The public prosecutor's office in the French legal system

di Johan Dechepy-Tellier

Abstract: This contribution attempts to highlight the changes in the French Public Prosecutor's Office, which affect both the place and the role that the institution now plays in the conduct of criminal trials. Although its members remain 'magistrates', they still do not enjoy the guarantees of full independence and impartiality, even though the development of their missions in terms of implementing criminal policy and the criminal response is certainly spectacular. More than a critical study of the existing situation, this contribution attempts to project the prospects for a more radical transformation of the Public Prosecutor's Office by examining the structure of the criminal trial. The questions of the erosion of the specific features of the pre-trial investigation, the specialisation of members of the public prosecutor's office, the de-specialisation of certain investigative methods and the progression of fundamental rights and freedoms permeate all the developments. The ambition is to reflect, as best we can, the state of our Public Prosecution Service in a European environment that is, on this issue, heterogeneous.

Keywords: Transformation; Public Prosecutor's Office; Criminal trial; Changes in the law; Alternative model.

Introductory remarks

The Public Prosecutor's Office[1] emerged in France at the junction of the 13th and 14th centuries within the ordinary royal courts. At this time certain legal practitioners, known as "*procureurs*", made defending the king's rights before his own courts their speciality. The function of prosecutor itself became official in the great reform ordinance of March 1303[2]. Later, these practitioners were joined by certain lawyers who had reserved their services for the crown. Initially unaffiliated with the judiciary, as auxiliaries of justice, these « *gens du roi*" [3] saw their status evolve towards that of magistrate. From then on, although they were still responsible for protecting the king's rights, they became the guardians of public peace[4]. As such, their primary role was to take public action when a criminal offense was committed.

[1] For an overall approach : F. Molins, *Ministère public*, Répertoire de droit pénal et de procédure pénale, Dalloz, 2020.
[2] J.M. Carbasse (ss. dir.), *Histoire du parquet*, PUF, 2000, p. 23 to 54.
[3] « King's people ».
[4] J.M. Carbasse, *Histoire du droit pénal et de la justice criminelle*, PUF, 2014, 76.

The criminal offense represents typical conduct that corresponds to the data contained in an incriminating text drawn up beforehand. This offense constitutes a disturbance of the social order, which is made up of various fundamental values that are protected in order to guarantee social peace. Any criminal offense gives rise to a legal action known as a "*public action*", through which the general interest can be defended before the criminal courts, thanks to a body responsible for representing society : the public prosecutor.

While the public prosecutor's office rarely acts as lead plaintiff in civil cases, it is always present in this capacity in criminal cases.

The Public Prosecutor's Office thus appears to be an essential institution for the effective application of substantive criminal law and, as such, a means of expressing the preventive and repressive vocations specific to criminal law[5] . To this end, it's the State which, firstly, investigates and establishes criminal offenses by the police made available for this purpose and which form the judicial police. It is then up to the prosecutor to decide whether it is appropriate to initiate public proceedings, in the light of the facts reported to him, and to include this decision in the list of options that the law authorizes him to use[6]. Without the initiation of such action, there can be no concrete punishment for conduct that has disturbed the social order, since the referral of a case to a criminal court, whether for investigation or trial, depends on it.

In the event of prosecution, the public prosecutor also becomes a party to the criminal proceedings and supports a charge to protect the interests of society, following which a criminal conviction may be handed down. As the plaintiff, the public prosecutor's office takes the requisitions and, if necessary, exercises the various means of appeal against judicial decisions.

Lastly, it's responsible for enforcing any decision on the merits of the case once all avenues of challenge have been exhausted[7] . The Public Prosecutor's Office is involved in all areas of French law enforcement[8] .

Magistrates responsible for criminal law enforcement are, in principle, professionals. In France, they are "*civil servants*" with a *sui generis* status, since the general provisions common to the civil service[9] don't apply to magistrates of the judiciary. Their status is set out in the Order of 22 December 1958[10], which is an organic law that states in its opening lines that "*The judiciary comprises : 1° judges and prosecutors (...)*", and adds that "*All judges are entitled to be appointed to judicial or prosecutorial posts during the course of their career*". There's thus a degree of uniformity in the status of French

[5] According to article 31 of the C.C.P., "*The public prosecutor exercises public action and requires the application of the law (...)*".

[6] These roads are generally covered by the provisions of article 40-1 C.C.P.

[7] Art. 707-1 C.C.P.

[8] It should be noted, however, that the recovery of fines and the enforcement of confiscations are carried out on behalf of the public prosecutor by the competent public accountant or by the agency for the management and recovery of seized and confiscated assets.

