendant to cross-examine the complainants and, when she was unable to provide them, decided not to rule on the application immediately, but requested that a CPS lawyer review the matter. Discussing this deeply embarrassing moment with the AP after the hearing, she told me that she had never before had to make a formal application to the court as it was always granted without further questions. The presence of defence lawyers normally ensures that applications are granted without further probing, the judge presumably assuming that the defence lawyer would raise an objection if they wished to oppose the application.

Employing non-qualified staff to prosecute at court is not necessarily detrimental if cases are pre-determined by qualified lawyers in the office, although it can result in a lack of reactivity in court. In practice, CPS qualified lawyers only have a weak oversight over the work of APs at court. Crown Prosecutors are asked to fill out the case management form at the charging stage for cases which have benefited from CPS charging advice. Case management decisions should therefore have the input of a lawyer, at least in certain cases. However, APs told me that they rarely received the completed form, either because charging lawyers failed to fill it out or because administrative staff did not attach it to the file bundle. In any case, one AP told me

that he preferred to fill it out himself as he needed to sign it and did not think that charging lawyers filled it out correctly. Yet in a case of criminal damage and harassment, the AP asserted that there were no exhibits, but corrected herself after it was pointed out by the court's legal adviser – a qualified lawyer –that the complainant's statement mentioned photographs.

Contradicting the notion that decisions are taken in CPS offices by qualified lawyers, I witnessed APs make pivotal decisions in court, sometimes fundamentally altering the fate of cases. Thus, APs often requested amendments to charges or the complete redrafting of them, sometimes in complete contradiction with the charging advice given to the police by a Crown Prosecutor. This was particularly prevalent in cases of assaults where the charging lawyer had opted for a common assault charge, but where the AP favoured a more serious charge of assault occasioning actual bodily harm (ABH) or even grievous bodily harm (GBH), because the defendant was alleged to have used a weapon.

In case EW-329, a defendant was charged with an assault on a doctor who refused to give him medication. He was alleged to have grabbed a chair, lifted it in the air and brought it back down towards the doctor's head. The doctor had put his arms up to protect himself and the chair hit his hand, causing a cut. At first, the doctor thought it might need stitches, but it was treated with strips in the end. The police had proposed to charge the defendant with ABH, but the charging lawyer only authorised charge for common assault. She properly applied the Charging Standards on offences against the person, which require prosecutors to base their decisions on the level of injury and the likely sentence, rather than the circumstances of the assault. She had specifically addressed the issue of the chair used as a weapon in her charging advice – 'a weapon was used, the chair, but it was instantaneous and the level of injury was a cut that bled

requiring steri-strips' —, but had concluded that the magistrates' sentencing powers were sufficient in this case. Nonetheless, the charge was changed back to ABH by the AP prosecuting at court and the defendant pleaded guilty to it.

In case EW-230 where the charging lawyer had only authorised two charges of common assaults, the AP added a charge of kidnapping to the original charges. This was despite the fact that the charging lawyer had considered a kidnapping charge, but had expressly rejected it, as the AP admitted to me. Since kidnapping is an indictable-only charge, a case which originally involved two summary charges and should have been tried at the magistrates' court was sent to the Crown Court for trial. These examples are complete reversals of decisions made by qualified lawyers in blatant disregard of the limits of the AP's role. Although these changes might have been 'authorised' by Crown Prosecutors, these authorisations came from people who had not reviewed the file to the extent the charging lawyer had, but were simply asked for their opinion before the AP left for court. This runs contrary to one of the main reasons for the establishment of the CPS according to the Philips Commission: to 'make the conduct of prosecution the responsibility of someone who is both *legally qualified* and is not identified with the investigative process' (emphasis added).⁵⁶² Although most commentators have focused on what became known as the Philips Principle and which forms the second part of the sentence, the first part on the legal qualification of the public prosecutor is equally important.

Section 7A of the Prosecution of Offences Act 1985 states that APs have 'the powers and rights of audience of a Crown Prosecutor in relation to (...) the conduct of criminal proceedings in magistrates' courts other than trials'. The law specifies that APs 'shall

⁵⁶² Philips (n 26) 7.3.

exercise any such powers subject to instructions given to [them] by the [DPP]'. According to paragraph 3.5 of the DPP's instructions to Associate Prosecutors, 'APs exercise these powers and rights of audience *on the instructions of a Crown Prosecutor* (...)'⁵⁶³ (emphasis added). In reviewing magistrates' court cases, Schedule 4 of the DPP's instructions states that APs have the power to make only minor amendments to the charge or summons. Any major change requires the authorisation of a CPS lawyer. The amendments of the charges in the cases described above were therefore all authorised by Crown Prosecutors.⁵⁶⁴ However, Crown Prosecutors' supervisory powers are limited. Magistrates' court cases are not reviewed by a lawyer to decide whether it is suitable to pass on to an AP. Instead, APs identify cases that they believe should be brought to the attention of a qualified lawyer because of inadequate charges. Even in these cases, Crown Prosecutors do not review the case file themselves due to time constraints, instead relying on the AP's account of the case.

