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## The French Prosecutor in Question

Jacqueline S. Hodgson

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# The French Prosecutor in Question

Jacqueline S. Hodgson\*

## *Abstract*

*Both the pre-trial and dispositive roles of the French prosecutor have continued to expand over the last decades with a resulting shift in power away from the trial judge and the juge d'instruction. The recommendations of the Léger Commission in 2009 went beyond the redistribution of authority and proposed the abolition of the juge d'instruction, placing the prosecutor in charge of all criminal investigations, even the most serious, complex, and sensitive. At the same time, the prosecutor's role and status has been challenged in a number of ways—in particular concerning her function as judicial supervisor of the detention and interrogation of suspects in the garde à vue. The case of Medvedyev v. France called into question the prosecutor's status as a judge and the string of cases beginning with Salduz v. Turkey has caused several jurisdictions, including France, to reconsider the provision made for custodial legal advice. There is a real tension between the direction of reforms proposed within France and the pressure from Europe to ensure more effective due process safeguards. As a result of domestic litigation and constitutional challenge, the French government is slowly relenting and allowing lawyers a greater role. It has yet to grasp the nettle of the independence of the prosecutor, however. The ECtHR has made it clear that a judge must be independent of the executive and of the case parties—both of which are contested in relation to the French prosecutor. Within a procedural model in which defense rights are secondary to the supposed truth-seeking ideology of the judicial supervisor, the independence of the prosecutor is crucial.*

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### I. Introduction

The public prosecutor, the *procureur*, is central to the functioning of the French criminal process—from investigation and prosecution through to case disposition—and her role continues to grow.<sup>1</sup> Like so many other jurisdictions, alongside a range of expedited trial procedures and alternatives to prosecution, France has expanded the function of the prosecutor in order to reduce the delay and expense associated with an ever-increasing criminal caseload.<sup>2</sup> The result has been a shift of power away from the trial judge and the *juge d'instruction*<sup>3</sup> in favor of the *procureur*, giving her significant dispositive powers: She is responsible for the decision in nearly half of all criminal cases.<sup>4</sup> The most recent reform

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1. See, e.g., JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE 75–79, 84 (2005) [hereinafter HODGSON, FRENCH] (discussing the role of the *procureur*).

2. See generally Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Eric Luna & Marianne Wade eds., forthcoming 2011) [hereinafter Hodgson, *Guilty*] (discussing the changing role of the French prosecutor in general and the implications of the guilty plea in particular).

3. A *juge d'instruction* is a member of the French judiciary whose role is to supervise criminal investigations. HODGSON, FRENCH, *supra* note 1, at 67.

4. See Jacqueline Hodgson, *The Changing Role of the Crown Prosecutor*, 79 CRIM. JUST. MATTERS 28, 28 (2010) [hereinafter Hodgson, *Changing Role*] ("In England and Wales, as in many other European countries and the United States, there is a general trend away from the courtroom disposition of cases and a corresponding expansion in the role of the police and the prosecutor.").

project is yet more radical, going beyond the redistribution of authority among existing legal actors and proposing the abolition of the *juge d'instruction* and the transfer of all investigative powers to the *procureur*.<sup>5</sup> The removal of France's most iconic criminal justice figure has proved highly controversial.<sup>6</sup> Although the *juge d'instruction* deals with only a small minority of criminal cases, these are often the most complex and sensitive investigations concerning terrorism, fraud, drug trafficking and, of course, political corruption. The prospect of removing these inquiries from a politically independent and immovable judge and delivering them into the hands of a public prosecutor who is hierarchically accountable to the executive has caused many commentators to fear for the future political independence of the criminal justice system.<sup>7</sup>

As a *magistrat*,<sup>8</sup> the *procureur* is considered a judicial authority in French law, but the European Court of Human Rights (ECtHR) Grand Chamber decision in the case of *Medvedyev v. France*<sup>9</sup> has recently put this authority in doubt. Although the court does not attack the status of the prosecutor directly, the very specific terms of the court's endorsement of the judicial status of the *juge d'instruction* emphasize the importance of a judge's independence from the executive and from the case parties, both of which are highly contested in relation to the *procureur*.<sup>10</sup> French criminal justice reflects an essentially judge-centered model with inquisitorial roots, in which the defense in particular plays a subsidiary role. The judicial status of the person conducting or supervising the criminal investigation, in this case the prosecutor, is therefore crucial.

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5. See, e.g., John Lichfield, *Sarkozy Goes to War with Napoleon's Legal Legacy*, INDEP., Jan. 7, 2009, at 20 (reporting on French President Nicolas Sarkozy's intention to call for the abolition of the *juges d'instruction* and the transfer of all criminal investigations to the public prosecution service).

6. See *id.* (reporting that President Sarkozy's call to abolish the role of *juge d'instruction* would raise a "political and legal storm").

7. See *id.* (reporting one investigating judge's fear that "[t]his reform will mean that all sensitive cases . . . will be subject to political interference").

8. The term *magistrat* refers to an individual who is a member of the French judiciary.

9. The first judgment was on July 10, 2008. See *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶ 63 (2008) (holding that French authorities violated Article 5 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms when they detained plaintiffs on a boat for thirteen days without supervision by a judicial authority). The final Grand Chamber judgment was on March 29, 2010. See *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. at ¶ 103 (2010) (affirming the judgment).

10. See *id.* ¶ 114 (discussing the characteristics and powers of the investigating judge).

A further, though indirect, line of attack on the *procureur's* role comes again from the ECtHR. In a series of cases beginning with *Salduz v Turkey*,<sup>11</sup> the ECtHR has stressed the requirement that custodial legal advice be available to all suspects at the start of their police detention for interrogation as part of the requirement for a fair trial under Article 6 of the European Convention on Human Rights (ECHR).<sup>12</sup> The court made clear that custodial legal advice should be meaningful and effective in preparing the suspect for interrogation and enabling her to prepare her defense.<sup>13</sup> France currently allows suspects a thirty-minute consultation with a lawyer at the start of detention and again after twenty-four hours if detention is extended.<sup>14</sup> The lawyer may know the date and nature of the charges, but has no access to the dossier of evidence and has no right to be present during the interrogation of her client.<sup>15</sup> The lawyer's role is therefore limited by constraints of time and of information. Furthermore, legal advice is delayed for forty-eight hours in cases of organized crime and seventy-two hours for drug trafficking and terrorism.<sup>16</sup> Defense lawyers argued successfully before the French courts that this delay clearly breached the *Salduz* doctrine and went on to use the new *question prioritaire de constitutionnalité* procedure to challenge the compatibility of the *garde à vue*<sup>17</sup> with the French constitution. In a landmark decision,<sup>18</sup> clearly inspired by the jurisprudence of the ECtHR, the *Conseil*

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11. See *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶ 56 (2008) (holding that the Republic of Turkey violated Article 6 §§ 1 & 3-(c) of the Convention when it denied *Salduz* access to a lawyer while he was in police custody and did not communicate the written opinion of the Principal Public Prosecutor at the Court of Cassation).

12. See *id.* ¶ 50 ("As the Court has already held in previous judgments, the right [to custodial legal advice] set out in paragraph 3-(c) of Article 6 of the Convention is one element, amongst others, of the concept of a fair trial in criminal proceedings . . .").

13. See *id.* ¶ 37 (citing Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners which allows "an untried prisoner . . . to receive visits from his legal adviser").

14. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 63-4 (Fr.) [hereinafter C. PR. PÉN.].

15. See *id.* (noting that a defendant may request to speak to an advocate, but the advocate simply speaks to the client for no more than thirty minutes and has no access to information outside of what she learns from the client during that conversation).

16. See *id.* (stating that an advocate must wait forty-eight hours to interview a client in custody for offenses like organized crime; for other offenses like drug trafficking and terrorism, the advocate must wait seventy-two hours to interview the detained client).

17. The period of detention and interrogation in police custody.

18. One of the lawyers bringing the case described the decision as a "revolution" in the *Le Monde* headline the next day. Aline Leclerc, *Garde à vue: "Cette décision est une véritable révolution!"*, LE MONDE, July 30, 2010, [http://www.lemonde.fr/societe/article/2010/07/30/garde-a-vue-cette-decision-est-une-veritable-revolution\\_1394198\\_3224.html](http://www.lemonde.fr/societe/article/2010/07/30/garde-a-vue-cette-decision-est-une-veritable-revolution_1394198_3224.html) (last visited Sept. 30, 2010) (on file with the Washington and Lee Law Review).

*constitutionnel* ruled on July 30, 2010 that the legal provisions regulating the *garde à vue* were contrary to the constitution.<sup>19</sup> This has, in turn, resulted in the Minister of Justice modifying the *garde à vue* section of the reform project first presented in March 2010 to allow lawyers to be present during the police interrogation of the suspect.<sup>20</sup> This is a major step forward, but there are limitations to the right and the effectiveness of the reform. If agreed by Parliament, the success of this new advisory function will also depend on the availability of legal aid and the proper training of lawyers.<sup>21</sup>

The judicial supervision of criminal investigations in France is a powerful remnant of its former inquisitorial procedure, in which the defense is considered less important than in an adversarial, two-party model. The *garde à vue* is no exception to this position. Suspects in France enjoy a very limited right to custodial legal advice during the period of police detention and interrogation.<sup>22</sup> The principal due process protection is understood to be the judicial oversight provided by the officer in control of the investigation—an investigation that does not focus simply on the suspect, but which is oriented towards the discovery of both incriminating and exculpatory evidence.<sup>23</sup> However, the judicial officer responsible for the conduct of the *garde à vue* and for authorizing the detention of suspects for up to forty-eight hours is the *procureur*, whose status as a judicial authority is currently in question.<sup>24</sup> The *garde à vue* is therefore subject to challenge on two fronts—the adequacy of its legal regulation by the *procureur* and the adequacy of the right to custodial legal advice.

In this way, both current government reform projects—the abolition of the *juge d'instruction* and the reform of the *garde à vue*—are inextricably

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19. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en201014qpc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en201014qpc.pdf). The court did not rule on the exceptional provisions relating to organized crime, drug trafficking and terrorism, having already examined them in 2004.

20. This was presented to the *Conseil d'etat* on September 7, 2010.

21. See generally MIKE McCONVILLE & JACQUELINE HODGSON, CUSTODIAL LEGAL ADVICE AND THE RIGHT TO SILENCE (1993) (discussing these issues in relation to a similar reform in England and Wales).

22. Indeed, this right was first available in 1993, but only after the suspect had been in police custody for twenty hours. In 2000, custodial legal advice was finally made available from the start of detention. C. PR. PÉN., *supra* note 14, art. 63–64.

23. *Id.*

24. See *supra* note 9 and accompanying text (discussing the first and Grand Chamber judgments in *Medvedyev*, opinions that questioned the judicial authority of the *procureur*).

linked with debate around the proper role and status of the *procureur*. Is she sufficiently independent to head up all criminal investigations within a procedural model in which defense rights are secondary to the supposed truth-seeking ideology and function of judicial supervision? And does she qualify as a judge for the purpose of authorizing the detention in police custody of a suspect for forty-eight hours, offering the kind of protection that has been claimed to justify the now-contested, diminished rights to custodial legal advice?

## II. *The Role and Professional Status of the Procureur*

When making comparisons between different legal processes, functional equivalence is often more elusive than it might first appear. The French public prosecutor, the *procureur*, shares many characteristics with her common law counterparts: For example, she prepares cases for trial and prosecutes them in court.<sup>25</sup> But just as there are dissimilarities between even apparently similar common law prosecution systems—for example, the English/Welsh Crown Prosecutor makes no recommendation as to sentence, unlike the American prosecutor<sup>26</sup>—there are major differences between the role and status of the *procureur* and the American prosecutor or the Crown Prosecutor in England and Wales.

The *procureur* is a public prosecutor, but is also part of the judiciary or *magistrature*.<sup>27</sup> Alongside the trial judge and the *juge d'instruction*, she is a *magistrat*. All three *magistrats* enjoy a common training—though each will specialize in her chosen branch during this period—and it is possible, and indeed not uncommon, for *magistrats* to switch between the three functions during their careers.<sup>28</sup> The *procureur* is not understood to be a

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25. See Hodgson, *Guilty*, *supra* note 2, at 3 ("[The *procureur*] is responsible for the decision to prosecute, as well as bringing the prosecution case in court and on appeal.")

26. See Hodgson, *Changing Role*, *supra* note 4, at 28 (discussing the changing perception of the Crown Prosecutor which would recast prosecutors as sentencers).

27. See HODGSON, FRENCH, *supra* note 1, at 65–72 (discussing the history and nature of the French *magistrature*).

28. See PRESIDENT ANDRÉ VALLINI & RAPPORTEUR PHILIPPE HOUILLON, ASSEMBLÉE NATIONALE RAPPORT [NATIONAL ASSEMBLY REPORT] No. 3125, June 6, 2006, at 446 [hereinafter NATIONAL ASSEMBLY REPORT NO. 3125] (noting that each year, around 9% of *procureurs* move to positions as *juges du siège* and some 6% move in the other direction). *Juge du siège* is a broad category of judges in France of which a *juge d'instruction* is one part, and the role of *juges du siège* includes making orders, judgments, and decisions. *But see* Alaine Salles, Interview with Denis Salas, *Il manque une part d'autonomie au parquet français*, LE MONDE, May 8, 2009, at 9 (noting that 70% of *procureurs* have spent their

judicial officer in quite the same sense as the trial judge or even the *juge d'instruction*: These two are part of what is called the sitting judiciary, while the prosecutor is part of the standing judiciary.<sup>29</sup> This distinction has important implications for the independence of each. While the sitting judiciary is immovable and independent of the orders and authority of the executive, the *parquet* is hierarchically accountable to the minister of justice and to the executive. The Minister is free to issue written instructions to the *parquet*.<sup>30</sup> She may also move, promote, or transfer *procureurs* or nominate her own political allies.<sup>31</sup> This subordination to political authority risks undermining the political independence of the prosecutor as a judicial officer.<sup>32</sup> On the other hand, it is considered an important means of ensuring that criminal justice policy is properly the responsibility of government and is not within the discretion of the individual *procureur*.<sup>33</sup> Despite these differences between the two types of *magistrat*, the Constitutional Court has confirmed the status of the *procureur* as a judicial authority.<sup>34</sup>

The judicial status of the *procureur* is essential to the pivotal role that she plays within the criminal justice process, a role that goes far beyond the

entire career in the prosecution service (the *parquet*)).

29. Interestingly, this is not a distinction made by most French citizens. See Camille Mialot, *La partie publique au procès pénal doit-elle être représentée par un magistrat?*, 37 RECUEIL DALLOZ 2497, 2498 (2009) (reporting that, in a study commissioned by the governing body of the *magistrature*—the *Conseil supérieure de la magistrature*—69% of the 1,008 people representing French society made no distinction between *magistrats du siege* and the *parquet*).

30. The Minister may instruct the *procureur* to proceed with a case, but not to drop a prosecution. See C. PR. PÉN., *supra* note 14, art. 30 (allowing the Minister to "initiate prosecutions or to cause them to be initiated"). Formerly, the Minister was able to issue oral instructions. Although this is no longer permitted, in order to ensure better transparency and accountability, it may be difficult to resist the instructions of the person responsible for your career advancement. HODGSON, FRENCH, *supra* note 1, at 76–77.

31. See, e.g., Alain Salles, *Jeu de chaises musicales dans la magistrature*, LE MONDE, Dec. 10, 2009, at 13 (discussing the political nature of some appointments).

32. See Alain Salles, *Les procureurs français sont-ils vraiment des magistrats?*, LE MONDE, May 8, 2009, at 1 (reporting that the lawyer for the applicants in the Grand Chamber hearing of *Medvedyev* presented a number of examples of the very real ways in which *procureurs* are subordinated and even sanctioned by the executive power).