[9] Provisions of Act no. 83-634 of 13 July 1983 *on the rights and obligations of civil servants.*

[10] Act no. 58-1270 of 22 December 1958 on the *status of the judiciary.*

judges, provided by a supra-legislative text[11], even though the functions of judging - performed by judges - and prosecuting - performed by public prosecutors - are strictly separated. Such a separation is necessary for a fair trial, since it prevents any switch from the prosecution to the trial court in the course of the same criminal case from undermining the guarantee of an independent and impartial trial court[12] .

The public prosecutor's office[13] is present in all the ordinary criminal courts. In each court, is made up of one or more members, the public prosecutor, one or more deputy public prosecutors and assistants prosecutors. At each court of appeal, the interests of society are represented by a public prosecutor, one or more advocates-general and deputy public prosecutors, who together form the « *prosecutor general's office*". At the highest judicial level, there's a public prosecutor at the Court of Cassation, who is assisted by several first advocates-general and a number of advocates-general at the Court of Cassation.

The public prosecutor's office is also present in specialized forms in order to increase the effectiveness of its intervention in criminal cases requiring special technical skills. For example, a financial public prosecutor has been set up within the Paris judicial court[14] to track down serious economic and financial crime[15]. In this area, specialized prosecution services now exist side by side, both at regional level through the specialized inter-regional courts or "*JIRS*"[16] , and at national level through the national financial prosecution service or the recent national court responsible for combating organized crime, known as "*JUNALCO*"[17]. Even more recently,

[11] An organic law has a higher status than an ordinary law because it has a specific purpose, namely to lay down the rules governing the organisation of public authorities. Its drafting and amendment are subject to special provisions set out in article 46 of the Constitution.

[12] The introductory article I. C.C.P. according to which "*Criminal proceedings must be fair and adversarial and preserve the balance of the rights of the parties. It must guarantee the separation of the authorities responsible for prosecution and the authorities responsible for judgment*".

[13] Magistrates who are part of the public prosecution service are sometimes referred to as standing magistrates, simply because they stand up to address the court, unlike judges who remain seated. They are also known as magistrats du parquet (*public prosecutors*), in reference to the enclosed "*little park*" in which the king's prosecutors held their hearings under the « *Ancien Régime* ».

[14] Act no. 2013-1117 of 6 December 2013 *on combating tax fraud and serious economic and financial crime.*

[15] The material jurisdiction of the Financial Public Prosecutor is determined by articles 705 et seq. of the Code of Criminal Procedure (*C.C.P.*). Often, the offenses in question are economic and financial offenses such as breaches of probity (*arts. 432-10 to 431-15 P.C.*), active corruption (*art. 433-1 P.C.*) or influence peddling (*art. 433-2 P.C.*) when the case is or appears to be highly complex due to the large number of perpetrators, accomplices or victims. These powers may be exercised throughout France.

[16] Created by Act no. 2004-204 of 9 March 2004 *adapting the justice system to developments in crime*, these courts have concurrent jurisdiction with the ordinary courts when a case of organized crime or an economic or financial offense is highly complex.

[17] Created by Act no. 2018-222 of 23 March 2019 *on programming 2018-2022 and reform for the justice system.*

a national anti-terrorist prosecutor's office has been set up [18] and is responsible for crimes against humanity, war crimes and offenses and, above all, terrorism[19] .

Lastly, the public prosecutor's office is present in special courts. This is essentially the case[20], in juvenile courts, since the public prosecutor attached to the judicial court in whose jurisdiction a juvenile court has its seat has jurisdiction to prosecute offenses committed by minors [21]. In accordance with the principle of specialization of those involved in juvenile criminal proceedings, this is a designated magistrate with special responsibility for cases involving minors[22] .

The French public prosecutor's office has very distinctive features. Firstly, it's characterized by its unity - or indivisibility -, to use the commonly used term. This means that each of its members is able to represent the entire institution as it is attached to a particular level of jurisdiction. The idea is that the public prosecutor's office doesn't have to be personified. The various members of the same public prosecutor's office can therefore replace each other in order to carry out the tasks that fall to the public prosecutor in the same case. There's no need for them to follow a case in its entirety and attend each hearing in person[23], unlike the magistrates of the trial court. However, such unity isn't without limits. Unity is attached to the function and not to the person performing it. For example, the Criminal Division of the Court of Cassation didn't object to the fact that a councillor of a Court of Appeal, who had previously been the public prosecutor in the same case, could exercise the function of trial judge, on the grounds that the prosecution had been initiated by one of his deputies and not by himself. At the time, the Court of Cassation pointed out that this magistrate from the Public Prosecutor's Office, who was subsequently appointed as a judge, had not taken any part in the prosecution in this case[24]. More recently, the same Court ruled that a public prosecutor could validly appeal against a judgment on the merits handed down in accordance with

[18] Also stemming from the aforementioned Act no. 2019-222 of 23 March 2019. JUNALCO now has concurrent jurisdiction over organized crime, throughout the country, and for certain offenses in so-called "*very highly complex*" cases.