B. France: personalisation of prosecutions or bureaucratic justice?

In France, all case management powers, such as choice of venue, belong fully with the prosecutor who takes all decisions prior to any court hearing. The *procureur* channels cases to their chosen venue and mode of trial (CRPC, *comparution immédiate*, etc.). The defence cannot contest the prosecutor's choice, unless it is unlawful. Perhaps because the French criminal justice system rarely relies on lay jurors to decide on guilt, the law of evidence is not as strict as in England and Wales. The principle of freedom

⁵⁶³ These instructions are available on the CPS website <http://www.cps.gov.uk/publications/directors_guidance/dpp_instructions.html> accessed 7 July 2015.

⁵⁶⁴ The APs requested a Crown Prosecutor's authorisation in these cases because they had prepared for the court hearing in the CPS office. See below for an account of Crown Prosecutors' supervisory powers over APs when they have to make decisions in court.

of proof rejects general exclusionary rules of evidence.⁵⁶⁵ Witnesses are seldom requested to attend trial and the court relies largely on the written dossier of evidence put together by the police under the supervision of the *procureur*.⁵⁶⁶ Guilt and sentence are decided at the same time and the trial is perceived as more than the sanction of an offence in French legal culture, but as a broader judgment on the character and life of the defendant as citizen of the state.⁵⁶⁷ As a result, previous convictions, which would be excluded as bad character evidence in England and Wales, are listed at the start of the hearing. Taken together, these characteristics of the French criminal justice system mean that there is no need for multiple hearings to dispose of cases and the criminal justice process is therefore less fragmented than in England and Wales.

Although specific tasks, such as TTR duties, representing the prosecution at hearings, sentence enforcement, etc., are allocated to different *procureurs* in medium and large court centres, their specialisation remains limited. Due to high staff turnover⁵⁶⁸ and limited staff resources, remits are not rigidly allocated and it is not rare for a *procureur* allocated to TTR duties to be asked to attend court hearings in order to replace a colleague on holiday or off sick or vice versa. It is therefore easier to maintain continuity in prosecutions at court. Furthermore, what struck me when I observed a French prosecutors' office after having spent time in a CPS office, was the high level of communication that took place between *procureurs*. Instead of relying on endorsements on paper files, *procureurs* did not hesitate to go and speak to their

⁵⁶⁵ Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (n 187); Stewart Field, 'State, Citizen, and Character in French Criminal Process' (2006) 33 *Journal of Law and Society* 522.

⁵⁶⁶ On the reality of police supervision by the *procureur*, see chapter 5. See also Hodgson, *French Criminal Justice* (n 62) 143–177; Mouhanna, *Polices judiciaires et magistrats* (n 65).

⁵⁶⁷ Field, 'State, Citizen, and Character in French Criminal Process' (n 565).

⁵⁶⁸ Geographic mobility of *magistrats* is encouraged for career progression and new *magistrats* usually join existing teams every year which often triggers a revision in the distribution of tasks between colleagues.

colleagues. Paradoxically, although the CPS office was open plan, there was more direct communication between colleagues in the *parquet* where staff had separate offices. The TTR office was the communication hub of the *parquet* as *procureurs* came and went, reporting on the hearings they had just attended or asking for information on a case from a colleague who had dealt with it at the investigative stage. Rather than filling out standard forms, prosecutors on duty during the night reported orally to their TTR colleagues every morning. These observations go against the traditional depiction of the French criminal justice system as bureaucratic, with the recording of every decision in writing to ensure future review by superiors.⁵⁶⁹ In reality, the CPS appears a much more bureaucratic institution than the French *ministère public*.

Finally, defendants participate more actively in their own criminal trial in France than in England and Wales. Hodgson observed that the trial is played out before the defendant by the lawyers acting for each side in England and Wales, whereas ‘the accused is very much more present in the [French] courtroom procedure.’⁵⁷⁰ At trial, the judge typically reads extracts of the file prepared by the police and invites the accused to react to the evidence. A direct dialogue is established between the judge and the defendant, in which the defence lawyer does not intervene. Only once the judge has finished questioning the accused are the *procureur* and the defence lawyer permitted to put forward their own questions. Following the *procureur*’s and the defence lawyer’s speeches and prior to the court retiring to make their decision, the defendant is customarily asked whether she wishes to add anything. Differences in legal cultures have been put forward as explanations for these contrasting court

⁵⁶⁹ Damaška, *The Faces of Justice and State Authority - A Comparative Approach to the Legal Process* (n 113).

⁵⁷⁰ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 189) 235.

practices.⁵⁷¹ The result of this greater participation of defendants in their own trial is a more personalised hearing. Human unpredictability prevents routinization to some extent.