33. But see Giuseppe Di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective*, 38 BRIT. J. CRIMINOL. 371, 371 (1998) (discussing the negative consequences of the Italian justice system in which the prosecutor is wholly independent and free to make arbitrary and political decisions).

34. See CC decision No. 93-326DC, Aug. 11, 1993, J.O. 11599 (discussing the *procureur*'s pivotal role in the pre-trial detention decision).



prosecution of cases. Increasingly, she is a player in local criminal justice policy-making and inter-agency cooperation,<sup>35</sup> such that *procureurs* have come to exercise "a hybrid function, half executive, half judicial and [they] have become the necessary interface between the judiciary, the state and civil society."<sup>36</sup> They also have the power to initiate alternatives to prosecution and trial such as mediation and a range of alternative sanctions.<sup>37</sup> Most recently, the *procureur* has been empowered to propose a reduced sentence to the accused in exchange for a guilty plea—a radical reform indeed for a jurisdiction that, until that time, did not even recognize a formal system of pleas.<sup>38</sup>

Perhaps the most significant function of the *procureur*, and one that touches the majority of cases, is her role as a pre-trial judicial authority: She is responsible for the investigation and prosecution of crime under CPP Article 41.<sup>39</sup> This includes directing the activity of the police and overseeing the police detention and interrogation of suspects held in *garde à vue*.<sup>40</sup> In most instances, the *procureur* retains control of the case and decides whether to prosecute, institute alternative proceedings such as mediation, or to dismiss the case.<sup>41</sup> In a minority of instances—around 4% of cases—the *procureur* will pass the inquiry to the *juge d'instruction*, who possesses wider powers of investigation than the *procureur*.<sup>42</sup> The *juge*

35. See HODGSON, FRENCH, *supra* note 1, at 84 ("[T]he *procureur* is increasingly implicated in the debate, stimulation and co-ordination [sic] of local penal policy, as well as in various forms of inter-agency co-operation [sic]."); Patricia Bénéç'h-le Roux, *Chief Public Prosecutor: A Strengthened Professional Identity*, 2007 PENAL ISSUES 15, 15, available at [http://www.cesdip.fr/IMG/pdf/PI\\_11\\_2007.pdf](http://www.cesdip.fr/IMG/pdf/PI_11_2007.pdf) (analyzing the prosecutor's position within the magistracy and the justice system, including the evolution of her professional identity).

36. Hubert Dalle & Daniel Soulez-Larivière, *Débats, Justice: à la recherche de la bonne coupure*, LE MONDE, May 30, 2002, at 18.

37. See Bénéç'h-le Roux, *supra* note 35, at 15 ("[The public prosecutor's] role . . . has grown in importance with the expansion of diversion, the so called the [sic] « third track » (victim-offender mediation and restoration) and with the establishment of alternative modes of prosecution . . . ." (citations omitted)).

38. See Hodgson, *Guilty*, *supra* note 2, at 9 (discussing in detail the system of pleas).

39. See C. PR. PÉN., *supra* note 14, art. 41 ("The district prosecutor institutes or causes to be taken any step necessary for the discovery and prosecution of violations of the criminal law.").

40. See *id.* (noting that the district prosecutor supervises all police custody measures).

41. See MINISTÈRE DE LA JUSTICE ET DES LIBERTÉS, LES CHIFFRES-CLÉS DE LA JUSTICE 14 (2009) (finding that of the 668,946 legal proceedings, 23,409 came before the *juge d'instruction*).

42. See C. PR. PÉN., *supra* note 14, art. 80 (stating that the *juge d'instruction* can only investigate cases referred by the *procureur*); *id.* art. 82 (stating that the *juge d'instruction*

*d'instruction* will question the accused<sup>43</sup>—known as the *mise en examen* once the accused is a suspect in the *instruction* process—instruct experts where necessary,<sup>44</sup> and carry out any acts of investigation she considers useful in her search for the truth.<sup>45</sup> These are two different models of judicial supervision. While the *procureur* oversees what is essentially a police investigation, the *juge d'instruction* is personally responsible for the *instruction* inquiry; she may delegate specific acts of investigation to named police officers, but not the questioning of the accused.<sup>46</sup>

One of the main criticisms of the *instruction* has been the duality of the *juge d'instruction*'s role as investigator and as judge—requiring her to be both Maigret and Solomon, as it is often described.<sup>47</sup> The majority of the Léger Commission considered this fundamental ambiguity to be fatal: How can a judge who is also responsible for a criminal investigation, remain neutral?<sup>48</sup> Historically, the most controversial power of the *juge d'instruction* was her authority to place a suspect under investigation in pre-trial detention,<sup>49</sup> but this function is now exercised by a judge independent of the *instruction*, the *juge des libertés et de la détention*.<sup>50</sup> Claims as to the schizophrenic role of the *juge d'instruction* therefore seem rather weak.

However, this duality is also present in the role of the *procureur*.<sup>51</sup> She is in charge of the investigation of crime, but at the same time carries

may, according to the law, carry out all inquiries that he considers necessary to the discovery of the truth).

43. See *id.* art. 80-2 ("[A] placement under judicial examination may not take place until after the person's first appearance before the investigating judge.") (Jason Rason Spencer trans.).

44. See *id.* art. 156 ("The experts carry out their task under the supervision of the investigating judge . . .").

45. See *id.* art. 82 (stating that the *juge d'instruction* may, according to the law, carry out all inquiries that he considers necessary to the discovery of the truth).

46. See generally Jacqueline Hodgson, *The Police, the Prosecutor and the Juge D'instruction: Judicial Supervision in France, Theory and Practice*, 41 BRIT. J. CRIMINOL. 342 (2001), for an analysis of judicial supervision of police investigations.

47. See, e.g., Robert Badinter, *La mort programmée du juge d'instruction*, LE MONDE, Mar. 22, 2009, at 17 (criticizing the simultaneous role of the *juge d'instruction* as investigator and decision-maker).

48. The *juge d'instruction* also has the power send a case to trial.

49. See HODGSON, FRENCH, *supra* note 1, at 214–19, for a discussion of the use of investigation during pre-trial detention.

50. See C. PR. PÉN., *supra* note 14, art. 137-1 ("Pre-trial detention is ordered and extended by the liberty and custody judge.").

51. See Jacqueline Hodgson, *The Role Played by the Juge in the Protection of the Suspect's Rights During the Police Investigation*, in JUSTICE ON TRIAL: THE FRENCH 'JUGE' IN QUESTION 207, 221 n.32 (2004) (noting that one senior *procureur* said: "What is the role

out a judicial function in authorizing the detention of suspects in *garde à vue* for up to forty-eight hours.<sup>52</sup> Any extension beyond this, in cases of suspected drug trafficking, organized crime or terrorism, may only be ordered by the *juge des libertés et de la détention*—a *magistrat du siège* who is also independent of the investigation.<sup>53</sup> It seems the *procureur* is sufficiently judicial to authorize detention for two days, but no longer.<sup>54</sup> If this duality of judicial and investigative power is a problem for the *juge d'instruction*, it is all the more so for the prosecutor, who is not a *magistrat du siège* and yet is authorized to place a suspect in police detention for up to two days.<sup>55</sup> What is the significance of the distinction between the *procureur* and the *juges du siège*? If the latter represent a purer judicial model in the sense that they are removed from the parties in the case and tend to have a more adjudicative role, does it make sense to see the *procureur* as a judicial authority? And if the *juge d'instruction's* former power to detain suspects was considered a serious conflict of interest, what justification is there for the *procureur's* authority to do the same thing—albeit for a shorter period of time? Surely it would be more appropriate for this decision to be made by a *magistrat du siège* such as the judge authorized to extend *garde à vue* beyond forty-eight hours, the *juge des libertés et de la détention*.

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of the parquet? Is it to immerse yourself completely in the direction of the investigation, or is it to keep a quasi-olympian detachment . . . ? Of course, I think, it is something between the two").

52. The *Conseil constitutionnel* ruled that the *procureur* could authorize the detention of a suspect in police custody for forty-eight hours; any further detention must be authorized by a *juge du siège*. CC decision No. 2004-492DC, Mar. 2, 2004, J.O. 4637 (citing § 706-88 of the C. PR. PÉN.).

53. See C. PR. PÉN., *supra* note 14, art. 706-88 ("[I]f the foreseeable length of the remaining investigations . . . justify this, the liberty and custody judge or the investigating judge may decide . . . that the custody period will be extended by one single period of forty-eight hours.").

54. In terms of case disposition too, the power of the prosecutor is limited. Through the *composition pénale*, the *procureur* may propose a range of measures to an accused who admits the offense—compensation to the victim, a drug rehabilitation order, a fine, a community service order—but these must be endorsed by a court. See Hodgson, *Guilty*, *supra* note 2, at 7–8 (describing the *procureur* as a quasi-sentencer). Because the *procureur* is a prosecutor, not a judge, she does not have formal sentencing authority. See *id.* at 8 (noting the *Conseil constitutionnel's* refusal to "turn[] the *procureur* into a judge by allowing her to hand down a sentence").

55. See *supra* note 51 and accompanying text (discussing the duality of the *procureur*).

### III. Judicial Corporatism

Given the different nature of the judicial authority represented by the *parquet* and the *juges du siège*, does it make sense for them both to belong to a common judicial grouping, the *magistrature*? Does their shared status as *magistrats* enhance their functioning, or mask the pronounced differences in their role and orientation? Some have suggested that their training and professional status should reflect the distinction between the standing and sitting judiciary.<sup>56</sup> Others emphasize that while there are differences between the functions of the different types of *magistrat*, their professional proximity, common training and ability to move between functions, are important to their independent outlook.<sup>57</sup> The idea is that seeing herself as a *magistrat* and as part of a wider judicial authority acting in the wider public interest prevents the *procureur* from becoming captive to a narrow prosecution perspective. As one senior *procureur* expressed it in my own empirical study:

*Procureurs* are *magistrats* and can become trial judges, or *juges d'instruction*. I think that this position is really a question of culture. That is to say that here, recruitment is by a single competitive examination and in this context, it is believed that all *magistrats* can be called on to carry out all of the three functions. This has the advantage that one can put oneself in the place of the *juge*, certainly to be less partisan and to understand the strict requirements of evidence . . . . [M]any people have been *juges du siège* and in the *parquet* . . . [and] that has the potential to vary your viewpoint.<sup>58</sup>

Or, as a senior *procureur* in a different region explained:

[M]agistrats du siège or the *parquet*, I make no distinction, because in reality, the approach is very similar. I have spent my entire career in the *parquet*, but tomorrow, I could be *au siège* and I would not change an iota. I have colleagues who were formerly *au siège* and we reason in the same way [or rather] the approach to problems is the same.<sup>59</sup>

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56. See NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28, at 447–49 (presenting opinions of several French magistrates on the relationship between the *parquet* and the *siège*).

57. See *id.* (noting that most of the *magistrats* interviewed preferred to preserve the current system).

58. HODGSON, FRENCH, *supra* note 1, at 70.

59. *Id.*

However, this closeness and the sense of being members of the same "club," can also have an adverse effect on the independence of each.<sup>60</sup> As the *Outreau* affair demonstrates, this can also be problematic when different *magistrats* place too much trust in their colleagues, unquestioningly adopt the same approach and the same perspective, and the system of checks and balances breaks down.<sup>61</sup>

The shared professional status of trial judges, prosecutors and *juges d'instruction* can also have a detrimental effect on the defense's ability to act as any form of counter balance to the judicial inquiry. All that unites *magistrats*—their common training, public interest centred ideology and judicial status—serves to reinforce the defense lawyer (an *avocat*) as a professional outsider. The *Outreau* Report<sup>62</sup> demonstrated this idea pointedly when it recommended that *magistrats* would broaden their outlook further if they trained not only with one another, but also alongside lawyers for a year.<sup>63</sup> The arrangements for the investigation of terrorist offenses also demonstrate this idea.<sup>64</sup> The combination of this form of judicial corporatism, together with the weak role that the defense lawyer plays, places in question the independence of the pre-trial inquiry as well as its ability to incorporate a more *contradictoire* procedure<sup>65</sup> as set out in the preliminary article of the CPP.<sup>66</sup> While the trial has a more accusatorial flavor to it, the more inquisitorial nature of the pre-trial has an enormous

60. See, e.g., NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28, at 448 (reporting on an interview with Guy Canivet in which he expresses doubt that one can neutrally pass from one function to the other).

61. See generally Alexandra Fouché, *Outreau Puts French Justice in Question*, BBC NEWS ONLINE, July 2, 2004, <http://news.bbc.co.uk/2/hi/europe/3852673.stm> (last visited Nov. 17, 2010) (discussing the *Outreau* case) (on file with the Washington and Lee Law Review); *infra* Part III.A (same).

62. On the day that the six appellants had their convictions quashed by the *cour d'assises*, December 1, 2005, the Minister of Justice instructed the inspecteur général des services judiciaires to conduct an administrative investigation into the various malfunctions of the *Outreau* case. MINISTÈRE DE LA JUSTICE, INSPECTION GÉNÉRALE DES SERVICES JUDICIAIRES, RAPPORT: CONDITIONS DE TRAITEMENT JUDICIAIRE DE L'AFFAIRE DITE "D'OUTREAU" (2006), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/064000472/0000.pdf>. A parliamentary inquiry was also carried out in 2006. NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28.

63. NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28, at 443.

64. See *infra* Part III.B (discussing terrorist offense investigations).

65. This term does not translate as adversarial, but is closer to accusatorial. It refers to the right to respond to the accusations against you and to have sufficient information to do this.

66. See C. PR. PÉN., *supra* note 14, art. 1-P ("Criminal procedure should be fair and accusatorial and preserve a balance between the rights of the parties.").

impact on the way in which the judge will receive the evidence; judges afford more credibility to material presented in the prosecution dossier as part of a public-interest-centered neutral judicial investigation than they afford to self-interested evidence put forward by the defense.<sup>67</sup> It is therefore crucial that the defense is able to have some input into the pre-trial investigation and some influence over the evidence that the *magistrat* will present in the case. If the independence of the *procureur* is further called into question, the corresponding limitations on defense rights must be as well.

#### A. Outreau

The findings of the Parliamentary inquiry into the *Outreau* case demonstrated the systematic nature of this judicial corporatism, the difficulties experienced by defense lawyers trying to assert their rights to participate in the case investigation, and the disastrous effects that this unchecked concentration of power can have. While the focus of criticism has been on the *juge d'instruction* acting in the case, Fabrice Burgaud, the problems identified are inextricably linked to the role and independence of the *procureur*.<sup>68</sup> The case concerned accusations of child sexual abuse made by a number of children and adults in the town of Outreau in Northern France.<sup>69</sup> When the case came to trial in July 2004, two of the accused retracted their statements against their co-accused and the prosecution case collapsed.<sup>70</sup> Seven of the seventeen defendants were acquitted in the *cour d'assises* (trial court) and six more by the Paris *cour d'assises*, on appeal, in December 2005.<sup>71</sup> Between them, they served almost twenty-six years in *détention provisoire* while the *juge d'instruction* carried out his investigation and one suspect, François Mourmand, died in custody.<sup>72</sup>

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67. See Hodgson, *Changing Role*, *supra* note 4, at 5 (noting the argument that, unlike the adversarial model which requires "both sides to be active," the inquisitorial model "is of a more neutral centralised enquiry in which the prosecutor plays the part of judicial investigator or supervisor").

68. See NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28, at 513–26 (offering a summary of the problems identified by the inquiry).

69. See *id.* at 21 (introducing the details of the affair).

70. *Id.*

71. *Id.*

72. *Id.* at 22.