[19] Articles 706-17 and next C.C.P.

[20] It should be noted that the Public Prosecutor's Office is also present at the Court of Justice of the Republic, in the person of the Public Prosecutor at the Court of Cassation, assisted by the First Advocate General and two Advocates General appointed by the Public Prosecutor. This court has jurisdiction to try members of the Government for acts performed in the exercise of their functions and qualified as crimes or misdemeanors at the time they were committed (*art. 68-1 C.*). Its jurisdiction is limited to crimes and misdemeanors directly related to the conduct of State affairs falling within their remit, to the exclusion of conduct relating to private life or local elected office. It should also be noted that Act no 2011-1862 of 13 December 2011 gives jurisdiction to the Paris Judicial Court to try crimes and misdemeanors committed outside the territory of the Republic by members of the armed forces or against them. The functions of the Public Prosecutor's Office are performed by the Public Prosecutor at this court. The latter appoints the public prosecutors specifically responsible for investigating and prosecuting the offenses in question (*art. 697-4 C.C.P.*).

[21] Article L.211-2 al. 1er Juvenile Criminal Justice Code (*J.C.J.C.*)

[22] Article L.12-2 al. 1er J.C.J.C.

[23] Crim, Dec. 2, 1959, bull. crim. n°254.

[24] Crim, Dec. 17, 1964, JCP 1965. II. 14042, note Combaldieu.

the submissions of one of his deputies[25]. This decision bears witness to the fact that the unity of the public prosecutor's office loses all free will to the point of following the lead previously initiated by one of its counterparts. Rather, unity must be reconciled with the principle of hierarchy that governs the practical operation of the public prosecutor's office.

Secondly, within the same public prosecutor's office, that is the one established at each level of jurisdiction, its members are hierarchical and thus obliged to follow the orders of their superior. This is the case, for example, for the entire prosecution service of the criminal court - the first level of jurisdiction in France - which is subordinate to the public prosecutor and those acting on his behalf - the second level of jurisdiction in France - through its hierarchical superior, the public prosecutor[26]. In addition, all members of the public prosecutor's office, with the sole exception of the public prosecutor at the Court of Cassation[27], are placed under the authority of the Minister of Justice[28]. Such a link between politics and the judiciary, which is part of the DNA of the French public prosecutor's office, can be seen as much as a means of ensuring a degree of consistency in public action as a way of preserving equality before the criminal justice system[29]. The Minister of Justice leads the criminal policy determined by the Government and ensures that it is implemented consistently. For this reason, he's required to issue general instructions to prosecutors without, however, being empowered to interfere in individual cases[30]. It follows, for example, that the Minister of Justice can't validly give an order to any public prosecutor to dismiss a case or, conversely, to prosecute a particular case. The principle of hierarchy, which is particularly attached to public prosecutors even though they are members of the judicial authority governed by the principle of the unity of the judiciary, doesn't fail to reveal a certain antagonism in the way the status of the public prosecutor is conceived in France. Hierarchical subordination necessarily undermines the independence that presides over the status of magistrate and, in spite of everything, divides the judiciary into two non-assimilable components. For example, because they belong to a hierarchical body and must carry out the orders of their superiors, public prosecutors can't enjoy the same security of tenure as judges. However, the antagonism in question didn't lead the Constitutional Council to regard this as a failure to comply with the fundamental rule[31]. The Conseil's position is all the more understandable

[25] Crim. Jan. 23, 2007, no. 06-84.551, bull. crim. no. 14.

[26] Article 36 C.C.P.

[27] The Public Prosecutor at the Court of Cassation may not receive instructions from the Minister of Justice except when the latter formally instructs the former to lodge an appeal in the interest of the law with a view to denouncing to the Criminal Division "*judicial acts, judgments or rulings that are contrary to the law (...)*". - cf. art. 620 C.C.P.

[28] Order no. 58-1270 of 22 Dec. 1958, *enacting an organic law on the status of the judiciary*, art. 5.

[29] J. Dechepy-Tellier, *Les mutations de la chambre de l'instruction : propositions pour une reconstruction de l'avant-procès pénal autour d'une juridiction du second degré*, Thèse, L.G.D.J., Bibliothèque des sciences criminelles, tome 59, n°356.