Whilst in England and Wales the bureaucratisation of the criminal justice process has become apparent in the courtroom, the phenomenon is less visible in France as it takes place outside of any court hearing. Describing their decision to prosecute a case or not, *procureurs* use the verb ‘to orientate’: they orientate a case on a certain procedural path, be it an alternative to prosecution, a *comparution immédiate* or the opening of an *instruction*. This orientation is supposed to be dependent on the seriousness of the offence, but also on the personality of the suspect. Previous convictions, a stable life demonstrated through a permanent job and a family, a remorseful attitude, etc. are all put forward as influential factors in the prosecutor’s decision. The multiplication of procedural pathways available to the *procureur* can allow for a tailored response. As demonstrated in Chapter 4, however, this ‘adaptation’ of the decision to the individual case comes up against the reality of limited resources and a heavy caseload. In practice, *procureurs* are more likely to choose the most efficient and effective response within resource constraints, than to seek a highly personalised option adapted to the personality of the suspect and their capacity to understand the gravity and impact of their actions and the final outcome of the criminal justice process.⁵⁷² This is illustrated by the practice of ‘permanent directives’ given to police officers to standardise the response to mass offences, such as drink driving or shop lifting.⁵⁷³ These instructions follow comprehensive grading scales, without any scope for greater individualisation.

⁵⁷¹ Delmas-Marty and Spencer (n 122); Field, ‘State, Citizen, and Character in French Criminal Process’ (n 565); Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 189).

⁵⁷² Grunvald (n 532) 109–110.

⁵⁷³ See Chapter 4 for more details.

This standardisation of the decision-making process is coupled with delegation to unqualified staff. Part of the *procureur*'s workload is delegated to *délégués du procureur* who usually operate in a *Maison de la Justice et du Droit* (House of Justice – MJD).⁵⁷⁴ Those cases are therefore dealt with outside of court. *Procureurs* started recruiting *délégués* in the 1990s when alternatives to prosecution started developing. Laura Aubert observed in her own study of the use of out-of-court disposals in two French court centres that *délégués* were generally public service retirees.⁵⁷⁵ The two *délégués* I observed during my own fieldwork were retired gendarmes. They had volunteered to become *délégués* 'to keep in contact with people' and to top up their pension. They were not offered any training before starting in their new role and only attended a 3-day training session in 2002 at the *cour d'appel* with two days dedicated to practical simulations and one day to theory.

Délégués du procureur deal with cases involving minor offences (public order offences, shoplifting, traffic offences, minor drug use, etc.). They administer some *rappels à la loi*,⁵⁷⁶ as well as *compositions pénales* and *ordonnances pénales*. They deal with a high proportion of *procureurs*' caseloads: in 2013, alternatives to prosecution together with *ordonnances pénales* represented over 50 percent of decisions taken by *parquets*.⁵⁷⁷ In the area I observed, *délégués* had limited discretion to deal with cases as they had to follow standard grading scales defined by the *parquet* to decide which punishment should be administered (fine, community work, etc.) for

⁵⁷⁴ See Adam Crawford, 'Justice De Proximité - The Growth of "Houses of Justice" and Victim/Offender Mediation in France: A Very Unfrench Legal Response?' (2000) 9 Social & Legal Studies 29.

⁵⁷⁵ Aubert, 'L'activité des délégués du procureur en France' (n 305); Laura Aubert, 'Systématisation Pénale et Alternatives Aux Poursuites En France : Une Politique Pénale En Trompe-L'œil' (2010) 1 Droit et Société 17.

⁵⁷⁶ *Rappels à la loi* can also be administered by police officers.

⁵⁷⁷ Ministère de la Justice, 'Les Chiffres Clefs de la Justice 2014' (Ministère de la Justice 2014) 14 <http://www.justice.gouv.fr/art_pix/1_stat_livret_final_HD.pdf> accessed 4 July 2015.

cases automatically sent by the police under permanent directives. The *parquet* defined strict formulas to calculate fines.⁵⁷⁸ *Délégués* also received cases from the police endorsed with specific instructions from *procureurs* with regards to the type of measure and the level of sentence to be administered. In those cases, sentencing indications could be a bit broader, such as a fine between €200 and €400 for example. As such, this delegation of prosecutorial work can be compared to the delegation of magistrates' court casework to Associate Prosecutors (APs) in England and Wales, in the sense that the delegation is regulated and poses, in theory at least, strict limits to the role of unqualified staff.

Following the introduction of the 'criminal response rate' as an official measure of *procureurs*' performance and its regular increase year on year,⁵⁷⁹ alternatives to prosecution and accelerated procedures are used to provide a systematic institutional response to offences, without increasing courts' caseloads. The aim is therefore to process the maximum of cases through the system with limited resources. Thus, each meeting between *délégués* and defendants lasted between 10 and 15 minutes. The *délégués* therefore did not have time to discuss the case in much detail and were not interested in hearing the defendant's account. Although *compositions pénales* require the admission of the offence by the suspect, *délégués* rarely checked the reality of the admission and even ignored suggestions that the defendant might in fact deny the offence or part of it.