The repercussions of the case were enormous, resulting in the establishment of the first ever Parliamentary inquiry into a criminal case as well as a full investigation by the Ministry of Justice.<sup>73</sup> As an *instruction*, this was a case to which all of the safeguards and cross-checks of the defense's right to participate in the judicial investigation attached: The defense could challenge and propose evidence.<sup>74</sup> In the case of disagreement, the parties could make appeals to the *Chambre de l'instruction*.<sup>75</sup> However, the report was critical of the single-case viewpoint offered by the *procureur* and *juge d'instruction* and the absence of reflexivity among *magistrats*: Although the case passed through the hands of some sixty different *magistrats*, none of them challenged either the central case thesis or the methods of investigation.<sup>76</sup> The Parliamentary inquiry found that the *procureur* dominated the investigation rather than acting as any form of check, and both he and the *juge d'instruction* adopted a wholly prosecutorial perspective to the case—they worked only *à charge* (with an eye towards discovering incriminating evidence).<sup>77</sup> The fact that the *juge d'instruction*, in his submission to the *cour d'assises*, simply copied and pasted his final case conclusions from those of the *procureur* underlines the unity of perspective of the *juge d'instruction* and the prosecutor.<sup>78</sup> They saw the suspects' declarations of innocence as justifying repressive measures, and the commission of inquiry was shocked to hear that the *procureur* and *juge d'instruction* considered such assertions as good reason to keep suspects in detention during the investigation.<sup>79</sup>

Throughout this process, the *juge d'instruction* systematically prevented the defense from participating in the inquiry, from challenging

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73. See NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28, at 5–6 (including a foreword by President André Vallini in which he calls the affair a human tragedy and notes that the Parliamentary inquiry was followed by millions in France). One might argue that it is inappropriate and offends against the principle of the separation of powers for parliament to conduct an inquiry into the functioning of the justice system.

74. See Hodgson, *Changing Role*, *supra* note 4, at 6 (noting that during the *instruction*, formal provisions for defense's presence or engagement exist).

75. See C. PR. PÉN., *supra* note 14, § XII (mandating that appeals be lodged before the *Chambre de l'instruction* (the investigating chamber)).

76. See NATIONAL ASSEMBLY REPORT NO. 3125, *supra* note 28, at 276 (identifying the absence of a culture of control as one of the main problems with this case).

77. See *id.* at 91–158 (explaining the power of the *procureur* and the prosecutorial perspective that linked her to the *juge d'instruction*).

78. See *id.* at 148 (noting that copying and pasting took place in 95% of the cases).

79. See *id.* at 33 (indicating the commission's reaction to the argument that this is a valid reason for holding suspects in detention).

his findings and methods, and from stimulating investigation à *décharge*.<sup>80</sup> Statements were taken from the children making the accusations in ways that produced unreliable evidence, but the *juge d'instruction* did not permit the defense to examine these witnesses on the grounds that it might traumatize the children further.<sup>81</sup>

After the *juge d'instruction* discovered that accusations of murder connected with a pedophile ring in Belgium were without foundation, he simply cut from the dossier the testimony of the relevant witnesses who had lied and did not seem to doubt their overall credibility in relation to other evidence.<sup>82</sup> By removing their false testimony from the dossier, the *juge d'instruction* placed the defense outside the procedure and deprived it of any opportunity to question the witnesses' character. The *juge d'instruction* also deprived the *cour d'assises* of important evidence. Yet, as a simple administrative measure, this action was not subject to appeal.<sup>83</sup> Both the *parquet* and the *juge d'instruction* agreed to this deception.<sup>84</sup>

In other instances, the *juge* overplayed his hand, implying that he was in possession of evidence that he was not and instructing the police to question a suspect on this basis.<sup>85</sup> Instead of correcting these problems, the pre-trial appeal court, the *Chambre de l'instruction*, compounded them by conducting only paper reviews and demonstrating a clear tendency to reinforce the position taken by the *juge* and the *parquet*.<sup>86</sup> Quite simply, the defense lawyer was described as an unwelcome outsider and the investigating judge did not receive his counter-arguments well. The inquiry questioned whether, given the negative experiences of defense lawyers and

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80. See *id.* at 98–112 (describing the ways in which the defense was unable to participate in the investigation).

81. See *id.* at 98–99 (giving further traumatization as the reason for keeping the defense lawyer from interviewing the juvenile accusers).

82. See *id.* at 149–51 (noting that the *juge d'instruction* allowed the skewed account of the affair in the dossier).

83. See *id.* at 151 (noting that this decision was technically a judicial administrative measure and thus not subject to review).

84. See *id.* (providing the accounts of several people who were critical of the joint deception).

85. See *id.* at 194–95 (criticizing the *juge d'instruction*'s decision to have the police question the individual as a mere suspect, when there was clearly enough evidence to make him *mise en examen* and thus subject to the rights and protections of being an accused within the *instruction*).

86. See *id.* at 280–81 (indicating that the solidarity between the *Chambre de l'instruction* and the *juge* and *parquet* was a problem of judicial culture).



their treatment by *magistrats*, one can consider the French criminal justice to be accusatorial and fair.<sup>87</sup>

Alongside proposals for *juges d'instruction* to work in a more collegial way in order to avoid the premature narrowing of the inquiry that was so evident in this case, the report discussed whether the *parquet* should move to a career path and standing that is different from the judiciary, creating a greater degree of separation between the two roles.<sup>88</sup> *Procureurs* contest this idea, insist on the importance of their status as *magistrats* who guarantee individual rights and freedoms, and oppose fiercely changes that, in their view, will reduce them to the status of *fonctionnaires* or bureaucrats.<sup>89</sup> An alternative solution may be to retain the hierarchical link with the Minister of Justice, thus ensuring the uniform application of penal policy, but remove responsibility for nomination and career progression to the professional regulating body for the judiciary, the *Conseil supérieure de la magistrature* (CSM), as with the *magistrature du siège*.

### B. Terrorism Investigations

Investigations into terrorist cases provide a very particular example of judicial working methods. A specialist section of counter-terrorism *juges d'instruction* and *procureurs* based in Paris carries out these investigations, with policy coordinated through the Ministry of Justice.<sup>90</sup> Members of the section work closely with intelligence officers in the *Direction de la Surveillance du Territoire* (DST).<sup>91</sup> Trust is the key to the *magistrat*-police

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87. See *id.* at 191 (explaining the problems inherent in relegating defense lawyers to a secondary or auxiliary role in the judicial process).

88. See *id.* at 446–50 (providing several professional opinions in support of the notion that there needs to be more distance between the prosecution and the judiciary).

89. See Jean-Louis Nadal, *Un risque pour notre justice et nos libertés*, LE MONDE, June 2, 2006, at 18 (setting out the views of one such prosecutor); Jean-François Renucci, *Un séisme judiciaire: pour la CEDH les magistrats du parquet ne sont pas une autorité judiciaire*, 9 RECUEIL LE DALLOZ 600, 600–01 (2009) (same).

90. See Jacqueline Hodgson, *The Investigation and Prosecution of Terrorist Suspects in France: Report for the Home Office* 37–38 [hereinafter Hodgson, *The Investigation*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1321868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321868) (providing a general description of the terror investigation procedures in France).

91. See *id.* at 12–13 (discussing the roles of the DST). This body has both administrative and judicial attributes. *Id.* It works on prevention and repression of terrorist activities as well as general counter-espionage work. *Id.*

relationship in ordinary cases,<sup>92</sup> and it is even more pronounced among this specialist corps of individuals.<sup>93</sup> As with all *instruction* investigations, the defense, as well as the *procureur* and the victim or *partie civile*, have the right to request that certain acts of investigation be carried out by the *juge d'instruction*, as well as to challenge the procedural legality of the procedure and to apply for bail to the *juge des libertés et de la détention*.<sup>94</sup> Appeal against refusal by either judge lies to the *Chambre de l'instruction*.<sup>95</sup> The defense has been present in the *instruction* since 1897 when she first gained the right to be present during the judicial questioning of her client and to have access to the dossier of evidence.<sup>96</sup> The reforms of 2000 strengthened her ability to participate in the investigation and broadly gave her the same opportunities as the *procureur*.<sup>97</sup> This is potentially an important counterbalance in the *instruction* process, an opportunity to ensure that the *juge* has considered all lines of inquiry and remains alive to defense as well as prosecution concerns—investigating *à charge et à décharge* (from both the prosecution and the defense perspective).

In terrorism cases, this counterbalance is especially important given the very close working relationships that exist between the *procureur*, *juges d'instruction* and the security services, and the sharing of evidence and intelligence between them beyond any instant case.<sup>98</sup> In practice, the length and complexity of the case dossier makes it very difficult for the defense to review the investigation as it is ongoing.<sup>99</sup> In non-terrorist cases, as noted by the *Outreau* inquiry, the defense is a structural, institutional, and ideological outsider: *Magistrats* act in the public interest in the search for the truth, while lawyers act in the interests of suspected criminals in the search for an acquittal.<sup>100</sup> Also, despite the assertions of politicians in

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92. See generally HODGSON, FRENCH, *supra* note 1, at 156–61; CHRISTIAN MOUHANNA & WERNER ACKERMANN, *POLICES JUDICIAIRES ET MAGISTRATS: UNE AFFAIRE DE CONFIANCE* (2001).

93. See Hodgson, *Guilty*, *supra* note 2, at 39–40 (describing the relationship between the *magistrats* and the police).

94. HODGSON, FRENCH, *supra* note 1, at 120–21.

95. Hodgson, *Guilty*, *supra* note 2, at 43.

96. See HODGSON, FRENCH, *supra* note 1, at 117.

97. *Id.* at 118–21 (describing the expanded rights of the defense attorney).

98. See Hodgson, *Guilty*, *supra* note 2, at 42 (discussing the often ongoing relationships between the various branches over multiple investigations).

99. See *id.* at 43 n.69 ("As *magistrats* acknowledged to us, it is very difficult for the defence to review the dossier during the investigation, given its length and complexity.").

100. See *supra* Part III.A (discussing the *Outreau* inquiry and outlining the ways in which the defense is on the periphery of investigation and trial procedures).

France and elsewhere that terrorism is a crime and will be treated as such, the political and foreign policy contexts of terrorism add to the risk that the defense perspective will be subordinated to security concerns in these investigations. Recent terrorist trials suggest that the defense faces enormous hurdles when challenging the evidential basis of the prosecution, and this was confirmed in my own research.<sup>101</sup> Judicial corporatism is amplified in the closed world of counter-terrorism judges and judicial counter-checks are of little assistance to the defense. When explaining their role as specialist judges within the *Chambre de l'instruction*, the *juges* stated that they would rarely make a ruling against the *juge d'instruction*.<sup>102</sup> It was clear that they trusted and favored the approach of the fellow *magistrat*, the *juge*, over that of the defense lawyer.

#### IV. *The Independence of the Procureur*

While public attention has focused on the conflicting roles played by the *juge d'instruction*, we have seen that these are replicated to some extent in the roles ascribed to the *procureur*.<sup>103</sup> There are also real concerns that, far from ensuring an independence of outlook, their common status as *magistrats* risks blurring the functional separation between the *procureur* and the *juge d'instruction*.<sup>104</sup> More recently, the *procureur*'s very status as a member of the judiciary has been called into question.<sup>105</sup> Does she provide sufficient guarantees of independence to exercise the power and authority entrusted to a judge? The Léger Commission, in setting out a number of proposals to reform the French criminal justice process, answered this question in the affirmative: The *procureur*'s status as a *magistrat* remains key in justifying the steady increase in prosecutorial power and in maintaining a centralized model of judicial supervision.<sup>106</sup> The ECtHR, however, in its recent Grand Chamber judgment of

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101. See generally Hodgson, *Guilty*, *supra* note 2.

102. See *id.* at 43 ("It is exceptional that [the *Chambre de l'instruction*] would rule against the *juge d'instruction* . . .").

103. See *supra* notes 39–40 and accompanying text (describing the *procureur*'s role as pre-trial judicial authority).

104. See *supra* Part II (discussing the role and status of the *procureur*).

105. See *supra* Part IV.B (discussing the status of the *procureur* and of a judge in *Medvedyev*).

106. See *infra* Part IV.A (discussing the Léger Commission).

Medvedyev, cast serious doubt on the *procureur*'s status as a judicial authority.<sup>107</sup> I will examine these two contrasting approaches in turn.

#### A. Chronicle of a Death Foretold: Léger

In September 2008, President Nicolas Sarkozy appointed the *Comité de réflexion sur la justice pénale*, chaired by Philippe Léger.<sup>108</sup> After a decade of reforms, the Commission's brief was to consider measures that would restore coherence to French criminal law and procedure, as well as being effective in addressing all forms of criminality and respecting the rights of victims and the accused.<sup>109</sup> Somewhat prematurely,<sup>110</sup> given that the Commission was not due to report until later in 2009, President Sarkozy announced his intention to abolish the *juge d'instruction* in his address at the formal re-opening of the *Cour de cassation* (the highest appeals court) on January 7, 2009.<sup>111</sup> As anticipated, one of the key recommendations of the Léger Commission in its final report in September 2009 was to abolish the *juge d'instruction* and place the public prosecutor in charge of all criminal investigations.<sup>112</sup>

Although presented as a rational separation of investigative and judicial functions, the proposal has been criticized widely. The *juge d'instruction* is politically independent and immovable, while the *procureur* is hierarchically subordinate to the minister of justice and so to the executive.<sup>113</sup> Those investigated by the *juge d'instruction* also enjoy

107. See *infra* Part IV.B (discussing the status of the *procureur* in Medvedyev).

108. PHILIPPE LÉGER, RAPPORT DU COMITÉ DE RÉFLEXION SUR LA JUSTICE PÉNALE 1 (2009) [hereinafter LÉGER REPORT].

109. See *id.* (detailing the Commission's brief in the opening address to the President and the Prime Minister).

110. As a result of this announcement, two members of the Commission resigned.

111. See Yves Laurin, *Le Président de la République et L'autorité Judiciaire*, 34 RECUEIL LE DALLOZ 2396, 2396–97 (2007) (questioning the President's mixture of justice and politics when he set out major themes for justice reform and addressed the re-opening of the *Cour de cassation*).

112. See Editorial, *Rapport Léger, Mais Pas Insignifiant*, 30 RECUEIL LE DALLOZ 2025, 2025 (2009) (describing the commission as docile in carrying out the wishes of the President).

113. See Nathalie Guibert, *Le Prince, le Juge et le Bourreau*, LE MONDE, Jan. 16, 2009, [hereinafter Guibert, *Le Prince*] available at 2009 WLNR 792706 (questioning the need for reforms as set out by groups like the Léger Commission). The nature of the *parquet*'s subordination to the executive is illustrated by an episode on January 8, 2009, when *procureurs* in Nancy were reprimanded by their superiors for standing and applauding the speech of the president of the court when it returned after the holiday recess. *Id.* The

greater due process rights than those subject to a police investigation overseen by the *procureur*.<sup>114</sup> The suspect may have her lawyer present in any interrogation by the *juge d'instruction*—the police are not permitted to interrogate the suspect once the *information* has been opened and she is formally under judicial investigation as a *mise en examen*—and she has access to the dossier throughout the inquiry.<sup>115</sup> All parties—the suspect, prosecutor, and victim—may ask the *juge* to carry out any specific acts of investigation including the commissioning of expert reports.<sup>116</sup> The idea is that all parties have the opportunity to influence the content and direction of the inquiry so that the *juge d'instruction* is not captive to one particular case theory, even if, as discussed above, this does not always work well in practice, given the professional bonds that exist between *juge* and *procureur* as *magistrats*.<sup>117</sup> In cases that the *procureur* oversees, neither the suspect nor her lawyer has any rights to participate in the pre-trial inquiry.<sup>118</sup> Together with the sharp rise in the number of people placed in police custody for interrogation,<sup>119</sup> this means that in most cases, the primary evidence against the accused is not that obtained through a judicial inquiry, but is rather evidence, such as confessions, that the police obtain

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subject of the speech was the independence of the justice system. *Id.*

114. See HODGSON, FRENCH, *supra* note 1, at 213 (noting the suspect's right to a lawyer during interrogation by the *juge d'instruction* and the right to examine the dossier).