[30] Art. 30 C.C.P. as amended by Act no. 2013-669 of 25 July 2013 *on the powers of the Keeper of the Seals and magistrates of the Public Prosecutor's Office with regard to criminal policy and the implementation of public action.*

[31] Cons. const. Feb. 21, 1992, n°92-305, DC, RFDC 1992. 323.

now that, as we shall see in detail, the French public prosecutor's office is undergoing a gradual functional transformation that is gradually making it more independent and impartial[32].

Finally, while the public prosecutor isn't liable for damages because he represents the main and necessary party to the criminal proceedings, he is also not liable in the event that he loses his claim for the effective application of the substantive criminal laws[33]. In this sense, the public prosecutor can't be ordered to pay damages on behalf of his opponent, whether acquitted or acquitted. Like any other member of the judiciary, a member of the public prosecutor's office is liable only for personal misconduct. From a civil point of view, magistrates can only be held liable for personal misconduct relating to the public service of justice through a recourse action brought by the State before a civil division of the Cour de cassation[34]. From a criminal point of view, magistrates have lost their jurisdictional privilege and are now subject to ordinary law[35]. However, if an offense is committed by a member of the judiciary in the course of legal proceedings and involves a breach of a provision of criminal procedure, the institution of public proceedings is subject to a prior determination of the unlawful nature of the proceedings or of the act carried out in the course of those proceedings, by a final decision of the criminal court to which the matter is referred[36] .

The characteristics of the public prosecutor's office described above show that the French concept of the institution is evolving slowly and continuously without really breaking with its traditional approach dating back to the Code of Criminal Procedure of 1808. The latter effectively conceived of public prosecutors as "*judicial prefects*"[37] , seen as veritable instruments of control of the judiciary by the executive. The *French-style* public prosecutor's office was built and evolved from the idea that the power to prosecute belongs to the central authority that exercises sovereignty. Therefore, while the public prosecutor's office belongs to the judicial authority, whose independence the President of the Republic is responsible for guaranteeing[38], it is at the same time subject to the authority of the Keeper of the Seals, Minister of Justice[39]. This submission was recently the subject of a priority preliminary ruling on constitutionality (*P.P.R.C.*), referred by the Council of State, with a view to establishing a contradiction with article 64 of the Constitution of 4 October 1958, the foundation of the independence of the judiciary. In a widely commented decision, the

[32] V. *Infra.*

[33] Art. 11-1 of Ordinance no. 58-127 of 22 December 1958 *containing the organic law relating to the status of the judiciary*, as amended by Act no. 79-43 of 18 January 1979.

[34] *Id.*

[35] Since the entry into force of Act no. 93-2 of 4 January 1993 *reforming criminal procedure.*

[36] This is a preliminary objection provided for in article 6-1 C.C.P. See, for example, Crim. June. 25, 2013, D. actu, 28 June 2013, obs. Lavric. This judgment was handed down in a case involving the collection of personal data by fraudulent, unfair or unlawful means, breach of secrecy of correspondence by a person in a position of public authority, breach of professional secrecy and concealment.

[37] Expression borrowed from J. P. Royer *in Histoire de la justice en France*, PUF, 2016.

[38] Article 64 paragraph 1 of the Constitution.

[39] Article 5 of the aforementioned Order of 22 December 1958.

constitutional Council declared article 5 of the ordinance of 22 December 1958 *containing the organic law on the status of the judiciary to be* consistent with the Constitution. In this decision, the Council stated that the submission of the public prosecutor's office to the authority of a member of the executive reconciles the principle of independence of the judiciary with the prerogatives of the Government under Article 20 of the Constitution, particularly in terms of determining criminal policy[40]. The Council added that the contested provisions didn't disregard the separation of powers, the right to a fair trial, the rights of the defense or any other right or freedom guaranteed by the Constitution. In addition, in a decision handed down on 14 September 2021[41], the constitutional Council rejected criticisms of the constitutionality of the transmission of specific reports by public prosecutors to the Minister of Justice[42], relating to ongoing legal proceedings. For the authors of the PPRC, the transmission at issue would allow the member of the executive to interfere in criminal proceedings and exert pressure on the magistrates of the public prosecutor's office, in respect of whom he has powers of appointment and sanction. In their view, this would be an infringement of the principles of independence of the judiciary and the separation of sovereign powers.