⁵⁷⁸ In cases of cannabis use, the suspect's income bracket matched a base which was added to a percentage of their income (increased proportion depending on income), plus €10 per gram of cannabis found. Thus, in case F-199, the suspect had been arrested in possession of 4g of cannabis resin and received €783 per month in benefits. The *procureur*'s grading scale established a base of €150 and a percentage of 6.5 for incomes between €750 and €999. The *délégué* therefore calculated that the defendant had to pay a €240 fine: €150 (base) + €50 (6.5 percent of income) + €40 (4g x €10).

⁵⁷⁹ See Chapter 4.

For example, in case F-187, the defendant was alleged to have insulted a bus driver.

The *délégué* started the meeting by summarising the case against the accused:

Délégué: On [date], you had an argument with a bus driver and you gave her the finger when you left the bus.

Defendant: Yes, that's true.

Délégué: Then on [later date], you were on the bus with the same driver and you had a difficult conversation with her.

Defendant: No, that's not true.

[In interview at the police station, the defendant admitted the first incident, but not the second one.]

Délégué: I'm not here to speak about the facts; you admitted [the offence]. I'm just here to offer you a *composition pénale*. You can accept my offer or refuse it. If you refuse, you'll be tried at court. (...)

[The defendant accepted the *composition pénale*.]

Case F-200 concerned a defendant who was accused of stealing a computer mouse from a shop. He struggled to express himself in French and the conversation was therefore quite difficult.

Délégué: Okay, do you accept the *composition pénale* then?

Defendant: Well, I don't have a choice; I want to sort it out.

Délégué: Yes, you do have a choice! If you think you're not in the wrong, you shouldn't accept. You did steal this mouse, didn't you?

Defendant [it is difficult to understand him]: No, I didn't steal it, a young guy took it. He's a youth; I'm an adult, so I take responsibility.

Délégué: Well, in this case, it would be handling stolen goods (...)

[Speaking to the researcher] He's telling me that he's taken the mouse out of the shop to help another guy, but that's handling. I think it's punished more severely than theft, so there's no point for him to go to court!

[The *délégué* checks the criminal code and finds that handling stolen goods is indeed punished more severely than theft]

[To the defendant] If you go to court to contest the theft, they'll convict you for handling and it's punished more severely. So, do you accept?

Defendant: I don't have a choice anyway.

Délégué: Okay, so you accept.

Although the *délégués* always presented the offer as a lenient gesture from the *procureur* and emphasised that the choice rested with the defendant, they clearly had no interest in seeing the case go to court. In fact, they exercised pressures to obtain the cooperation of the defendant, often presenting the maximum punishment incurred as the sentence defendants exposed themselves to if they chose to go to court. This is in stark contrast with the role of freedom guardians assumed by *procureurs* during CRPC hearings. Whilst the *procureurs*' ideology appears to incite them to check the veracity of the defendant's admission and to refer the case to a full trial if it seems in the interest of the defendant, *délégués du procureur* do not share the same professional ethos. As former police officers or gendarmes, they unconsciously revert back to old habits of police station interrogations when talking to suspects.

[The defendant was arrested and found to be in possession of 0.15g of cannabis]

Délégué: For this, the *procureur* could have sent you to court.

Defendant: It was the first time I was caught.

Délégué: Even for a first time, you could have been sent to court.

Defendant: I don't know anything about courts or police.

Délégué: Well, I will tell you [he opens the criminal code and reads the relevant article out loud]. In front of the court, you could have had up to one year in prison and a €3,750 fine. However, the *procureur* decided to offer you an alternative to prosecution. If you accept it, you will need to pay a €120 fine. You can refuse it, but then you will be sent to court.

Defendant: No, no, I accept. [case F-196]

In case F-201, the defendant had been arrested for shoplifting. She was accompanied by her husband and was crying. Her husband explained that she did not speak French.

The *délégué* announced that the *procureur* had decided to give her a *rappel à la loi*.

Defendant: I didn't steal!

Délégué: Careful, because if you're saying that you didn't steal, you'll have to go to court to explain.

[To the husband] Tell her that it's not a good idea. If she hasn't stolen, okay, but otherwise she needs to admit. We won't do anything to her today, she can go back home, but she needs to admit.

[The husband translates and the defendant admits that she did steal.]

Délégué: You told the police that you could understand and speak French a bit, but now you're saying you cannot speak any French!

Defendant: A little bit, a little bit.

Délégué: You shouldn't steal.

Defendant: No, never!

Délégué: Don't deny it again! I'm going to get annoyed!

Husband: No, she says she will never do it again (...) I would like to apologise for her, it's bad. She's depressive, she's going to get surgery for breast cancer soon (...)

Defendant (crying): Sorry, please pardon me! It was for the baby!

[When they have left, the *délégué* speaks to the researcher]

Délégué: These are very difficult situations, they don't have any money and they have a lot of problems (...) but they're a bit cheeky too, she didn't want to admit that she stole! So I had to speak a bit louder and after that she was fine.