115. *Id.*

116. *Id.* at 120–21.

117. See *supra* Part III.A (discussing *Outreau*).

118. See HODGSON, FRENCH, *supra* note 1, at 212–13 (noting that the rights that attach to a judicial investigation do not apply to the *procureur*'s pre-trial inquiry).

119. See *Les Gardes à Vue Ont Bondi de 23% entre 2004 et 2009*, LE MONDE, July 23, 2010, [http://www.lemonde.fr/societe/article/2010/07/23/les-gardes-a-vue-ont-bondi-de-23-entre-2004-et-2009\\_1391731\\_3224.html#ens\\_id=1389987](http://www.lemonde.fr/societe/article/2010/07/23/les-gardes-a-vue-ont-bondi-de-23-entre-2004-et-2009_1391731_3224.html#ens_id=1389987) (last visited Sept. 11, 2010) (reporting that the number of people placed in *garde à vue* has risen by nearly a quarter in five years (23% between 2004 and 2009), according to official statistics analyzed by the *Institut national des hautes études de la sécurité et de la justice*) (on file with the Washington and Lee Law Review); see also Isabelle Mandraud & Alain Salles, *Les Statistiques Officielles Sous-estiment le Nombre Réel des Gardes à Vues*, LE MONDE, Jan. 28, 2010, at 12 (reporting that since 2001, there has been a 72% increase, but noting that the precise figures vary depending on whether those held for traffic offenses are included—they are generally excluded from the official statistics); Christine Lazerges, *Les Désordres de la Garde à Vue*, 30 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 274, 275 (2010) (revealing that over 100,000 *gardes à vue* last more than twenty-four hours). See generally INSTITUT NATIONAL DES HAUTES ÉTUDES DE LA SÉCURITÉ ET DE LA JUSTICE, LA GARDE À VUE EN FRANCE (2010), <http://www.inhesj.fr/articles/accueil/ondrp/publications/focus-h155a173.html> (last visited Sept. 11, 2010) (on file with the Washington and Lee Law Review).

before the end of the *garde à vue*.<sup>120</sup> Therefore, in the absence of any corresponding strengthening of either the political independence of the *procureur*, the due process rights of the suspect, or the legal aid funding necessary to make these rights effective, there is a real concern that such a reform represents a retrograde step, which threatens to undermine the independence of the judicial process.<sup>121</sup>

The number of investigations conducted by the *juge d'instruction* is small and continues to decline (from 20% in the 1960s to 8% in the 1990s and less than 4% currently), and for this reason, some argue that it is a moribund and irrelevant procedure.<sup>122</sup> It is true that the *instruction* represents a purer model of judicial investigation: The "Rolls Royce" version of French criminal justice that most accused persons will not experience. However, it still represents an important counter-power within the judicial system, independent of an executive that is closely connected with the *parquet*. The cases that the *instruction* deals with are often the most complex and politically sensitive dossiers, in which judicial independence is crucial.<sup>123</sup> In the 1990s, *juges d'instruction* investigated a number of high profile cases concerning politicians and powerful business people.<sup>124</sup> The government's deep sense of unease was apparent as the executive made a number of attempts to thwart inquiries and to keep investigations within the control of the *procureur*, over whom it has a direct line of authority.<sup>125</sup>

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120. See CC Decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, ¶ 16 (noting that evidence gathered during police questioning often forms the basis of the case to be heard before court).

121. Press reports at the time of Sarkozy's announcement in January 2009 speak of him wanting a justice system under the orders of the executive and the temptation for the Sarkozy state to slide towards totalitarianism. *Magistrats et politiques s'insurgent contre la suppression du juge d'instruction*, LE MONDE, Jan. 6, 2009, [http://www.lemonde.fr/societe/article/2009/01/06/magistrats-et-politiques-s-insurgent-contre-la-suppression-du-juge-d-instruction\\_1138612\\_3224.html](http://www.lemonde.fr/societe/article/2009/01/06/magistrats-et-politiques-s-insurgent-contre-la-suppression-du-juge-d-instruction_1138612_3224.html) (last visited Sept. 30, 2010) (on file with the Washington and Lee Law Review). Muzzling the independent judiciary in this way is described as "a politician's fantasy"; asking the *procureur* to pursue the kinds of financial-political affairs such as the contaminated blood case, or the Elf scandal is asking her to be a "masochist" and effectively, to commit professional suicide—the view expressed by Sophie Clément, *juge d'instruction* in the financial section in Paris. *Objection, monsieur le président!*, LE MONDE, Jan. 15, 2009, at 19.

122. Guibert, *Le Prince*, *supra* note 113.

123. See HODGSON, FRENCH, *supra* note 1, at 81–82 (noting the importance of the cases handled by the *instruction*).

124. *Id.*

125. *Id.*

Recent cases include the sentencing to one year in prison of former interior minister Charles Pasqua for his role in "Angolagate"—the illegal sale of arms to Angola—in October 2009.<sup>126</sup> And just as President Sarkozy was announcing his intention to kill off the *juge d'instruction*, the treatment of his former political colleague and President, Jacques Chirac, demonstrated the political importance of this *magistrat*. At the close of the investigation into the misuse of public funds and breach of trust, the *procureur* considered that there was no evidence to support a prosecution of Monsieur Chirac.<sup>127</sup> *Juge d'instruction* Xavière Simeoni flatly contradicted this assertion and issued a 215-page report that set out the reasons why the case would be sent to trial.<sup>128</sup> The allegation was that as mayor of Paris, Chirac had employed a number of people within his administration who were in fact working for his personal political campaign for the presidential election.<sup>129</sup> While the *procureur* view was that there was no evidence to verify this claim, the *juge d'instruction* considered that at least twenty-one of Chirac's associates were not in fact genuine employees.<sup>130</sup> She described how he used his position as mayor of Paris and as head of the political party RPR (Rally for the Republic, a right-wing party that merged into the Union for a Popular Movement party in 2002), to create a confusion of roles whereby he could use funds from the city's budget for his own electoral campaign.<sup>131</sup> The evidence showed that the amount of time spent by some employees on city business was marginal, insignificant, or in some cases nonexistent. Because of this arrangement, the city of Paris lost an estimated 4.5 million Euros.<sup>132</sup> Just as with the affairs of the 1990s, when the *juges*

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126. Adam Sage, *French Establishment Players Convicted over Arms to Angola Scandal*, TIMES UK, Oct. 28, 2009, <http://www.timesonline.co.uk/tol/news/world/europe/article6892954.ece> (last visited Sept. 11, 2010) (on file with the Washington and Lee Law Review).

127. Associated Press, *Jacques Chirac to Stand Trial for "Corruption,"* INDEP., Oct. 30, 2009, <http://www.independent.co.uk/news/world/europe/jacques-chirac-to-stand-trial-for-corruption-1811887.html> (last visited Sept. 14, 2010) (on file with the Washington and Lee Law Review).

128. Gérard Davet, *Charles Pasqua, Jacques Chirac: le baroud d'honneur des juges? Ce que dit l'ordonnance sur la responsabilité de M. Chirac*, LE MONDE, Nov. 2, 2009, [hereinafter Davet, *Charles Pasqua*] available at 2009 WLNR 21761283.

129. Henry Samuel, *Jacques Chirac in the Clear over "Ghost Jobs" Affair*, TELEGRAPH, Aug. 25, 2010, <http://www.telegraph.co.uk/news/worldnews/europe/france/7964112/Jacques-Chirac-in-the-clear-over-ghost-jobs-affair.html> (last visited Sept. 14, 2010) (on file with the Washington and Lee Law Review).

130. *Id.*

131. Davet, *Charles Pasqua*, *supra* note 128.

132. *Id.*

*d'instruction* were accused of being political for applying the law to politicians, this decision is controversial. However, *juge d'instruction* Simeoni described her decision not as a choice, political or otherwise, but as the simple application of her legal duty to send a case before the court when she considers that an offense has been committed.<sup>133</sup>

The timing and the content of the Léger Report is surprising. Although numerous bodies have proposed amending or abolishing the role of *juge d'instruction*,<sup>134</sup> the Léger Report's recommendation in relation to the *juge d'instruction* comes only a short time after the very lengthy and detailed scrutiny of the *juge's* role by the parliamentary inquiry into the *Outreau* affair.<sup>135</sup> The inquiry proposed to remedy the major shortcomings of the *juge d'instruction* in that case by strengthening and adapting, rather than abolishing, the role of the *juge d'instruction* and bolstering defense rights.<sup>136</sup> In order to avoid the premature narrowing of issues and over-reliance upon the *procureur*, the commission recommended a more collegial approach in which more than one *juge d'instruction* would work on a case.<sup>137</sup> The legislature approved this framework and passed a law to establish such a structure.<sup>138</sup> But before this law came into operation,<sup>139</sup> the

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133. *Id.*

134. Compare MIREILLE DELMAS-MARTY, LA MISE EN ÉTAT DES AFFAIRES PÉNALE 125 (1991) (recommending a clear separation of investigation and judgment and greatly improved defense rights in order to develop a more accusatorial procedure), with LÉGER REPORT, *supra* note 108 (emphasizing the rights of the victim in making the procedure more accusatorial).

135. See *supra* Part III.A (discussing the *Outreau* affair). The timing of the publication of the preliminary report of the Léger commission—just as *juge d'instruction* Burgaud, of *Outreau* fame, appeared before his professional disciplinary body, the *Conseil supérieure de la magistrature*—further underlines the differences between the two inquiries.

136. LÉGER REPORT, *supra* note 108, at 513–25 (summarizing the recommendations and proposing to video record interrogations (recommendation 3), to give the lawyer access to the case file during the *garde à vue* (recommendation 4), and to establish a collegial system of *instruction* (recommendations 26–31), all of which would reinforce defense rights during the *instruction*).

137. See generally *id.* at 353–84.

138. See Alain Salles, *La réforme de la justice consacre le pouvoir du parquet*, LE MONDE, March 3, 2010, at 10 (noting that even though the legislature established such a structure, the death of the *juge d'instruction* would be a slow one).

139. See LÉGER REPORT, *supra* note 108, at 7–8 (noting that a minority of the commission favored waiting to see how the new arrangement worked out before setting in motion another major upheaval in this area of criminal justice); see also Bernard Bouloc, *Que Penser Des Propositions du "Comité Léger"?*, 33 RECUEIL LE DALLOZ 2264, 2264 (2009) (indicating his views as a member of the minority in the Commission).



majority view of the Léger Commission superseded it and consequently it has been put back until 2011.<sup>140</sup>

The ambiguity of the *procureur*'s status continues in the recommendations of the Léger Commission, whose proposal is not simply to replace the *juge d'instruction* with the *procureur*. It proposed that the *juge du siège*, or the *juge de l'enquête et des libertés* (a judge who handles issues of pre-trial investigation and detention), would exercise judicial oversight over the prosecutor's decisions.<sup>141</sup> This person would provide a counter-power to the extended power of the *procureur* and would authorize intrusive investigative acts such as wire taps.<sup>142</sup> Also, instead of decisions being subject to the review of the *Chambre de l'instruction*, they would be under the jurisdiction of a new *Chambre de l'enquête et des libertés*.<sup>143</sup> Léger does not appear to take account of the systematic failings in hierarchical accountability discovered by the *Outreau* inquiry. While *Outreau* criticized the failure of dozens of *magistrats* to sound the alarm in that case—including the pre-trial review court, the *Chambre de l'instruction*—Léger declares that this system of hierarchy is quite satisfactory by placing all investigations in the hands of the *procureur*.<sup>144</sup> Other parts of the report identify training as an important feature of effective reforms,<sup>145</sup> but this proposal does not. It is unclear how this new arrangement will avoid the problems of judicial corporatism identified in *Outreau*, in addition to concerns over the *procureur*'s political independence.<sup>146</sup>

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140. See Alain Salles, *Réforme de la Procédure Pénale*, LE MONDE, Mar. 3, 2010, at 10 (contrasting the wind of unanimity that blew in favor of the *Outreau* reforms with the wind of protest that blew against the proposed reforms following Léger).

141. LÉGER REPORT, *supra* note 108, at 6 (recommending first that the *juge d'instruction* be transformed into a *juge de l'enquête et des libertés* with a purely judicial function, leaving the investigation to the *procureur*).

142. See *id.* at 9–11 (providing ways in which this new judge will ensure that the investigation is properly accusatorial).

143. See *id.* at 27 (laying out the new review process in recommendation 6).

144. See *id.* at 10 (recommending that the *procureur* would still be responsible for all investigations, albeit subject to the proposed judicial checks and counterweights).

145. See *id.* at 32 (identifying the need for training in relation to the role of the judge at trial).

146. Unsurprisingly, given that the report is not informed by any independent empirical research, there are many things the report does not take into account and there are gaps in the commission's knowledge. For example, the Commission also argues that the opening of an *information* represents an unnecessary break in the inquiry, and that keeping the *procureur* in charge will maintain continuity. *Id.* at 8–9. In practice, the reverse is true. The *instruction* should allow a fresh approach and should not be a simple and unquestioning continuation of the police inquiry. It is often the case that the police officers request that the

Improving the coherence of the criminal process is clearly a part of the Léger commission's report and indeed is a part of its claimed rationale in recommending the abolition of the *juge d'instruction* in order to create a single authority in charge of criminal investigations.<sup>147</sup> However, although there is one authority in the form of the *procureur*, two separate procedural regimes of rights remain—the *régime simple*, which is essentially the same as that currently in place for *procureur* supervised investigations, and the *régime renforcé*, in which the suspect enjoys the rights currently available during the *instruction*.<sup>148</sup> In this way, one duality replaces another. Instead of giving suspects in all cases the rights that those currently investigated through the *instruction* procedure enjoy, the Léger proposals establish a two-tiered system in which the gravity of the offense will trigger a different regime of rights.<sup>149</sup> The suspect herself can request that she benefit from this regime and its application will be obligatory when she meets the same evidentiary threshold for the opening of an *information*.<sup>150</sup> The *parquet* can also initiate this procedure.<sup>151</sup> The application of the *instruction* regime of rights will be obligatory when the suspect's rights are seriously affected; when she risks a significant penalty; in the case of the most serious offenses, *crimes*; and in order for the suspect to be placed in custody or on conditional bail.<sup>152</sup> It remains to be seen how much this will simplify matters and precisely what constitutes a significant penalty or when the suspect's rights are "seriously affected"—arguably this is the case immediately upon arrest. Despite claims about reinforcing the rights of the accused, the net result looks like a system of weaker supervision, fewer defense rights, and no real political independence.

Where does this leave the *procureur*? Is she a judicial authority or is she not? The Léger proposals appear to replicate the confusion evident in the current arrangements for supervision of the *garde à vue*, in which the *procureur* is sufficiently judicial to authorize the detention of a suspect for two days—not an insignificant length of time—but no longer.<sup>153</sup> The report

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*information* be opened in order to allow them to continue their investigation with the benefit of greater powers authorized by the *juge d'instruction*. Hodgson, *Guilty*, *supra* note 2, at 23.

147. See LÉGER REPORT, *supra* note 108, at 7 (explaining how the committee saw the overlap and confusion of roles as damaging to the criminal investigative process).

148. *Id.* at 14.

149. *Id.*

150. *Id.* at 15.