The hybrid form of the Public Prosecutor's Office, which seeks to reconcile the tradition of a prosecutor who is an agent of the executive and the modernity of a prosecutor who collaborates with the judge in the application of the law, appears to be set in stone, but the status of the Public Prosecutor's Office is undergoing adjustments and sometimes attracts bolder political will. For example, at the official opening of the Court of Cassation in 2018, the President of the Republic said in his speech that criminal policy should continue to be defined by the Minister of Justice. He nonetheless accompanied this opinion with major changes designed to enhance the independence of public prosecutors by reforming the rules governing their appointment and the disciplinary sanctions applicable. More recently, Eric Dupond-Moretti, the current Keeper of the Seals, has put the issue of greater independence of the judiciary back on the agenda[43], even before the parliamentary commission of enquiry into the obstacles to the independence of the judiciary had submitted its report[44]. The report, published in September 2020, calls (*once again!*) for the appointment and disciplinary system for public prosecutors to be brought into line with that for judges.

At the crossroads of politics and the judiciary, the French public prosecutor's office leaves neither judges nor politicians unmoved. For more than 20 years, the former have been calling for clarification of the status of the public prosecutor's office, while the latter, concerned about the full emancipation of the judiciary - not to say a "*government of judges*" - would for the most part like to maintain the current status, while amending it in

[40] Cons. const., Dec. 8, 2017, no. 2017-680 PPRC.
[41] Cons. const., Sept. 14, 2021, no. 2021-927 PPRC.
[42] In accordance with the provisions of articles 35 and 39-1 C.C.P.
[43] Speech on 7 July 2020.
[44] National Assembly, *Report on behalf of the commission of enquiry into obstacles to the independence of the judiciary*, U. Bernalicis - President - et D. Paris - Reporter -. This report was set up on 7 January 2020.

successive stages to allay a certain mistrust. The rules that structure and govern the public prosecutor's office in French law are still based on the idea of a balanced relationship between the institution and the judiciary and the executive respectively. However, in this quest for balance, the public prosecutor's office is undergoing a series of changes.

Firstly, it's the result of a slow transformation of the functions of the investigating judge, through which a new model of criminal procedure is taking shape. The investigating judge - a judge from the bench - continues to take a back seat to the increasingly powerful public prosecutor's office.

Secondly, it's because the role of the public prosecutor in criminal proceedings has become more important with each reform that the question of the independence of the public prosecutor's office has been raised.

This development leads us to highlight **the functional transformation of the Public Prosecutor's Office (Part 1)**, before addressing the question of **a formal transformation of the institution (Part 2)**.

Part 1 : The functional transformation of the French public prosecutor's office

The functions of the French Public Prosecutor's Office reflect its hybrid status. Its close links with the Minister of Justice, the Keeper of the Seals, give its functions a political dimension **(§1)** insofar as, before any prosecutions are initiated, it determines criminal policy and participates in defining public policy. Then, as part of a single body of magistrates, the members of the public prosecutor's office are more closely linked to purely judicial functions **(§2)**. These two functions are, to varying degrees, being transferred.

§1) The changing political function of the French public prosecutor's office

It's precisely through the public prosecutor, who's attached to each judicial court in France[45], that the public prosecutor becomes a player in criminal policy. Article 40 of the C.C.P. states that the public prosecutor "*receives complaints and denunciations and decides what action to take*". In practical terms, this means that the public prosecutor gives the police services within his territorial jurisdiction [46] general guidelines for investigating and recording breaches of criminal law. There is a common thread here between the exercise of central power, whereby the Minister of Justice issues general instructions to the magistrates of the public prosecutor's office, and the relaying of these instructions to the public prosecutors of the appeal courts, who in turn liaise with the public prosecutors within the jurisdiction of these courts. Through this channel, the public prosecutor sets the guidelines for the criminal policy to be followed, extracts the priorities for action and draws up the procedures for handling criminal cases. This new system was introduced by the Act of 25

[45] Article 39 al. 1 C.C.P.

[46] Article 43 C.C.P. determines this jurisdiction by fixing it at "*the place of the offense*", "*the place of residence of one of the persons suspected of having participated in the offense*", "*the place of arrest*" and "*the place of detention*".

July 2013[47], which represents a break with the rules inherent in the Act of 9 March 2004[48]. The latter law provided that the Minister of Justice had the power to "*issue written instructions, to be included in the case file, to initiate proceedings or have them initiated, or to submit to the competent court such written submissions as the Minister deems appropriate*"[49] . With individual instructions to prosecute now outlawed, interference by the Minister of Justice in the initiation of prosecutions has officially disappeared. The new law of 2013 thus increases the functional independence of public prosecutors by giving them greater latitude in the conduct of public prosecutions.