Despite the *délégués*' lack of legal qualification and the summary nature of the procedure before them, limited safeguards are in place to protect defendants' rights. Defendants can choose to be represented by a lawyer, but I never witnessed such a case, although one *délégué* told me that it happened more and more. He claimed that they did not need a lawyer given the pettiness of the offence and the lightness of the sanction. However, *ordonnances pénales* result in a conviction which forms part of the defendant's criminal record.⁵⁸⁰ Although *compositions pénales* are not formally equivalent to convictions, they are nonetheless recorded on a defendant's criminal record and will be taken into account in the event of future offending. Furthermore, the interactions between *délégués* and defendants and the pressures put on the latter to accept the sentence are reminiscent of police station's encounters where the presence

⁵⁸⁰ Gildas Roussel, 'L'essor de l'ordonnance pénale délictuelle' [2014] *Droit et Société* 607.

of the defence lawyer is necessary to conform with the right to a fair trial defined at article 6 of the European Convention on Human Rights.⁵⁸¹

Furthermore, cases dealt with by the *délégués* are subjected to very few checks by *procureurs* and judges. Cases that fall under permanent directives are sent directly from the police to the MJD without being checked by the *parquet* first or even without the *parquet* being aware of their existence. A *procureur* can decide to deal with the case through an *ordonnance* or a *composition pénale* even if it falls outside of permanent directives, but they will rely on the police oral report to make their decision and the file will again be sent directly from the police to the MJD. Following the first meeting with the defendant, *délégués* sent the files to the *parquet* along with the offer they made to the defendant. A *procureur* should review them and send them to the judge for validation. However, with over 2,000 cases dealt with by *ordonnance* or *composition pénale* every year in the court centre I observed, the review by the public prosecutor cannot amount to more than a cursory check.

The requirement for a judge to validate the *composition pénale* was introduced following a ruling of unconstitutionality by the *Conseil constitutionnel* who considered that some of the measures that could be offered by the prosecutor were restrictive of individual freedom. As such, they could not be pronounced solely by the authority in charge of prosecution, even with the agreement of the defendant. They require the decision of a judge.⁵⁸² In practice, however, this control of the judge amounts to little more than rubber-stamping.⁵⁸³ The clerk administering the MJD estimated that judges refused to validate the decision of the *parquet* in about 5 percent

⁵⁸¹ *Salduz v Turkey* (2009) 49 EHRR 19.

⁵⁸² *Conseil constitutionnel*, Decision 95-360 DC, 2 February 1995, para. 6.

⁵⁸³ Saas (n 230); Brigitte Pereira, 'Justice Négociée : Efficacité Répressive et Droits de La Défense?' [2005] *Recueil Dalloz* 2041.

of cases. She added: ‘they always explain why they refuse and I speak to the *parquet* about it who will speak to them as well. At the moment, we might have a few more refusals than normal because the judge is new, so it always takes a bit of time to get used to the way they work.’ This hinted to a form of agreement between the *procureur* and the judge to secure the cooperation of the latter ahead of these alternative or accelerated procedures being carried out. Participants of other studies have also alluded to such agreements which explain low refusal rates.⁵⁸⁴

Conclusions

An important feature of case disposals in modern criminal justice systems is the central role played by public prosecutors, following efficiency concerns. In many cases, guilt is not adjudicated upon by a judge in practice, but by a prosecutor. Thus, guilty pleas have become a routine disposal in England and Wales. However, few safeguards are in place to protect the interests of people accused of crime. Whilst previous studies have shown that defence lawyers provide very weak protection to defendants against pressures to plead guilty, I have argued in this chapter that CPS prosecutors are rarely held accountable for decisions resulting from plea bargaining at court. This is all the more surprising given the high level of accountability demanded from them for decisions taken in the office. Instead, efficiency concerns have justified greater cooperation between defence and prosecution to ensure guilty pleas at the earliest opportunity, even prior to full disclosure of the evidence collected by the police. In France, the CRPC organises the negotiation of a sentence between the defence and the prosecution following an admission of guilt. Important safeguards are in place, such

⁵⁸⁴ Saas (n 230); Grunvald (n 532) 100–101.

as the mandatory presence of a lawyer and the impossibility to apply the procedure to juveniles. Furthermore, the *procureurs* I observed checked the reality of the admission, in line with their duties as impartial *magistrats*. However, the CRPC has not become a routine disposal as in England and Wales. This can be explained by the abbreviated form of trials in France and the multitude of simplified procedures based on a confession by the accused.

In both jurisdictions, the adjudication on guilt, whether in open court or not, has become a quasi-administrative process, with the speedy disposal of cases as the main objective. Opportunities for legal contestation are minimised and minor cases are dealt with in a standardised fashion. This has allowed public prosecution services to delegate part of their role to unqualified members of staff. In England and Wales, most prosecutions at magistrates' courts are led by Associate Prosecutors (APs) who are not legally qualified. Although legal contestation is often rooted out thanks to the cooperation of defence lawyers, APs make crucial legal decisions on cases with little oversight by Crown Prosecutors. In France, although court procedures appear less bureaucratic due to greater participation of defendants, bureaucratisation takes place outside of the courtroom, through alternatives to prosecution. Again, those out-of-court disposals have been delegated to unqualified staff who deal with cases in a speedy fashion, with little safeguards for the interests of the accused.