151. *Id.*

152. *Id.*

153. *Id.* at 18.

further proposes that the legislature should write the *procureur's* duty to *décharge* into the CPP, as it is now for the *juge d'instruction*.<sup>154</sup> While formalizing this duty should be welcomed, this process is unlikely to overcome the *procureur's* prosecutorial orientation, which is the inevitable result of her dependence upon the police in carrying out her role in the investigation and prosecution of crime. To overcome this would require a huge legal, cultural, and occupational shift, a change which would be almost impossible to attain alongside the *procureur's* retention of the prosecution function. Neither would it change the fact that the *procureur* is a prosecutor, which for the ECtHR, rules her out from being a judicial authority.<sup>155</sup>

### B. Medvedyev v. France

In contrast to domestic policy, which seeks continually to expand the role of the *procureur* as the primary *magistrat* in charge of criminal investigations and case disposition, European case law has placed something of a question mark over the *procureur's* judicial status. The case which has most recently brought this to the fore is that of *Medvedyev v. France*, which concerned the interception by the French authorities of a merchant ship, the *Winner*, registered in Cambodia.<sup>156</sup> The vessel was suspected of carrying large quantities of drugs for distribution across Europe.<sup>157</sup> After the Cambodian authorities gave their permission, the French Navy located and boarded the ship and brought it directly to Brest under the authority of the French *procureur*.<sup>158</sup> This took approximately thirteen days due to the weather and the poor condition of the vessel.<sup>159</sup> The French Navy confined the crew on the ship, and one was fatally wounded.<sup>160</sup> The applicants claimed a breach of ECHR Article 5, paragraph 3: That after detention, they had not been brought promptly

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154. *Id.* at 9; see also MINISTÈRE DE LA JUSTICE ET DES LIBERTÉS, PROJET DE LOI: TENDANT À LIMITER ET À ENCADRER LES GARDES À VUE 7–17 (2010), available at <http://www.cercle-du-barreau.org/media/01/02/731278778.pdf> (adopting the report's proposals for reforming the *garde à vue*).

155. See *supra* notes 9–10 and accompanying text (discussing *Medvedyev*).

156. *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶¶ 6–10 (2008).

157. *Id.* ¶ 7.

158. *Id.* ¶¶ 8–10.

159. *Id.* ¶ 11.

160. *Id.*

before a judge.<sup>161</sup> They had been detained for thirteen days on board the *Winner* before being brought to Brest and then the *juge d'instruction* about eight or nine hours later.<sup>162</sup> In both its first judgment and the second hearing on appeal before the Grand Chamber, the court found no breach of ECHR Article 5, paragraph 3, as the applicants went before a judge as soon as was possible in the exceptional circumstances.<sup>163</sup> The poor state of the *Winner* accounted for the slow journey to France; and, the number of suspects and the need for translators in order to question them once in French police custody meant that it was unavoidable that it would take several days before some were brought before a judge.<sup>164</sup>

The applicants' other argument proved far more controversial. They argued that they were not detained lawfully in accordance with ECHR Article 5, paragraph 1.<sup>165</sup> In the first judgment in the case in July 2008, the court ruled that the Cambodians' authority for interception did not provide a legal basis for detention.<sup>166</sup> Furthermore, the cited French provisions did not offer sufficient guarantees against arbitrary detention or afford the detainees sufficient rights to contact a lawyer or a family member during the period of detention.<sup>167</sup> It then went on to say that the detention did not occur under the supervision of a judicial authority as required, because "the public prosecutor is not a 'competent legal authority' within the meaning the Court's case-law gives to that notion . . . , he lacks the independence in respect of the executive to qualify as such."<sup>168</sup>

There are reports of French lobbying against this final part of the court's reasoning because it represents a major attack on the prosecution function.<sup>169</sup> In the second judgment on appeal, the Grand Chamber dropped

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161. *Id.* ¶ 28.

162. *Id.*

163. *See* *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶ 128 (2010) (supporting the judgment of the Fifth Section in light of new information that the applicants were brought before the *juge d'instruction* after eight or nine hours rather than the one or two days, as it was originally thought).

164. *Id.* ¶ 131.

165. *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶ 28 (2008).

166. *See id.* ¶ 58 (noting that the permission of the Cambodian authorities did not explicitly cover anything beyond the initial interception by the French authorities).

167. *See id.* ¶ 61 (detailing the ways that the French measures fell short of sufficient rights protections).

168. *Id.* (quoting *Schiesser v. Switzerland*, 34 Eur. Ct. H.R. (ser. A.) at 12–13 (1979)).

169. *See, e.g., Indépendance du Parquet: La Cour européenne a rendu un arrêt en demi-teinte*, LE NOUVEL OBSERVATEUR, May 28, 2010, <http://tempsreel.nouvelobs.com/dossier/libertes-sous-pression/20100329.OBS1375/independance-du-parquet-la-cour-europeenne-a-rendu-un-arret-en-demi-teinte.html> (last visited Sept. 11, 2010) (noting the

this part of the reasoning.<sup>170</sup> The court relied only on the absence of a legal basis for detention that was sufficiently clear and of a requisite quality to satisfy the requirement of legal certainty.<sup>171</sup> In essence, it did not need to discuss the judicial quality of the *procureur* because the detention was illegal in any event. However, the issue remains alive in the court's pronouncement on what constitutes an independent judge, a topic that it discusses in relation to the alleged breach of ECHR Article 5, paragraph 3.<sup>172</sup> In underlining the qualities that make the *juge d'instruction* a judicial authority for the purposes of the ECHR, the court calls the judicial status of the *procureur* into question. Relying on the same authorities that underpinned its comments on the non-judicial qualities of the *procureur* in its first judgment, the court stated that "[t]he judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority."<sup>173</sup> Despite the claims of French government officials that this does not address directly the status of the *procureur*, it seems that the public prosecutor falls clearly outside of this definition.

This decision follows a line of case law in which the ECtHR criticizes the role of other judicial officers as breaching the principle of equality of arms,<sup>174</sup> but it contradicts the domestic jurisprudence of the French Constitutional Court, which has ruled that both *magistrats du siège* and *magistrats du parquet* are judicial officers.<sup>175</sup> This decision also echoes the opinion adopted in the joint meeting of the Consultative Council of European Prosecutors (CCPE) and the Consultative Council of European Judges (CCJE) in Slovenia in November 2009.<sup>176</sup> This opinion emphasized

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reaction of the deputy general secretary of *le syndicat de la magistrature*, Benoist Hurel) (on file with the Washington and Lee Law Review).

170. See generally *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. (2010).

171. See *id.* ¶ 128 (commenting that investigating possible drug trafficking does not entitle authorities to violate rights).

172. See *id.* ¶¶ 123–26 (clarifying the requirements for judicial independence).

173. *Id.* ¶ 124.

174. See *Kress v. France*, 2001-VI Eur. Ct. H.R. 43, 68–69 (criticizing the role of the Government Commissioner in the *Conseil d'Etat*); see also *Reinhardt et Sliman-Kaïd v. France*, 1998-II Eur. Ct. H.R. 640, 664 (criticizing the lack of neutrality on the part of the investigating judge).

175. CC decision No. 93-326DC, Aug. 11, 1993, J.O. 11599.

176. See CCPE & CCJE, *Bordeaux Declaration*, Opinion No. 12 (2009), [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2008\)OP12&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC8](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2008)OP12&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC8)

the importance of judicial and prosecutorial independence both with respect of individual functions and as between functions.<sup>177</sup> Paragraph 7 follows the ECtHR line of reasoning that any exercise of a judicial function in relation to ECHR Article 5, paragraph 3 and Article 6 must be by an officer independent of executive power and of the parties.<sup>178</sup> For this reason, the Councils asked France to reconsider its proposal to abolish the *juge d'instruction*.<sup>179</sup>

Predictably, the French government has not acknowledged the devastating blow that this judgment has had on the justice system's architecture. To do so may stymie attempts to abolish the *juge d'instruction* (the reform has so far been postponed until 2011 and some doubt it will ever see the light of day),<sup>180</sup> or at least cause Sarkozy's government to rethink its position. But if the *parquet* continues to exercise powers that require the attribution of a judicial officer, it is acting against the clear requirements set out in numerous ECtHR judgments and most recently affirmed in *Medvedyev*.<sup>181</sup> An additional objection to the ECtHR's approach is that in criticizing French arrangements, the court is rejecting a whole procedural tradition and "seeking to impose, without any mandate, an anglo-saxon model of accusatorial justice across the whole continent."<sup>182</sup> While it is undeniable that the *parquet* functions within the executive hierarchy, some see this as a model that does not compromise independence: It does not necessarily entail complete subordination or a

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64 (last visited Sept. 12, 2010) (affirming the validity of continental law systems in which there may be overlap between prosecutorial and judicial roles) (on file with the Washington and Lee Law Review).

177. See *id.* ¶¶ 20–38 (affirming the importance of independence and laying out conditions that will be considered sufficiently independent).

178. *Id.* ¶ 7.

179. See *id.* ¶ 25 (recommending that member states should consider removing the power of public prosecutors to make binding decisions).

180. See Alain Salles, *Réforme de la Procédure Pénale: Chronique d'une Mort Annoncée*, LE MONDE, May 6, 2010, [http://www.lemonde.fr/societe/article/2010/05/06/reforme-de-la-procedure-penale-chronique-d-une-mort-annoncee\\_1347266\\_3224.html](http://www.lemonde.fr/societe/article/2010/05/06/reforme-de-la-procedure-penale-chronique-d-une-mort-annoncee_1347266_3224.html) (last visited Sept. 12, 2010) (questioning the government's commitment to reforming the justice system) (on file with the Washington and Lee Law Review).

181. See *supra* notes 9–10 and accompanying text (discussing the different functions of *magistrats* and the common training of all); see also MINISTÈRE DE LA JUSTICE ET DES LIBERTÉS, PROJET DE LOI: TENDANT À LIMITER ET À ENCADRER LES GARDES À VUE 7–17 (2010), available at <http://www.cercle-du-barreau.org/media/01/02/731278778.pdf> (affirming the *procureur*'s duty to oversee the *garde à vue* and to safeguard the rights of the suspect without any additional measure to ensure the efficacy of this role).

182. Jean-François Renucci, *Un séisme judiciaire: pour la CEDH les magistrats du parquet ne sont pas une autorité judiciaire*, 9 RECUEIL LE DALLOZ 600, 601 (2009).

duty to follow orders in all aspects of the prosecution function, but rather it has clear limitations. For example, the minister of justice may give written instructions to prosecute to the *procureur général* or the *procureur général* may give them to the *procureur de la république*;<sup>183</sup> neither is permitted, however, to issue instructions not to prosecute a case.<sup>184</sup> Individual *procureurs* are also free to develop arguments in court,<sup>185</sup> and regional heads enjoy their own power to develop policy and organize personnel.<sup>186</sup>

However, the approach of the ECtHR case law on this matter is to focus on the objective appearance of independence, which is undermined when prosecutors hold dual investigative and prosecutorial functions. Even when the trial prosecutor is different from the one who authorized detention and carried out the investigation, it is the latent potential of the latter to become a party in the proceedings that destroys the appearance of independence.

The case generally cited in support of the ECtHR's approach to defining what constitutes a judicial officer is *Schiesser v. Switzerland*.<sup>187</sup> The court had to determine whether the Swiss District Attorney (the *Bezirksanwalt*), who has both a prosecution and investigating function, is a judicial officer for the purposes of ECHR Article 5 paragraph 3.<sup>188</sup> This person is not the equivalent of the French *procureur*: Although she prosecutes minor cases before the single judge, she is elected by universal suffrage and is under the supervision of the public prosecutor who in turn is under the authority of the Department of Justice and Government in the local Canton.<sup>189</sup> She does, however, have the power to issue a punishment order (*strafbefehl*), which imposes a fine or one month's imprisonment.<sup>190</sup> Like the French *procureur*, she may issue a warrant for arrest and must hear the arrested person within twenty-four hours, but her powers are more extensive in that she may order that the suspect be held in custody for up to

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183. See C. PR. PÉN., *supra* note 14, art. 30 (setting out this instructional hierarchy).

184. See HODGSON, FRENCH, *supra* note 1, at 80 (noting the clear limitations on the entire chain of command when it comes to passing on certain cases).

185. See C. PR. PÉN., *supra* note 14, art. 39-1, for an expression of this concept in the phrase: "*La plume est servie mais la parole est libre.*"

186. See HODGSON, FRENCH, *supra* note 1, at 228-31 (explaining the national and local organization of the judiciary).

187. See *Schiesser v. Switzerland*, 34 Eur. Ct. H.R. (ser. A.) ¶ 38 (1979) (finding that Switzerland's district attorneys are permissibly judicial officers under ECHR Article 5 even though they have both prosecutorial and investigative functions).

188. *Id.* ¶ 9.

189. *Id.* ¶¶ 12-14.

190. *Id.* ¶ 14.

fourteen days.<sup>191</sup> Although the District Attorney is under the authority of the prosecutor, the court held that the District Attorney had received no special orders or instructions concerning her power to place someone in detention.<sup>192</sup>

The court held that while "officer" was not the same as "judge"—or else its inclusion in ECHR Article 5, paragraph 3 would be redundant—the two shared certain attributes.<sup>193</sup> The officer must be independent of the executive and of the parties; she might be subordinate to other judges, provided they too were independent.<sup>194</sup> The court ruled by a majority that the District Attorney was a judicial officer in this case because he acted exclusively in his investigatory capacity; he did not exercise concurrently his investigatory and prosecution functions.<sup>195</sup> He followed his duty to investigate evidence both for and against the suspect and did not act as a prosecutor; he neither drew up the indictment nor prosecuted in court.<sup>196</sup> The Court was not required, therefore, to determine whether a concurrent exercise of prosecutorial and investigative functions would prevent the District Attorney from being considered a judicial officer for the purposes of ECHR Article 5, paragraph 3.

Contrast this with the latter case of *Huber v. Switzerland*,<sup>197</sup> in which the District Attorney, who ordered Huber's detention and investigated the accusation against her, went on to draw up the prosecution indictment fourteen months later.<sup>198</sup> Under the Cantonal Code of Criminal Procedure, the District Attorney was therefore a party in the trial proceedings, though he did not appear as the prosecuting authority.<sup>199</sup> The ECtHR in *Huber* drew on several more recent military tribunal cases, in which the Dutch

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191. *Id.* ¶¶ 15–16.

192. *Id.* ¶ 35.

193. *See id.* ¶ 27 (stating that Article 5, paragraph 3 allows an arrested person to be brought before a judge or officer). The court noted that while "[i]t is implicit in such a choice that these categories are not identical . . . the Convention . . . presupposes that these authorities fulfil [sic] similar functions; it thus clearly recognises the existence of a certain analogy between judge and officer." *Id.* (citations omitted).

194. *Id.* ¶ 31.

195. *Id.* ¶ 34.

196. *Id.*

197. *See Huber v. Switzerland*, 188 Eur. Ct. H.R. (ser. A) ¶ 43 (1990) (holding that even though the District Attorney who investigated did not prosecute, he had nonetheless been "entitled to intervene in the . . . criminal proceedings" which called into doubt his impartiality and breached Article 5, paragraph 3).

198. *Id.* ¶ 39.

199. *Id.* ¶ 41.