The same text also aims to improve the function of preventing breaches of criminal law, as performed by the public prosecutor. In this respect, the Act of 5 March 2007 had only specified that the public prosecutor "*leads and coordinates the judicial component of crime prevention policy within the jurisdiction of judicial tribunal, in accordance with the national guidelines for this policy determined by the State, as specified by the public prosecutor (...)*" [50]. Henceforth, although the public prosecutor is still required to implement the criminal policy defined by central government, he fulfills this role in two ways. Firstly, the public prosecutor at the Court of Appeal may adapt the general instructions of the Minister of Justice, while the public prosecutor at his level may take account of the specific context of his jurisdiction. The renewal of this preventive mission is also accompanied by new transparency obligations. To this end, the public prosecutor is required to submit several types of report highlighting his or her actual activities[51], thus paving the way for various external controls.

Finally, the public prosecutor is consulted by the representative of the State in the department before the latter adopts the crime prevention plan[52]. This mission is fully in line with the territorial security and cooperation arrangements for preventing and combating crime, through which three local bodies for consultation and action are involved[53]. At municipal or inter-municipal level, the local security and crime prevention council [54] is primarily responsible for developing criminal security policy and monitoring the local security contract when the mayor and the prefect, after

[47] Act no. 2013-669 of 25 July 2013 *on the powers of the Keeper of the Seals and the magistrates of the Public Prosecutor's Office with regard to criminal policy and public action.*
[48] Act no. 2004-204 of 9 March 2004 *adapting the justice system to developments in crime.*
[49] Article 30 al. 3 C.c.P. in the version in force from 10 March 2004 to 27 July 2013.
[50] These provisions are now included in article 39-2 of the C.C.P..
[51] Article 39-2 C.C.P., amended by Act no. 2013-669 of 25 July 2013, requires the public prosecutor to send the public prosecutor an annual report on criminal policy and the application of the law and general instructions, as well as an annual report on the activities and management of the public prosecutor's office. At least once a year, he is also required to inform the assembly of judges and prosecutors of the conditions under which criminal policy and the general instructions issued by the Minister of Justice for this purpose are implemented in the jurisdiction. It should be noted that the Internal Security Code also requires the public prosecutor to submit an annual report on criminal policy to the security headquarters and the operational unit of the internal security forces - see articles L. 132-10-1 and R. 132-6-1 C.I.S.
[52] Article 39-2 al. 3 C.C.P.
[53] According to decree no. 2002-999 of 17 July 2002 and decree no. 2007-1126 of 23 July 2007.
[54] Articles L. 132-1 et seq. Code of Internal Security (C.I.S.)

consulting the public prosecutor and the council, consider that the intensity of crime problems in the municipality justifies its conclusion. At departmental level, the departmental council for crime prevention, victim support and the fight against drugs, sectarian aberrations and violence against women helps to implement public policies in these areas. In addition to examining the state of delinquency, it assesses the preventive action taken by the local safety councils. The public prosecutor is one of its vice-chairmen. The departmental council also includes a security headquarters and an operational coordination unit for the internal security forces. Their main task is to coordinate, within their territory, all actions dedicated to the execution of sentences and the prevention of recidivism[55], under the authority of the prefect and the public prosecutor. These bodies are also informed by the public prosecutor of the penal policy implemented in their area and give their opinion on the implementation of the policy on alternatives to prosecution provided for in article 41-1 C.C.P.

As part of a network of relationships that enables them to play an active part in public policy, public prosecutors have a special relationship with mayors. Mayors have become key players in local crime prevention, which has led the legislature to clarify the relationship between them and public prosecutors. Under article 132-2 C.I.S., which has been in force since 1 May 2012, all mayors must report to the public prosecutor any crimes or offenses of which they become aware in the course of their duties. Each mayor may also ask the public prosecutor to be informed of decisions taken by him in the exercise of public action relating to offenses committed in his municipality or to those actually recorded in his municipality by municipal police officers, pursuant to article 21-2 of the C.C.P.[56].

Any such exchanges must respect the secrecy of the investigation and enquiry referred to in article 11 paragraph 1 C.C.P. This text expressly refers to any person involved in criminal proceedings in order to compel them to observe professional secrecy, the violation of which is, since the entry into force of Act December 22, 2021, punishable by 3 years' imprisonment and a fine of 45,000 euros[57]. Only the public prosecutor has the right to disclose information about an ongoing investigation. The public prosecutor may, either on his own initiative or at the request of the investigating judge or the parties, make public objective information taken from the proceedings.

However, this information must not include any assessment of the merits of the charges against the accused. The purpose of such disclosure is to prevent the dissemination of incomplete or inaccurate information, or even to put an end to a disturbance of the peace[58] .