Chapter 7 – Conclusions

Procureurs can rightly be described as the most powerful officials in the French criminal justice system as their powers have steadily increased. The same tendency can be seen elsewhere in Europe and U.S. prosecutors have also long enjoyed unfettered discretionary powers. In many instances, public prosecutors effectively determine the outcome of cases. In England and Wales, however, the Crown Prosecution Service (CPS) is a more recent creation and remains far less powerful than its continental and U.S. counterparts. This study interrogated the way French and Anglo-Welsh public prosecution services operate in practice. It attempted to understand how these different systems endeavour to combine the necessities of prosecutorial accountability with prosecutorial discretion. It is based on data collected through the direct observation of the work of public prosecutors for several months in each system, complemented by interviews with public prosecution services' staff. The chosen methodology permitted the study to show at what level and how national priorities are adapted to local needs, which systems of internal accountability are in place and enabled me to observe the internal organisation of public prosecution services (caseload, team-working, case distribution, hierarchical relationships), rather than merely relying on doctrinal sources.

The legitimacy of the French *ministère public* is founded on electoral democracy and the impartial expertise of *magistrats*. A classical account of the French public prosecution system is that of a centralised hierarchical process, in which opportunities for the exercise of official discretion are closely circumscribed to ensure the coherence of prosecutorial decisions across the territory. On the contrary, this study shows that the concept of 'adaptation' plays a central role in French legal culture in enabling the

definition of local policies and offering a great degree of discretion and autonomy to individual prosecutors in practice to adapt their decisions to individual cases. This organisation results in a lack of transparency in prosecutorial decisions and weak oversight by the hierarchy which can lead to inconsistency and arbitrary decisions. However, it also provides a clear responsibility structure for decisions which can be traced back to a particular prosecutor and may lead to better adapted outcomes in individual cases, although pressures on resources have pushed for some standardisation to deal with minor cases more rapidly.

By contrast, the CPS in England and Wales enforces consistency in prosecutorial decisions through a detailed regulatory framework defined centrally which strictly constrains prosecutorial discretion. Far from the traditional image of autonomous professionals associated with lawyers, public prosecutors in England and Wales are now part of a centralised bureaucratic organisation with the prosecution process resembling more closely an assembly line. CPS prosecutors do not have a holistic view of the process as they are constrained to narrow and repetitive tasks on cases. This segmentation, in addition to the drive for efficiency, has resulted in part of their workload being delegated to unqualified staff who are not supervised adequately. This organisational structure weakens the decision-making process which was set out to be the responsibility of a legally qualified prosecutor by the Philips Commission. Instead, it seems that no-one has responsibility for outcomes as they are the result of multiples decisions taken by different members of staff, each of whom is reluctant to overrule previous decisions or to antagonise the police.

A larger scale empirical research project would be necessary to determine whether or not data collected in this study are representative of the reality in all French *parquets* and CPS offices, rather than specific to the local sites observed. However, as

legitimacy could become an issue for French *procureurs*, consideration might be given to the introduction of more transparent prosecution policies following the CPS example. A national regulatory framework allowing for local adaptations could be drafted by the *Direction des affaires criminelles et des grâces* in the Ministry of Justice which is essentially composed of *magistrats*, rather than senior public servants. Another possibility would be for this framework to be drafted by a committee of senior public prosecutors, similar to the *Collège des procureurs généraux* instituted in Belgium. This would meet the requirement of avoiding political interference, although it would not answer concerns about democratic legitimacy. However, this ‘*collège*’ could be tasked with the direct codification of current practices, rather than political decisions on the type of criteria that public prosecutors should apply when making their decisions. In other words, the *collège* could be asked to draft a document similar to the CPS Code for Crown Prosecutors, rather than make decisions on law enforcement priorities. Local policies could also be published on the websites of each *parquet* to inform the public of the factors taken into account by *procureurs* to make their decisions. Furthermore, the recording of reasons for prosecution decisions could be introduced. This would encourage some degree of reflexivity by individual *procureurs* when making their decisions. Linked to transparency and accountability, the recording of prosecutorial decisions could also allow the hierarchy to carry out routine reviews to test whether or not stated policies are being applied appropriately.

Aware of its weak legitimacy basis, the CPS has successfully developed and published a detailed regulatory framework clearly setting out the criteria used by its prosecutors to take their decisions. CPS policy-making also allows it to shape police investigations to some extent by regulating what public prosecutors need on a case file in order to make their decisions. However, all policy-making takes place at the national level and

there is little place for local policies. Coupled with the segmentation of the prosecution process, this national regulation results in the standardisation of prosecutorial decision-making for file reviews in CPS offices and an important curtailing of prosecutorial discretion. The decisions of CPS prosecutors are systematically reviewed by colleagues or managers and regular audits are carried out. This has a clear impact on the profession of public prosecutor in England and Wales. This transformation of the profession of prosecutors could have detrimental implications for CPS efforts to attract the very best lawyers in criminal law. Interestingly, however, decisions taken at court by CPS advocates, especially following plea bargaining discussions with the defence, are not under as much scrutiny. Instead, concerns over flexibility and speed appear to overcome the need for accountability. This is the case despite the delegation of much advocacy to Associate Prosecutors who are not legally qualified and the fact that many of the decisions taken at court have particularly great influence on the final outcome of the case, in particular decisions to accept pleas or to amend charges.