*auditeur-militair*<sup>200</sup> responsible for the arrest and detention of military personnel was held not to be independent of the parties at the preliminary stage of the proceedings because he was "liable" to become one of the parties at the next stage of the case.<sup>201</sup> By analogy, the District Attorney here was not considered independent because he too was "liable" to become a party in the case: "Clearly the Convention does not rule out the possibility of the judicial officer who orders detention carrying out other duties, but his impartiality is capable of appearing open to doubt . . . if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority."<sup>202</sup> *Brincat v. Italy*<sup>203</sup> also concerned an alleged breach of ECHR Article 5, paragraph 3, and the court again held that it is the "objective appearances at the time of the decision on detention" that are material.<sup>204</sup> It was believed that the public prosecutor who detained and questioned Brincat was entitled to go on to prosecute him and so the prosecutor was not independent from the parties in the way required of a judicial officer.<sup>205</sup>

In light of this established line of case law, the conclusions of *Medvedyev* appear predictable. What is perhaps surprising is that nobody had challenged the *procureur*'s authority as a judicial officer before, and, in

200. An *auditeur-militair* is "an officer empowered by law to advise on whether or not [members of the military] should be referred for trial before a military court." 78 INTERNATIONAL LAW REPORTS 266 (Elihu Lauterpacht ed., 2001). The *auditeur-militair* may "also appear as a prosecuting authority before the military court." *Id.*

201. See *De Jong, Baljet and Van Den Brink v. The Netherlands*, App. No. 77, Eur. Ct. H.R. (ser. A) ¶ 49 (1984) ("[T]he *auditeur-militair* did not enjoy the kind of independence demanded by Article 5 para. 3 (art. 5-3). . . . [T]he *auditeur-militair* could not be independent of the parties at this preliminary stage precisely because he was liable to become one of the parties at the next stage of the procedure." (citations omitted)); see also *Duinhof and Duijf v. The Netherlands*, 79 Eur. Ct. H.R. (ser. A) ¶ 38 (1984) ("[T]he *auditeur-militair* could not . . . fulfil [sic] the very specific judicial function contemplated by Article 5 § 3 (art. 5-3) since he at the same time performed the function of prosecuting authority before the Military Court." (citations omitted)); *Van der Sluijs, Zuiderveld and Klappe v. The Netherlands*, 78 Eur. Ct. H.R. (ser. A) ¶ 44 (1984) ("[T]he *auditeur-militair* could not be independent of the parties at this preliminary stage precisely because he was liable to become one of the parties at the next stage of the procedure." (citations omitted)).

202. *Huber v. Switzerland*, 188 Eur. Ct. H.R. (ser. A) ¶ 43 (1990), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Huber%20%7C%20v.%20%7C%20Switzerland&sessionid=58575805&skin=hudoc-en>.

203. See *Brincat v. Italy*, 249-A Eur. Ct. H.R. (ser. A) ¶ 21 (1992) (finding that the appearance of impartiality, regardless of actual impartiality, is sufficient to contravene Article 5, paragraph 3).

204. *Id.*

205. *Id.*

particular, her role in ordinary criminal cases in which she quite clearly does exercise concurrently the role of investigator and prosecutor.

#### V. *The Procureur and the Garde à Vue*

The thrust of the reforms that the Léger commission proposed was to expand the role played by the *procureur* so that she could absorb much of the investigative function currently carried out by the *juge d'instruction*.<sup>206</sup> This is part of a continuum in which investigative and dispositive power has shifted away from a purely judicial figure, in favor of the prosecutor. However, concerns over the proper regulation of the *garde à vue* have momentarily overtaken this strand of the project, heightened by the recent decision of the *Conseil constitutionnel*.<sup>207</sup> The inability of the defense to participate in over 95% of criminal investigations and the uncertainty over the status of the *procureur's* authority to detain suspects for up to two days have converged to make this a pressing issue of constitutional importance.<sup>208</sup>

#### A. *The Procureur Overseeing the Garde à Vue*

The *procureur* is responsible for the investigation and prosecution of crime, which includes supervising the police investigation and the detention and interrogation of suspects in police custody, the *garde à vue*.<sup>209</sup> The French criminal justice process is weighted towards the pre-trial investigation, in contrast to adversarial procedures where the bulk of fact-finding takes place at trial.<sup>210</sup> As a mixed/inquisitorial procedure, this process of fact-finding is not conducted by the parties, but by a central figure representing the State.<sup>211</sup> Over a century ago, that figure would have been the *juge d'instruction*, but as her role has waned, so the *procureur's*

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206. LÉGER REPORT, *supra* note 108, at 8 (proposing that the investigation function should be shifted to the *procureur* in the second recommendation).

207. See CC decision No. 93-326DC, Aug. 11, 1993, J.O. 11599 (affirming the judicial status of both *magistrats du siège* and *magistrats du parquet*).

208. See *supra* note 88 and accompanying text (describing ECtHR-inspired proposals that would increase procedural protections for defendants).

209. See HODGSON, FRENCH, *supra* note 1, at 143 (setting out the duties of the *procureur*).

210. See *id.* (contrasting the inquisitorial and adversarial systems).

211. *Id.* at 143-44.

role has increased, such that she now handles around 96% of all criminal cases.<sup>212</sup> Because the investigation is understood to be carried out by a neutral judicial figure (a *magistrat*) charged with pursuing both inculpatory and exculpatory inquiries, the defense's role is very much diminished when compared to the adversarial procedure.<sup>213</sup> The accused does not require the same safeguards as might be necessary when the police and prosecution are constructing the accusation: The judicial nature of the inquiry offers more protection and avoids the vulnerability of the accused in an adversarial procedure.<sup>214</sup> Significantly, the *magistrat* affords the prosecution's case greater credibility at trial than that of the defense because it is seen as the product of a judicial—or judicially supervised— inquiry into which the defense has had the opportunity to participate.<sup>215</sup> This may be true in theory for the *instruction*, but there is no provision for defense participation in the 96% of criminal investigations that the *procureur* oversees.<sup>216</sup>

The *procureur's* responsibility for the conduct of the *garde à vue* is currently the most contested aspect of this supervisory function. During the 1990s, the suspect in *garde à vue* had access to a defense lawyer—albeit only for a thirty-minute consultation after twenty hours of detention until further legislation in 2000 allowed consultation at the outset—a doctor, and the basic rights to contact a friend or family member and to know the

212. Hodgson, *The Investigation*, *supra* note 90, at 22.

213. See HODGSON, FRENCH, *supra* note 1, at 104 (noting the difference in the defense's role in each system).

214. *Id.* at 146 (explaining why the accusatorial system requires fewer safeguards for the defense); Jacqueline Hodgson, *Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights*, in HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES OF HUMAN RIGHTS IN THE NATIONAL CONTEXT 198 (Simon Halliday & Patrick Schmidt eds., 2004) [hereinafter Hodgson, *Human Rights*] (describing the vulnerabilities of the accused in an adversarial procedure). In particular, the dependence on a defense lawyer is generally regarded as benefitting the rich and those involved in organized crime, as they will have the best lawyers. *Id.* at 202. The very poor rates of legal aid heighten this disparity between retained and assigned counsel.

215. See Hodgson, *The Investigation*, *supra* note 90, at 2–3 (explaining that because the prosecution's case is judicial in nature, it commands greater weight in the eyes of the *magistrat*).

216. *Id.* at 22. In a recent case in Paris, the *procureur général de la Cour de cassation* praised the quality of the *procureur's* investigation, but suggested that the inquiry pass to the *juge d'instruction* in order that a wider investigation be conducted in which full defense rights of access to the dossier and the assistance of a lawyer would also be available. Laurence de Charette, *Woerth: Courroye détermine à garder son dossier*, LE FIGARO, Sept. 27, 2010, <http://www.lefigaro.fr/actualite-france/2010/09/27/01016-20100927ARTFIG00637-woerth-courroye-determine-a-garder-son-dossier.php> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review). This caused some surprise. *Id.*

charges against her.<sup>217</sup> The principal safeguard, however, continues to be the judicial oversight provided by the *procureur*.<sup>218</sup> She must be informed once someone is placed in *garde à vue*.<sup>219</sup> She authorizes that detention and any extension of the *garde à vue* for up to two days, and she may order the release of the suspect at any time.<sup>220</sup> She then determines whether to prosecute, drop charges, pass the case to the *juge d'instruction* for a more extensive inquiry, initiate mediation or an alternative to trial such as a guilty plea or *composition pénale* or, in the case of drug trafficking, organized crime, or terrorism, to ask the *juge des libertés et de la détention* to authorize further detention in police custody.<sup>221</sup> Access to a lawyer may be delayed for forty-eight hours in instances of organized crime and seventy-two hours in cases of drug trafficking and terrorism, making the *procureur's* oversight all the more crucial in these cases.<sup>222</sup> When questioned as to whether lawyers should have more extensive access to their clients in *garde à vue* and, in particular, whether they should be permitted to be present during the police interrogation of the suspect, police officers always responded that there was no need, as the *procureur* was responsible for authorizing and overseeing the period of detention.<sup>223</sup>

Empirical research suggests that this trust in judicial supervision is misplaced.<sup>224</sup> While this trust may safeguard against the most egregious police abuses, the *procureur's* ability to oversee or to direct the police investigation and the *garde à vue* is very limited.<sup>225</sup> There is no expectation that supervision will be anything more than bureaucratic, retrospective, and based on a review of the case files at the end of detention.<sup>226</sup> Prosecutors are responsible for large numbers of *gardes à vue* across police stations within their jurisdiction.<sup>227</sup> Telephone-based supervision is therefore to some extent a function of inadequate resources. However, there is no real

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217. HODGSON, FRENCH, *supra* note 1, at 148; Hodgson, *Human Rights*, *supra* note 214, at 195.

218. Hodgson, *The Investigation*, *supra* note 90, at 21.

219. *Id.* at 8.

220. *Id.*

221. *Id.*

222. *Id.*; C. PR. PÉN., *supra* note 14, art. 63-4.

223. HODGSON, FRENCH, *supra* note 1, at 133-35.

224. Hodgson, *Human Rights*, *supra* note 214, at 200 (presenting research that suggests that judicial supervision is not as effective as proponents think it is).

225. *See id.* at 199 (noting that most of the oversight is retrospective).

226. *Id.*

227. *Id.*

expectation that responsibility for the *garde à vue* will entail checking up on specific cases or sitting in on interrogations.<sup>228</sup> Visits to the police station are rare and always announced in advance;<sup>229</sup> to do otherwise would be regarded as a more intrusive surveillance-style of supervision that would undermine the all-important trust that exists between police and prosecutor. While officers are hierarchically accountable to the *procureur* and must report to her and gain authorization for measures such as placing someone in *garde à vue*, the *procureur* is also dependent upon the police to carry out her job of investigating crime.<sup>230</sup> The *procureur* directs the police in their criminal investigation work, but the police hierarchy is responsible for operations and resources; cooperation is therefore essential.<sup>231</sup> As a result of this mutual dependence, they both come to share a crime-control and prosecution-oriented perspective, in which the truth is equated with a confession.<sup>232</sup> If supervision consisted of a set of orders from a superior, the system would cease to function.

One might question the ability of the *procureur* to act as an effective supervisor of the *garde à vue*, given that she is absent from the police station and the interrogation of the suspect. Interrogations are not tape-recorded, the suspect is not cautioned of her right to silence, and she will have had at most a thirty-minute meeting with a lawyer who is not permitted to be present during questioning.<sup>233</sup> In organized crime, drug trafficking, and terrorism cases, she will not have seen a lawyer at all.<sup>234</sup> Although the *procureur* must be informed of the decision to place a suspect

228. *Id.*

229. The C. PR. PÉN. requires the *procureur* to visit each police station within her jurisdiction only once each year.

230. See HODGSON, FRENCH, *supra* note 1, at 76 (describing the mutual dependence between the police and the prosecutor).

231. See *id.* at 154–55 (explaining that the police and prosecution must cooperate because they each have requirements of the other).

232. Hodgson, *The Investigation*, *supra* note 90, at 19 (noting that a confession is the ultimate goal of the police and the prosecution).

233. *Id.* at 20–21. The March 2010 reform took up the Léger suggestion of having audio visual recordings not only for crimes but also—if requested by the police, *procureur* or suspect, for délits—unless the lawyer is present, but this has been abandoned in the September 2010 amended reform project. See MINISTÈRE DE LA JUSTICE ET DES LIBERTÉS, PROJET DE LOI: TENDANT À LIMITER ET À ENCADRER LES GARDES À VUE 7–17 (2010), available at <http://www.cercle-du-barreau.org/media/01/02/731278778.pdf> (abandoning the previous suggestions about audio visual recordings). While the *procureur*'s duty to oversee the *garde à vue* is affirmed, she is required to do no more than at present. See *id.* (putting forth duties that represent the status quo for the *procureur*).

234. *Id.* at 8.

in *garde à vue*, the initial power to detain is that of a police officer.<sup>235</sup> The *Medvedyev* decision generates further uncertainty. In direct conflict with the rulings of the French Constitutional Court, the decision questions whether the *parquet* is a judicial authority for the purpose of ECHR Article 5 and the detention of a person in *garde à vue*.<sup>236</sup> A series of ECtHR decisions further compounds the situation by articulating the minimum requirements for an adequate defense provision under ECHR Article 6.<sup>237</sup> France has tended to justify its somewhat minimalist due process rights on the grounds of the protection that the system of judicial supervision offers suspects.<sup>238</sup> The ECtHR has applied a "margin of appreciation" doctrine, allowing for the fact that different legal procedures and traditions might provide the same level of protection in different ways.<sup>239</sup> However, the protection that prosecutorial supervision offers is debateable in practice, and now post-*Medvedyev*, also in law. This reasoning also looks increasingly weak as the more recent ECtHR jurisprudence lays down standards that are universal and not susceptible to dilution in favor of other types of safeguards that come into play at various points in the process.<sup>240</sup> In contrast to earlier case law, which held that breaches of Article 6 ECHR at the start of an investigation may be remedied subsequently, resulting in a fair trial for the accused overall, in its recent case law the court has taken a more robust stance.<sup>241</sup> It has insisted on the importance of custodial legal advice as a fundamental and freestanding right, the breach of which will result in the rights of the defense being "irretrievably prejudiced."<sup>242</sup>

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235. *Id.* at 7.

236. *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶¶ 123–26 (2008).

237. *See, e.g., Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶¶ 50–55 (2008) ("Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.").

238. *See* HODGSON, FRENCH, *supra* note 1, at 28–29 (noting the Minister of Justice's comments in defense of judicial supervision procedure).

239. *See Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R. ¶ 47 (1976) (explaining that the margin of appreciation doctrine allows the court to take into effect the fact that the Convention will be interpreted differently in different signatory states and that judges are obliged to take into account the cultural, historic, and philosophical differences of the state).

240. *See, e.g., Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶ 54 (2008) ("[T]he Court underlines the importance of the investigation stage for the preparation of the criminal proceedings.").

241. *See id.* ¶ 54 ("Any exception to the enjoyment of [the] right [to legal advice] should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges . . .").

242. *Id.* ¶ 55.

*B. The Call for Greater Defense Rights*

In a line of case law beginning with the cases of *Salduz v. Turkey* and *Panovits v. Cyprus*,<sup>243</sup> the ECtHR has given its strongest ruling yet on the importance of suspects having access to effective custodial legal advice. The court has condemned the absence of defense counsel at the start of a suspect's detention in police custody as well as during police interrogation as a breach of ECHR Article 6 and has described it as irretrievably prejudicing the rights of the defense.<sup>244</sup> In France, no suspects are permitted to have their lawyer present during police interrogation, and legal advice is delayed significantly in cases of organized crime, drug trafficking, and terrorism.<sup>245</sup>

In *Salduz*, the applicant was arrested and questioned by the anti-terrorism branch of the Izmir Security Directorate in May 2001 on suspicion of having participated in an unlawful demonstration in support of an illegal organization, namely the PKK (the Workers' Party of Kurdistan) and of hanging an illegal banner from a bridge in Bornova on April 26, 2001.<sup>246</sup> The applicant was seventeen years old.<sup>247</sup> He was told of the charges against him and of his right to silence, but was not given access to legal advice.<sup>248</sup> Under police interrogation, he admitted to the charges against him, but he immediately retracted these admissions in his statement to the investigating judge, claiming that they were obtained under duress and that he had been beaten and insulted by the police.<sup>249</sup> In its first judgment of April 26, 2007, the Chamber held that there had been no violation of ECHR Article 6, paragraph 3.<sup>250</sup> Overall, the fairness of the applicant's trial had not been prejudiced by the lack of legal assistance during police custody as he had been legally represented at trial, his confession was not the sole basis for his conviction, and he had been able to

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243. See *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H.R. ¶ 73 (2008) (finding that the failure to notify the defendant of his right to consult a lawyer violated ECHR Article 6, §§ 1 and 3-(c)).