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[55] To this end, the headquarters and the operational coordination unit of the internal security forces organise the procedures for monitoring and supervision in an open environment by the competent services. They also inform the courts responsible for enforcing sentences and the integration and probation services of the conditions for implementing these monitoring and supervision measures.

[56] Article 132-3 C.I.S.

[57] This is precisely a form of obstruction of justice incriminated in article 434-7-2 P.C.. since the entry into force of Act no. 2021-1729 of 22 December 2021 *for confidence in the judiciary.*

[58] Article 11 al. 3 C.C.P.

Such an exchange of information demonstrates the importance that French law attaches to involving elected representatives and public prosecutors in achieving the general interest objective of improving the fight against crime. But the increase in the political role of the public prosecutor's office, which has been accompanied by a move towards independence and transparency, doesn't sum up the changes that the institution is undergoing in France.

Functional change is all the more obvious when it affects the judicial function performed by the public prosecutor.

§2) Changes in the judicial function of the French public prosecutor's office

As the protector of social peace, the public prosecutor has one main task : to investigate and establish breaches of criminal law. To carry out this task, it directs the activities of the judicial police[59]. As soon as an offense is likely to be committed, it may give rise to an investigative phase designed to gather evidence relating both to the actual commission of the offense and to the revelation of its participant(s). It is by taking into account this evidence in terms of its relevance, integrity and likelihood that the public prosecutor takes a decision on the public prosecution, which itself stems from the commission of the offense in question. The functions of directing the investigation and deciding on the direction to be taken by public prosecutors, and more specifically the public prosecutor, are both undergoing significant changes.

Firstly, the police investigation is gaining in interest and resources. It continues to exist alongside the preparatory investigation, whose specific features it's nibbling away at. What's more, the transformation of the police investigation, as intended by the legislature, is reconfiguring French criminal procedure by regularly calling into question the relevance of maintaining the investigative function. As a result, the public prosecutor has acquired unprecedented power and is now in clear competition with the investigating judge. **He now clearly dominates the preparation of criminal trials (A)**.

Secondly, the philosophy and content of the referral decision have been renewed. As successive legislators have sought to combat the lack of an effective criminal response, the public prosecutor is no longer constrained by a binary approach to public action. Between prosecution and '*dry*' dismissal of the case lies an impressive range of measures that the public prosecutor decides on. The principle of discretionary prosecution, which governs the prosecution process, now leaves considerable room for the office

[59] The public prosecutor himself directs the activities of the judicial police within his jurisdiction (*article 12 C.C.P.*), while the public prosecutor supervises the judicial police within the jurisdiction of the Court of Appeal. Supervision of the activities of the officers and agents of the judicial police is carried out by the Investigating Chamber, a court of second instance, which, when a case is referred to it, conducts an investigation. On this occasion, it may address observations to the police officer or agent concerned and, above all, "decide that he or she may not, either temporarily or permanently, carry out his or her duties, either within the jurisdiction of the court of appeal or throughout the national territory (...) (*article 227 C.C.P.*).

of the public prosecutor. **The latter now has considerable latitude in resolving criminal cases (B).**

A) The domination of the public prosecutor in the preparation of criminal proceedings

The criminal procedure follow one another at a frenetic pace without, for the time being, bringing about a complete change in the structure of the French criminal trial. Tied to the figure of the examining magistrate, a judge present in the judicial courts, this trial is based on three necessarily separate functions : prosecution, preparatory inquiry and judgment[60] .

Prosecution consists of bringing a case before an investigating or trial court in accordance with the procedures laid down by law. The aim is to ensure the effective application of substantive criminal law by the judge called upon to rule on the question of individual guilt. This may or must be preceded by an in-depth investigation phase entrusted to a judge by objective necessity[61] or by obligation under the law[62]. By virtue of the referral and the legal and human resources available to him under the applicable legislation[63], the investigating judge conducts an investigation at the end of which one or more persons may be brought before the competent court.

In the course of its (too many!) reforms[64] , French criminal procedure has steadily lost its specific features, not to say its relevance, to the pre-trial investigation. It is clear that this phase, which was once a major part of the criminal trial, has gradually lost its technical specificity **(1°)**, before losing its status as the guarantor of a fair trial. At the same time, the police investigation has seen an unexpected breakthrough in general principles of law, giving rise to a new form of procedural fairness **(2°)**.