Following the 2015 Leveson review, greater case ownership in the CPS was recommended. Not only would it allow for greater cooperation between the parties as argued by Leveson, but it would also mean that CPS prosecutors would feel more in control of their cases if they are asked to deal with them from start to finish. Greater professional investment would be expected, even for more minor cases, as full responsibility for the success of the case would be given to an individual prosecutor, rather than being diluted by virtue of being shared between several members of staff. I would also recommend a more flexible regulatory framework at the national level, allowing for greater participation of local CPS offices in policy-making, in particular in their relationships with local police forces. I have shown the perverse effect that

some targets, such as the attrition rate, can have on prosecutorial decisions in chapter 4. Given the existing strength of the audit culture in CPS offices, a rise or fall of this indicator could be used as a trigger to launch a closer analysis of the reasons for attrition conducted in cooperation with other agencies involved in the process and find solutions to improve those statistics (e.g. further training, improved communication with victims and witnesses, etc.), rather than simply discouraging prosecutors to discontinue cases. Greater accountability for decisions taken at court is also necessary. Such decisions should be more foreseeable and be the result of a more careful consideration of the facts, if the prosecutor representing the CPS at court is the one who has reviewed the case from the start of the process.

In both jurisdictions, public prosecutors are expected to neutrally review police investigations in order to decide whether or not to prosecute cases. Previous research studies showed that this task is only imperfectly performed by public prosecution services as police investigators are able to largely influence the prosecution decision since they control the collection of evidence, whether public prosecutors have supervisory powers over police investigations or not. Since public prosecutors depend entirely on the police to collect evidence and to bring cases to them, there is an original imbalance in the relationship. The Anglo-Welsh model consists of two wholly independent agencies, with no hierarchical link between them, whilst the French model gives public prosecutors the power to supervise police investigations. In chapter 5, I showed that the Anglo-Welsh model resulted in serious tensions between the public prosecution service and the police, with little trust and a tendency to blame each other for mistakes or failings. Importantly, CPS prosecutors have become accountable to the police in many ways, creating a further imbalance in the relationship. By contrast, the French model has a clearer responsibility structure, which appears to lead

to more trust and cooperation between legal actors. Finally, if providing wholly neutral reviews of individual cases does not seem to be possible, I argued that public prosecutors can help shape police investigations through general policy and guidance and through the provision of training to police officers.

The last chapter provides an analysis of case disposals and of the growing role played by public prosecutors. I argued that the adjudication on guilt, whether in open court or not, has become a quasi-administrative process in both jurisdictions, with the speedy disposal of cases as the main objective. Opportunities for legal contestation are minimised and minor cases are dealt with in a standardised fashion. This has allowed public prosecution services to delegate part of their role to unqualified members of staff, such as Associate Prosecutors in England and Wales and *délégués du procureur* in France. I showed how guilty pleas have become a routine disposal in England and Wales, but how few safeguards are in place to protect the interests of people accused of crime. In particular, I argued that accountability mechanisms for plea bargaining in the CPS are weak, especially when considering that many decisions are taken by Associate Prosecutors, rather than qualified lawyers. Recent developments also saw growing pressures on defence and prosecution to cooperate to ensure guilty pleas at the earliest opportunity, even prior to full disclosure of the evidence collected by the police. In France, a formal guilty plea procedure was introduced in 2004, but has not become a routine disposal. I argued that this could be explained by the abbreviated form of trials in France and the multitude of simplified procedures based on a confession by the accused.

In order to remedy the two issues flagged up above (relationship with the police and plea bargaining), a clarification of the role of public prosecutor in a modern criminal justice system is necessary in England and Wales. On this basis, vocational training

should be designed specifically for Crown Prosecutors. This should include ethical issues – such as to what extent public prosecutors have a duty to ensure that their decisions do not adversely affect suspects or defendants accused of crimes –, and also more practical training such as how to review police files and how to communicate with police officers. It seems unrealistic in the current political climate that CPS prosecutors will be given supervisory powers over police investigations or even powers to require the police to collect further evidence, especially given the context of budget cuts. However, a clearer delineation of each agency's responsibilities is required. In France, the Beaume commission recommended a lesser involvement of *procureurs* in police investigations in order to guarantee the objectivity of their decisions. A recent reform project to 'simplify' criminal procedure provides for a limitation of the instances in which police officers must report to the *parquet* or must get the *parquet*'s authorisation.⁵⁸⁵ This could fundamentally alter the balance of powers in the relationship between *procureurs* and police officers. Although previous studies have shown that the control exercised by *procureurs* over police activities is not as thorough as it should be, the answer cannot be to simply suppress any opportunity for this control to be exercised and to significantly restrict the *procureur*'s possibilities to intervene in the investigation at an early stage. Greater use could be made of technologies to improve communications between *parquet* and police investigators, in particular the transfer of information between legal actors. There is no reason why witness and interview statements could not be sent to the *parquet* by email, rather than *procureurs* having to rely on oral summaries by police officers to

⁵⁸⁵ For a summary of the government's project, see <<http://www.gouvernement.fr/partage/5657-forces-de-securite-et-justice-de-nouvelles-mesures-pour-simplifier-les-procedures>> accessed 23 October 2015.

take their decisions. Finally, greater training is required for *délégués du procureur* if they are to replace *procureurs* in some of their missions.