244. *Id.*

245. Hodgson, *The Investigation*, *supra* note 90, at 8.

246. *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶ 12 (2008).

247. *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶¶ 4, 9 (2007).

248. *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶ 14 (2008).

249. *Id.* ¶¶ 14, 17.

250. *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶ 24 (2007).

challenge the prosecution's case at trial under conditions that did not place him at a substantial disadvantage *vis-à-vis* his opponent.<sup>251</sup>

The Grand Chamber reversed this judgment, underlining the significance of the initial police investigation in shaping the case, the vulnerability of suspects at this stage in the procedure, and therefore the importance of the assistance of a lawyer "whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself."<sup>252</sup> The Court found this right to be of particular importance for serious charges, where the penalties are heaviest. It stated:

[I]n order for the right to a fair trial to remain sufficiently "practical and effective" . . . Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right . . . . The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.<sup>253</sup>

In *Panovits*, the applicant was also seventeen years old and in April 2000, he was questioned on suspicion of murder and robbery.<sup>254</sup> His father accompanied him to the police station, but was not present during his son's interrogation.<sup>255</sup> The applicant was cautioned, but neither he nor his father was informed of his right to legal advice prior to questioning.<sup>256</sup> Panovits made a written confession, but claimed that this was involuntary and induced through psychological deception, promises, threats, and tactics designed to instill fear.<sup>257</sup> He also said that he was drunk at the time and thus unable to recall the events about which he was being questioned.<sup>258</sup> In May 2001, the applicant was convicted of manslaughter and robbery, and his appeal was subsequently dismissed.<sup>259</sup> Before the European Court, the applicant claimed he had not been informed of his right to legal advice prior to being questioned, which was particularly detrimental to his defense given his status as a minor and the absence of his father during his police

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251. *Id.* ¶ 23.

252. *Salduz v. Turkey*, App. No. 36391/02, Eur. Ct. H.R. ¶ 54 (2008).

253. *Id.* ¶ 55.

254. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H.R. ¶ 7 (2008).

255. *Id.* ¶ 14.

256. *Id.*

257. *Id.* ¶ 13.

258. *Id.*

259. *Id.* ¶¶ 26, 31.



interrogation, and that he had not been adequately informed of his right to silence.<sup>260</sup> He alleged that these facts constituted a violation of Article 6 ECHR.<sup>261</sup>

In another strongly worded judgment, the Court again underlined the crucial nature of custodial legal advice. It stated:

[T]he concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defense rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings.<sup>262</sup>

The Court found that in this instance there was a violation of Article 6 ECHR.<sup>263</sup> The applicant was unaware of his right to legal advice and of the consequences of being questioned without a lawyer; there was insufficient provision of information about the right to consult a lawyer prior to interrogation; in the absence of a lawyer or guardian present during interrogation, the applicant did not comprehend sufficiently the nature of his rights, such as the right against self-incrimination; and there was no waiver of the right to legal advice in the unequivocal and explicit manner required to avoid a breach ECHR Article 6.<sup>264</sup> Finally, as in *Salduz*, the Court did not consider that this pre-trial violation was remedied by subsequent proceedings.<sup>265</sup> These decisions have been affirmed by later cases such as *Pishchalnikov v. Russia*,<sup>266</sup> in which the ECtHR found that the absence of legal assistance during the (adult) applicant's police interrogation breached ECHR Article 6.<sup>267</sup>

France has felt the impact of these decisions; lawyers have challenged successfully the compatibility of French criminal procedure with the guarantees of the ECHR.<sup>268</sup> The first case that received publicity was a

260. *Id.* ¶ 50.

261. *Id.* ¶ 49.

262. *Id.* ¶ 66.

263. *Id.* ¶ 77.

264. *Id.* ¶ 73.

265. *Id.* ¶ 75; *Shabelnik v. Ukraine*, App. No. 16404/03, Eur. Ct. H.R. ¶ 52 (2009); *Plonka v. Poland*, App. No. 20310/02, Eur. Ct. H.R. ¶ 41 (2009).

266. *See Pishchalnikov v. Russia*, App. No. 7025/04, Eur. Ct. H.R. ¶¶ 79–80 (2009), (finding that being informed of the right to remain silent and being provided a form stating rights prior to confession was not enough to assume a waiver of the right to legal representation).

267. *Id.* ¶ 92.

268. *See* André Giudicelli, *Chroniques*, 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT

decision of the Bobigny *juge de la détention et des libertés* on November 30, 2009.<sup>269</sup> The judge found that the *garde à vue* did not conform to Article 6 ECHR: The suspect had been denied his right to a lawyer at the start of the *garde à vue* and during interrogation.<sup>270</sup> Basing any conviction on incriminating statements obtained in this way caused irretrievable prejudice to the rights of the defense.<sup>271</sup> A string of further cases followed.<sup>272</sup> On December 30, 2009, the *tribunal correctionnel* in Bobigny went further and set out what was required under Article 6 ECHR. In addition to those rights set out in the French CPP, the suspect is entitled to the immediate assistance of a lawyer for moral support, to discuss her defense, and to prepare for interrogation. The lawyer in turn must have access to the dossier or to information on the charges faced by her client. Informing the lawyer of the date and nature of the offense, as stipulated by CPP Article 63-4, was wholly inadequate as it provided no information on the evidence against the suspect, preventing her from preparing for interrogation or the confrontation with the complainant.<sup>273</sup> Her right to legal assistance, in the sense required by the ECHR, had not been respected.<sup>274</sup> A month later, the Paris *tribunal correctionnel* ruled as inadmissible five *gardes à vue* for the same reasons.<sup>275</sup> It also struck out the prosecution's proceedings on the grounds that they were not the result of an inquiry *à charge et à décharge*, but were based on a wholly prosecution-oriented investigation conducted through the *garde à vue*, in which the defense had no opportunity to participate.<sup>276</sup> In Nancy, the court excluded evidence obtained in the absence of a lawyer, but left the rest of

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PENAL COMPARÉ, 182, 183–89 (2010) (discussing these cases); Albert Maron & Marion Haas, *Tandis que les gardes à vue explosent, la garde à vue implose . . .*, 22 DROIT PENAL: LES REVUES JURISCLASSEUR 10, 10–18 (2010) [hereinafter Maron & Haas, *Tandis*] (same).

269. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Bobigny, Nov. 30, 2009, [hereinafter TGI *Bobigny*] available at <http://combatsdroitshomme.blog.lemonde.fr/files/2009/12/decision-jld-bobigny-cedh.1259856473.pdf>; Maron & Haas, *Tandis*, *supra* note 268, at 12.

270. TGI *Bobigny*, *supra* note 269; Maron & Haas, *Tandis*, *supra* note 268, at 12.

271. TGI *Bobigny*, *supra* note 269; Maron & Haas, *Tandis*, *supra* note 268, at 12.

272. See generally Maron & Haas, *Tandis*, *supra* note 268 (discussing this string of cases).

273. *Id.* at 13.

274. *Id.*

275. *Id.* at 13–15.

276. *Id.*

the proceedings intact.<sup>277</sup> The appellants were held on suspicion of drug trafficking and so denied access to a lawyer for seventy-two hours.<sup>278</sup>

There is evidence that this is also having some influence on practice. As early as July 2009, the chief prosecutor of Paris allowed the defense full access to the ongoing investigation into the financial dealings of the politician Julien Dray, in order that they could request additional investigations before the *procureur* determined whether or not to send the case for trial.<sup>279</sup> This mirrors to some extent the regime of the *instruction* in which prosecution, defense, and victim can all request specific acts of investigation, including expert reports. In December 2009, the *parquet* announced that it would not formally prosecute Monsieur Dray.<sup>280</sup> In May 2010, Grenoble senior prosecutor Christophe Vivet explained that he had allowed a lawyer to be present during police interrogation in line with recent ECtHR jurisprudence.<sup>281</sup> He believed that to refuse custodial legal advice to a suspect who has explicitly requested a lawyer risked compromising the validity of the procedure.<sup>282</sup>

In March 2010, the Justice Minister proposed a reform of the *garde à vue*, following the recommendations of the Léger Commission: A second consultation with the suspect after twelve hours of detention, access to the record of any interrogation, and if detention is prolonged beyond twenty-four hours, the possibility to be present throughout the *garde à vue* including during any questioning of her client.<sup>283</sup> The video recording of all interrogations, rather than just those involving the most serious offenses as is currently required, is an aspiration rather than a concrete proposal. This strengthening of defense rights is welcome, especially given the uncertainty over the nature of the protection that can be offered by prosecutorial supervision of the *garde à vue* in law and in practice. It is, however,

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277. *Id.* at 17.

278. *Id.*

279. Gérard Davet, *Julien Dray ne devrait pas être renvoyé devant le tribunal correctionnel*, LE MONDE, Dec. 16, 2009, available at 2009 WLNR 25338197.

280. *Id.*

281. *Garde à vue: une avocate assiste son client pendant l'interrogatoire de garde à vue*, LES ECHOS, May 6, 2010, <http://www.leclubdesjuristes.com/publications/actualites/garde-a-vue-une-avocate-assiste-son-client-pendant-l-interrogatoire-de-garde-a-vue> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

282. *Id.*

283. Guillaume Didier, porte-parole du ministère de la Justice et des Libertés, *Réforme de la garde à vue* (2010), <http://www.presse.justice.gouv.fr/lu-vu-entendu-11603/reforme-de-la-garde-a-vue-20025.html> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

modest when compared with the more ambitious and ECtHR-inspired proposals made by a number of politicians to allow suspects access to a lawyer during police interrogation from the outset of the *garde à vue*; to allow the lawyer access to the case file; and to remove the exceptional procedures in which protections such as custodial legal advice can be delayed.<sup>284</sup> Strengthening suspects' access to lawyers is important, but it also requires appropriate funding in order to be effective. Criminal defense lawyers are not well paid,<sup>285</sup> and the structure of the profession means that they tend not to specialize.<sup>286</sup> Earlier and more extensive access to suspects held in *garde à vue* will increase legal aid costs substantially if it is to be available to all. This is all the more important given that the central plank of protection for suspects—supervision of the *garde à vue* by the *procureur*—is increasingly in question.<sup>287</sup>

However, it became clear that these changes would not be enough in light of the recent decision of the *Conseil constitutionnel*, holding that the provisions regulating the *garde à vue* are contrary to the values enshrined in the French Constitution.<sup>288</sup> On March 1, 2010, the first day on which the provision came into force, lawyers in Paris made use of the new procedure to raise a question of constitutional importance.<sup>289</sup> *La question prioritaire*

284. Maron & Haas, *Tandis*, *supra* note 268, at 11 (referencing six proposed reforms lodged by members of the National Assembly: prop. AN Aeschlimann, No. 2181, prop. AN Goulard, No. 2191, prop. AN Hunault, No. 2193, prop. AN Vallini, No. 2295, prop. AN Mamère, No. 2356, prop. AN Candelier, No. 2364). Three proposals were lodged with the Senate: prop. Sénat Boumediène-Thiery, No. 201, prop. Sénat Borvo Cohen Seat, No. 286, prop. Sénat Mézard, No. 208. *Id.* The proposals were ultimately rejected.

285. While private clients are charged 150 Euros an hour, criminal legal aid pays only 200 Euros for a case in the tribunal correctionnel, with a minimum of six hours of work. Marie Piquemal, *Interview with Jean-Louis Borie*, syndicat des avocats de France, *Aide juridictionnelle: Le gouvernement s'en prend aux plus modestes*, LIBÉRATION, July 15, 2010, <http://www.liberation.fr/societe/0101647176-aide-juridictionnelle-le-gouvernement-s-en-prend-aux-plus-modestes> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

286. Hodgson, *The Investigation*, *supra* note 90, at 33.

287. See *supra* note 24 and accompanying text (discussing the questionable status of the *procureur* as a judicial authority).

288. See *supra* note 19 and accompanying text (discussing CC decision No. 2010-14/22QPC).

289. See Pascale Robert-Diard, *Nouvelle offensive des avocats contre les conditions de garde à vue: Ils veulent profiter de l'entrée en vigueur d'une disposition de la réforme constitutionnelle*, LE MONDE, Mar. 2, 2010, available at 2010 WLNR 4265268 (explaining that Parisian lawyers used the adoption of the new provision as an occasion to challenge several articles of the C. PR. PÉN. in what eventually became CC Decision No. 2010-14/22QPC).

*de constitutionnalité* brings into effect Article 61-1 of the Constitution, adopted on July 23, 2008.<sup>290</sup> It provides that in a case before the court, where it is maintained that a legislative provision offends against the rights and freedoms guaranteed by the Constitution, the *Conseil constitutionnel* can be required to rule on the question through a reference from the *Conseil d'Etat* or the *Cour de cassation*.<sup>291</sup> The Parisian lawyers questioned whether CPP Articles 62, 63, 63-1, 63-4, 77 and 706-73 offend the rights and freedoms guaranteed by the constitution, namely, the principle of respect for the rights of the defense, of a fair trial, of individual freedom, of freedom of movement—the right not to be subject to arrest unless strictly necessary—and the principle of equality.<sup>292</sup> They supported their claims with reference to the principles set out in the ECtHR jurisprudence, arguing that custodial legal advice must be real, effective, and available throughout the period of detention—including the interrogation of the suspect—and that the lawyer must have access to the dossier of evidence in order to be able to advise the client effectively.<sup>293</sup>

In a landmark decision, the *Conseil constitutionnel* ruled that with the exception of CPP Articles 63-4 and 706-3,<sup>294</sup> which it had already examined in 2004,<sup>295</sup> the provisions raised were all contrary to the constitution.<sup>296</sup>

290. Conseil constitutionnel, *12 Questions to Begin with*, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/12-questions-to-begin-with.47857.html> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

291. Conseil constitutionnel, *Ordonance N° 58-1067 Constituting an Institutional Act on the Constitutional Council*, § 23-4 (2009), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en\\_ordonance\\_58\\_1067.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en_ordonance_58_1067.pdf). The ruling must take place within three months; the question of compatibility must not have been previously decided and it must relate to a new matter or one that is of a serious nature.

292. CC Decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, ¶¶ 2–11.

293. *Id.* This is, of course, rejected by the government. The ministry of justice criticized lawyers for using the ECtHR cases to criticize the French *garde à vue* procedure, when they have never seen fit to challenge it before the ECtHR themselves. Didier Guillaume, port-parole du ministère de la Justice et des Libertés, *Garde à vue—Question prioritaire de constitutionnalité et CEDH* (2010), <http://www.presse.justice.gouv.fr/lu-vu-entendu-11603/garde-a-vue-questions-prioritaires-de-constitutionnalite-et-cedh-20031.html> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review). It also noted that the Justice Minister had already announced her intention to reform the *garde à vue* back in July 2009. *Id.*

294. These relate to the prolonged detention period and delayed access to custodial legal advice for suspects held on suspicion of organized crime, drug trafficking, and terrorism.