Less than thirty years ago, one of the main characteristics differentiating the Anglo-Welsh criminal justice system from the French system was the absence of a prosecution service, with independent police forces conducting investigations and hiring lawyers to conduct prosecutions at court. By contrast, the French system had a powerful, hierarchically organised public prosecution service. The emergence of the Crown Prosecution Service in England and Wales and the introduction of adversarial elements in French criminal procedure questioned the significance of the traditional dichotomy of adversarial and inquisitorial systems. I argue that the distinction still impacts on today's criminal justice systems by shaping the professional ethos of public prosecutors, as well as of other legal actors. At a time when the establishment of an EU-wide public prosecutor is considered, lessons can be drawn from the development of public prosecution services in France and in England and Wales. As argued by Conway, 'much can be learned from national practice'.⁵⁸⁶ In particular, the centrality of the role of the state in public prosecutions must inform the thinking on the creation of a European public prosecutor who will find it difficult to establish their legitimacy without links to a nation state. Similarly, the way the new European prosecutor would overlap or cooperate with investigative functions needs to be considered carefully, especially if the new institution will mainly rely on national police forces.

Both jurisdictions under study attempt to strike a balance between prosecutorial discretion and accountability, but neither of them manages to find a satisfactory equilibrium between these two requirements. In France, *procureurs* have a high level

⁵⁸⁶ Conway (n 118) 373.

of discretion, which could lead to incoherent and arbitrary decisions, as few accountability mechanisms are in place. In England and Wales, by contrast, the pendulum has swung towards high levels of bureaucratic accountability for written decisions, with prosecutorial discretion shrinking away fast. The overbearing accountability structure, coupled with a historical balance of power in favour of the police, prevents CPS prosecutors from taking decisions perceived as unpopular with their hierarchy or the police. However, decisions at court, although having a great impact on the final outcome of cases and often taken by less qualified staff, are rarely subjected to close review. Recent evolutions, driven by efficiency concerns in both jurisdictions, enable the delegation of part of public prosecutors' workload to unqualified staff who are not adequately trained or supervised and the speedy disposal of minor cases in a one-size-fits-all fashion.

Appendix: Glossary of Terms

avocat – lawyer. The defence lawyer is an *avocat* with a distinct training and status from prosecutors and judges who are *magistrats*.

comparution immédiate – procedure available for offences with a maximum sentence of between two and ten years imprisonment, where the *procureur* considers the case ready for trial (Art. 395 CPP). The procedure is designed to deal rapidly with cases which are tried within hours of the police custody period.

comparution sur reconnaissance préalable de culpabilité (CRPC) – guilty plea procedure which allows *procureurs* to offer a sentence (including imprisonment) to the defendant if the offence is admitted. If the sentence is accepted by the defendant, the agreement is submitted to the court for validation.

composition pénale – alternative to prosecution which allows the *procureur* to impose a fine or community work, if the suspect admits the offence.

Conseil Supérieur de la Magistrature (CSM) – High Council for the Judiciary. It is jointly in charge of managing the career of *magistrats* with the Ministry of Justice, although its powers are limited with regards to *procureurs*.

cour d'assises – criminal trial court with jurisdiction to hear cases involving defendants accused of the most serious offences (murder, rape, etc.) and the only one involving a jury of citizens.

délégués du procureur – untrained staff, usually retired public servants, recruited by the *parquet* to administer out-of-court disposals.

garde à vue – the period of police detention of suspects.

juge d'instruction – investigative judge, responsible for investigative in the most serious and complex cases.

magistrat – member of the *magistrature*, the career-trained judiciary which include judges and public prosecutors.

ministère public – French public prosecution service, also called *parquet*.

ordonnance pénale – expedited procedure without a public hearing. Judges make their decision purely on the basis of the prosecution papers.

parquet – collective name for *procureurs*.

politique pénale – broadly translates as crime policy. It includes operational policing strategies, prosecution policy, criminal policy and penal policy, but also community safety and crime prevention.

préfet – representative of the government in each region.

procureur – French public prosecutor, a *magistrat*.

rappel à la loi – alternative to prosecution, similar to warnings.

traitement en temps réel – practical organisation of a *parquet* to take decisions on cases reported by the police ‘in real time’, i.e. over the phone.

tribunal correctionnel – criminal trial court normally composed of three professional judges – although some offences can be tried by a single judge – which tries mid-ranking offences such as burglary, theft, assaults, etc.

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