295. See Conseil constitutionnel, *Decision n° 2004-492 DC March 2nd 2004: The Act Adapting the Administration of Justice to the Changing Face of Crime* (2004), available at

Although they had been examined when the original legislation was passed in 1993, the *Conseil* considered that the circumstances of their operation had changed considerably over the last twenty years.<sup>297</sup> More specifically, the number of cases dealt with through the *instruction* procedure has declined, while those under the authority of the *procureur* have increased.<sup>298</sup> The *temps réel* procedure means that many cases are prosecuted and disposed of on the basis of evidence gathered during the period of the *garde à vue*; this has now become the principal phase on which the dossier is based and on which the accused is judged.<sup>299</sup> There has also been a huge rise in the number of people placed in *garde à vue* in poor material conditions; recourse to detention is systematic even in minor cases<sup>300</sup> such that there is a *banalisation* of the use of the *garde à vue*.<sup>301</sup> Having set out why it believed it necessary to re-examine these provisions, the *Conseil* went on to examine the balance struck between the need to investigate crime and maintain public order on the one hand, and the obligation to ensure the proper exercise of constitutionally guaranteed freedoms on the other.<sup>302</sup> It concluded that the provisions regarding police custody did not strike the balance in the appropriate way.<sup>303</sup> In particular, resort to the *garde à vue* as a repressive measure is too frequent and too easily authorized by the police in the first instance; the suspect is not told of her right to silence and is not afforded effective assistance from her defense

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[http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a2004492dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2004492dc.pdf) (ruling that these provisions conformed to the Constitution after examining the March 9, 2004 law). It was not a fresh issue as required under the QPC procedure.

296. Decision No. 2010-14/22QPC, *supra* note 19, ¶ 29.

297. *Id.* ¶ 15.

298. *Id.* ¶ 16.

299. *Id.*

300. Excluding motoring cases that are not present in the official statistics, the principal reasons for placing a suspect in *garde à vue* include offences against immigration police (72,466), assaults (59,730), drug use (49,008), receiving stolen goods (22,505), and shoplifting (19,355). Bastien Hugues, *Les Sages exigent une réforme de la garde à vue*, LE FIGARO, July 30, 2010, <http://www.lefigaro.fr/actualite-france/2010/07/30/01016-20100730ARTFIG00482-les-sages-exigent-une-reforme-de-la-garde-a-vue.php> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

301. M. Daniel W. et al., *Commentaire de la décision n° 2010-14/22 QPC—juillet 2010*, 30 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 15 (2010), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-14/22QPC-ccc\\_14qpc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010-14/22QPC-ccc_14qpc.pdf).

302. CC Decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, ¶ 29.

303. *Id.*

lawyer, irrespective of the circumstances of the case or the need to preserve evidence or protect an individual.<sup>304</sup>

The Justice Minister was required to develop the March 2010 reform project to take account of this new decision.<sup>305</sup> The amended project, set out in September 2010, concerns ordinary cases, leaving the exceptional regime for organized crime, drug trafficking, and terrorism in place.<sup>306</sup> The *Conseil constitutionnel* stated that it lacked jurisdiction to consider these measures; the government has interpreted this rather more ambitiously as a positive endorsement of their constitutionality.<sup>307</sup> The suspect will be informed of her right to silence<sup>308</sup> and may inform a friend and her employer (rather than in the alternative, as at present) of her detention.<sup>309</sup> But the most significant proposal, predictably, is to allow lawyers to be present during the interrogation of the suspect in *garde à vue*.<sup>310</sup> However, there are a number of important limitations. Consultation remains limited to thirty minutes and the second consultation remains at twenty-four hours

304. *Id.* ¶¶ 27–28.

305. This is described in positive terms, as "enriching" the reform project. *Garde à vue: projet de réforme enrichi*, LE FIGARO, July 30, 2010, <http://www.lefigaro.fr/flash-actu/2010/07/30/97001-20100730FILWWW00530-garde-a-vue-projet-de-reforme-enrichi.php> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

306. *See generally* MINISTÈRE DE LA JUSTICE ET DES LIBERTÉS, PROJET DE LOI: TENDANT À LIMITER ET À ENCADRER LES GARDES À VUE (2010), <http://www.cercle-dubarreau.org/media/01/02/731278778.pdf> [hereinafter PROJET DE LOI]. This reform will have to be revised yet again in the light of the decision of the *Cour de cassation* on October 19, 2010, which held that the arrangements for custodial legal advice in all *Gardes à vue*, including the exceptional regimes for terrorism, organized crime, and drug trafficking, are contrary to the requirements of the ECHR. *Cour de cassation, Communiqué relative aux arrest rendus le 19 octobre 2010 par la Chambre criminelle de la Cour de cassation*, [http://www.courdecassation.fr/jurisprudence\\_2/chamber\\_criminelle\\_578/arrest\\_rendus\\_17837.html](http://www.courdecassation.fr/jurisprudence_2/chamber_criminelle_578/arrest_rendus_17837.html) (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

307. *See* Jacqueline Hodgson, *The French garde à vue declared unconstitutional* 174 JUST. PEACE NEWS 523, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669915). *But see* *Cour de cassation, Communiqué relative aux arrest rendus le 19 octobre 2010 par la Chambre criminelle de la Cour de cassation*, [http://www.courdecassation.fr/jurisprudence\\_2/chamber\\_criminelle\\_578/arrest\\_rendus\\_17837.html](http://www.courdecassation.fr/jurisprudence_2/chamber_criminelle_578/arrest_rendus_17837.html) (last visited Nov. 8, 2010) (providing the most recent decision of the *Cour de cassation* which declared on October 19, 2010 that the exceptional procedures in place for delaying access to custodial legal advice to those detained on suspicion of terrorism, organized crime, and drug trafficking, were contrary to the ECHR) (on file with the Washington and Lee Law Review).

308. PROJET DE LOI, *supra* note 306, art. 73:5.

309. *Id.* art. 73:16.

310. *Id.* art. 77:19.

—rather than at twelve hours as proposed in March.<sup>311</sup> If the police feel that the necessities of the investigation require the lawyer's presence in interrogation to be delayed, the *procureur* can authorize this for up to twelve hours in order to assemble or to preserve evidence.<sup>312</sup> Access to the suspect's statements can be delayed for the same reason.<sup>313</sup> Furthermore, while the March reform proposed allowing lawyers to ask questions at the close of interrogation, they are now permitted simply to make written observations.<sup>314</sup>

Lawyers have been critical that the reform does not go far enough and continues to restrict custodial legal advice unnecessarily.<sup>315</sup> As one *Le Figaro* journalist describes it, lawyers consider that the doors to the police station are not open, but only ajar.<sup>316</sup> Furthermore, the exceptional regimes are untouched (which appears contrary to the ECtHR jurisprudence) and a mini-custody procedure is proposed in which a suspect is held only for the time necessary to take a statement—with none of the rights available to those in *garde à vue*.<sup>317</sup> While the numbers of those detained in *garde à vue* may decrease, it may be that they are simply displaced into a new regime (a *garde à vue* lite, if you will) during which they enjoy no legal advice. And for the reform to have any real impact, legal aid provision will have to increase substantially and lawyers will need to organize and train in order to meet the challenge of this extended role.

Police, too, are skeptical about the reform. Just as they opposed the initial provisions allowing custodial legal advice in 1993, they fear that this further encroachment into their territory will undermine the investigation. Their depiction of the roles of legal actors is telling: While the police

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311. *Id.* art. 73:18.

312. *Id.* art. 73:19.

313. *Id.* art. 73:18.

314. *Id.* art. 73:20.

315. See, e.g., Press Release, Syndicat de la magistrature, *Projet de réforme de la garde à vue: une occasion historique, un texte insuffisant* (Sept. 8, 2010), available at <http://www.syndicat-magistrature.org/Projet-de-reforme-de-la-garde-a.html> (criticizing the report's narrow approach and effect). A strike was called in Dijon on September 29th in protest at the inadequacy of the reform. *Garde à vue: avocats en action*, LE BIEN PUBLIC, Sept. 28, 2010, <http://www.bienpublic.com/fr/accueil/article/3859407/Garde-a-vue-avocats-en-action.html> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

316. Laurence de Charette, *Réforme de la garde à vue: les avocats doivent s'organiser* LE FIGARO, Sept. 9, 2010, <http://www.lefigaro.fr/actualite-france/2010/09/08/01016-20100908ARTFIG00542-reforme-de-la-garde-a-vue-les-avocats-doivent-s-organiser.php> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

317. PROJET DE LOI, *supra* note 306, art. 73:1, 73:2.



describe interrogation as creating the "intimacy of a confessional" which establishes a relationship of trust that allows the suspect to "relieve her conscience," they portray the arrival of the lawyer as "inviting silence and reinforcing her sense of impunity."<sup>318</sup>

The *Conseil* recognizes that for its July ruling to take effect immediately would throw the criminal justice system into disarray.<sup>319</sup> It has therefore delayed its coming into effect until July 1, 2011, allowing time for legislation.<sup>320</sup> It has also made clear that the *garde à vue* procedure cannot be challenged as unconstitutional until that time, creating a kind of limbo where we know the provisions are wrong, but we have to apply them nonetheless.<sup>321</sup>

## VI. Conclusion

The French government's proposal earlier this year to abolish the *juge d'instruction* and to place the *parquet* in charge of all criminal investigations, has put the independence of the *procureur* under the spotlight at a time when it has been subject to challenge within the European arena.<sup>322</sup> The proposed reform, based on the Léger Commission report, gives the executive the judicial power to supervise and to direct all criminal investigations through the authority that it is able to exercise over the *parquet*.<sup>323</sup> But at the same time, the ECtHR in the *Medvedyev* case has indirectly questioned whether the *procureur* is sufficiently independent of

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318. Christophe Comevin, *Réforme de la garde à vue: les policiers très reserves*, LE FIGARO, Sept. 8, 2010, <http://www.lefigaro.fr/actualite-france/2010/09/08/01016-20100908ARTFIG00508-reforme-de-la-garde-a-vue-les-policiers-tres-reserves.php> (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

319. CC Decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, ¶ 30.

320. *Id.* The current reform proposal would take effect in July 2011.

321. *Id.*

322. There is a certain irony in the fact that the hierarchical nature of the *parquet* is justified on the grounds of the importance of democratic accountability, yet the findings of a *parliamentary* committee are simply brushed aside when they do not coincide with the wishes of the President—who goes on to set up his own committee and makes clear what he wants them to recommend, or at least what his reform will be. This is all part of what is frequently described as the *hyper-presidence* of Sarkozy: His tendency to attempt to control all aspects of French political life.

323. See generally Jean Pradel & Didier Guérin, *Les relations entre le ministère public et le ministre de la justice dans l'avant-projet de réforme de la procédure pénale*, 11 RECUEIL DALLOZ 660 (2010).

the executive and of the parties in the case to qualify as a judicial authority.<sup>324</sup>

The French government has rejected the reasoning in the *Medvedyev* case and preceding line of case law, refusing to acknowledge its implications for the French *procureur*.<sup>325</sup> Similarly, it has sought to minimize the impact of *Salduz* and the subsequent cases underlining the importance of immediate and effective custodial legal advice for suspects, claiming that they apply only to the respondent countries and that no direct challenge has been brought against French arrangements.<sup>326</sup> Historically, this has been France's approach: To do the minimum necessary in order to ensure legislative compliance with the ECHR, rather than to embrace the spirit of European jurisprudence.<sup>327</sup> The result is a hybrid procedure that contains the vestiges of a centralized inquisitorial model—and an inferior version at that, given the *procureur*'s lack of clear judicial status—but with some safeguards of the two party system grafted on. The presence of the defense is increasingly required in the administration of new measures such as the guilty plea procedure, but the protection that this can offer is limited; we know that the key to criminal cases is in the early stages of the investigation: The *garde à vue*. If the defense is not protected adequately at this stage, the interests of the accused are likely to be prejudiced irretrievably, as demonstrated in miscarriages of justice and now set out by the ECtHR. This is especially so in French criminal procedure: The pre-trial investigation produces the dossier of the "judicial inquiry" and so, in practice, it assumes a central importance in the case.

This position now looks difficult to maintain. France's own constitutional council has dealt a severe blow to the *garde à vue* regime, declaring it to be against the values of the constitution in a decision directly inspired by the very European jurisprudence from which the government sought to distance itself.<sup>328</sup> Quite simply, the *procureur*'s supervision of the *garde à vue* cannot justify or compensate for the very poor level of due process safeguards.

It is significant that this decision comes from a domestic court. The consequences of both *Medvedyev* and *Salduz* were ill-received not only

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324. See *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶ 63 (2008) (clarifying the requirements for judicial independence).

325. See *Didier*, *supra* note 283 (noting the French government's reaction).

326. See *id.* (noting the arguments that the French government has formulated to avoid being bound by these new precedents).

327. See generally *Hodgson*, *Human Rights*, *supra* note 214, at 185–208.

328. CC Decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, ¶ 29.

through a natural resistance to criticism, but also because they were seen as an attack on French legal culture and an attempt to set down requirements for a more adversarial procedure at the European level. *Salduz* in particular represents a move away from the doctrine of the margin of appreciation through which national differences are tolerated and rejects the argument that breaches at one stage of the procedure can be remedied at a later point. Instead, it holds that custodial legal advice is a universal and freestanding right, irrespective of procedural tradition. This fear and demonization of the defense lawyer manifests itself whenever there is some strengthening of defense rights,<sup>329</sup> and it was again apparent in the reactions of some *Le Monde* readers to the breaking news of the *Conseil constitutionnel*'s decision on the *garde à vue*.<sup>330</sup>

The reform proposals presented in September 2010 make some adjustments to reflect the concerns of the *Conseil constitutionnel* but their success will depend as much on a change in legal culture and an acceptance of the legitimacy of the lawyer's role. Some commentators see increasing the role of the defense lawyer as a direct attack on the role of the *procureur* and the procedural tradition of judicial supervision.<sup>331</sup> Despite the model of defense participation that has been developed through legislation (if not practice) during the *instruction*, there is still resistance to the idea that the defense role might complement that of the *procureur*, act as a counterbalance, and ensure that all relevant information is obtained and inquiries carried out.<sup>332</sup> The *parquet*'s ability to provide independent

329. See generally HODGSON, FRENCH, *supra* note 1, at 28–29, 124–41.

330. Some consider this a move to "Anglo-Saxon" criminal justice; others voice concern that this will benefit only the rich. Aline Leclerc, *Garde à vue: "Cette décision est une véritable révolution!"*, LE MONDE, July 30, 2010, [http://www.lemonde.fr/societe/reactions/2010/07/30/garde-a-vue-cette-decision-est-une-veritable-revolution\\_1394198\\_3224.html#opened](http://www.lemonde.fr/societe/reactions/2010/07/30/garde-a-vue-cette-decision-est-une-veritable-revolution_1394198_3224.html#opened) (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review).

331. Most people do not trust lawyers and see them as benefitting the rich and those involved in organized crime. People also categorize lawyers as entrepreneurs who act for suspected criminals, whereas they see *procureurs* as *magistrats* who acts in the interests of society. See HODGSON, FRENCH, *supra* note 1, at 135–41, for the comments of *magistrats* and police.

332. Even the Léger committee opposed the presence of the lawyer in the *garde à vue* from the outset on the grounds that this would compromise the effectiveness of the inquiry. LÉGER REPORT, *supra* note 108, at 18. Research has established that across jurisdictions, the initial period of detention and interrogation is very often determinative of the case's outcome. Hodgson, *The Investigation*, *supra* note 90, at 19. It is therefore paramount that due process safeguards are in place in order to ensure that the evidence is thorough and reliable. However, the Léger committee frames its view in terms of the first hours of investigation being determinative of the discovery of the truth, and it does not want a

supervision of the police investigation is open to challenge in practice and in law. In contrast to the rights of the defense during the *instruction*, the lawyer's structural exclusion from the pre-trial phase has made it impossible for her to participate and undermines the promise of a procedure that is *contradictoire*. If the Justice Minister is serious about requiring the *parquet* to investigate *à décharge*, it must recognize and support the lawyer's role in helping to achieve this requirement. This can only strengthen the independence of the *procureur*'s role, which is paramount given that 96% of investigations are under her authority and that figure may soon rise to 100%.<sup>333</sup>

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defense lawyer getting in the way of this process. See LÉGER REPORT, *supra* note 108, at 17–26 (explaining this view in the fifth recommendation).

333. Hodgson, *The Investigation*, *supra* note 90, at 22.