1°) The loss of the technical specificities of the preliminary investigation

By law, the public prosecutor plays a central role in society's response to public order offenses. The CCP requires him to carry out "*all acts necessary for the investigation and prosecution of breaches of criminal law*"[65] and, to make this mission operational, adds that he directs the activities of the officers and

[60] It should be noted that only the separation of the prosecution and trial functions is expressly referred to in the preliminary article of the Code of Criminal Procedure. This same separation was also noted as a principle by the Conseil constitutionnel (*Cons. const. Feb. 2, 1995, n°96-360, DC.*). On the other hand, the separation of the investigation from the prosecution is only due to the fact that the investigating judge has been retained in French criminal procedure.

[61] The police investigation that preceded the public prosecutor's decision to request that the case be referred to an investigating court didn't yield sufficient evidence to justify referring one or more persons to the competent trial court.

[62] A preparatory inquiry is mandatory in criminal cases (*Article 79 C.C.P.*).

[63] Articles 79 to 230 C.C.P.

[64] Criminal procedure is currently undergoing a major overhaul : see the Orientation and Programming Bill for the Ministry of Justice 2023-2027, which was submitted to the Senate on 3 May 2023 after receiving the opinion of the Council of State (*CE, 13 April and 2 May 2023 n°406855*).

[65] Article 41 paragraph 1 C.C.P.

agents of the judicial police within the jurisdiction of his court[66]. He also has the power to call in the police directly, without an intermediary[67]. Thus, without being a judicial police officer himself, the public prosecutor has all the prerogatives attached to this function.

Everything is set out in the legislation to enable the public prosecutor to carry out his duties effectively. This is demonstrated by the fact that he coordinates and directs police activity, in particular by issuing instructions aimed at carrying out certain investigations, which he can't issue in a general and permanent manner but only on a case-by-case basis. This precaution, introduced by the Cour de cassation, is intended to ensure that the supervision of judicial investigative powers is systematic and effective, especially when the investigations extend over time[68] .

In addition, access to information for the public prosecutor, who is at the heart of the power to direct investigations, is meticulously organized. While it's perfectly possible for private individuals to send their complaints and denunciations directly to him, the public prosecutor is much more regularly informed of offenses detected by the police services[69]. These services are also obliged to forward their reports to him.

Through these measures, the public prosecutor has gradually taken on the role of manager of low-level criminal cases, which has led to a major overhaul of his practice. For several years now, almost all public prosecutors' offices have been using "*real-time handling*" of proceedings, whereby a police officer reports to the public prosecutor by telephone on a case in progress. This "as we *go*' management concerns flagrant offenses, cases in which a defendant has been taken into police custody, and even all fifth-class misdemeanor cases that are not complex.

As a method of criminal prosecution through which preparations for the trial are made, the preparatory inquiry is constantly being reduced and losing its specific features. This phase of the French criminal trial, which leads to the case being referred *in rem* to a judge, the investigating magistrate, is mandatory in criminal cases[70] and is required in other cases where the complexity of the situation calls for the mobilisation of specific skills, a degree of expertise and regular monitoring over time. The added value of this phase lay in the intervention of a real judge, the guarantor of individual freedom, thanks to which investigations that seriously infringed fundamental rights and freedoms could be provided for by law and used in a considered and, above all, necessary and proportionate manner in relation to the facts of each case.

For several decades now, although the preliminary investigation has been the preferred legal framework for imposing security measures before

[66] Article 41 paragraph 2 C.C.P.
[67] Article 42 C.C.P.
[68] In this sense : Cons. const. March 10, 2011, n°2011-625 DC ; Crim. Dec. 17, 2019, n°19-83.358.
[69] Such information is a legal obligation (*Articles 19, 27 and 29 C.PC.P.*), but failure to provide it has no effect on the validity of the acts performed (*Crim., Dec. 1, 2004, no. 04-80.536*).
[70] Article 79 C.C.P.

any judgement on the merits[71], its decline in numbers[72] and the questioning of its leading role are regularly the subject of debate[73] , there is no doubt that acts of taking evidence that were previously reserved for the preliminary investigation are now authorized in police investigations, especially when these are governed by the rules of flagrante *delicto*. There is ample evidence of this trend.

Firstly, certain special investigation measures, initially reserved for preliminary investigations, have been transferred to police investigations. This has been the case, for example, with "*sound recordings and fixing of images of certain places or vehicles*" since the entry into force of the Act of 3 June 2016[74], or, and for much longer, with "*interceptions of correspondence sent by electronic communications*"[75] . While this concerns the special law applicable to the fight against organized crime and not ordinary law, it nevertheless carries another message that is certainly more interesting. Measures that seriously infringe individual freedoms, which in police investigations couldn't be authorized by the public prosecutor because of his lack of independence, can now be authorized under a new procedural scheme that requires the same prosecutor to request the measure from a fully independent judge, namely the liberty and custody judge (*LCJ*).

The appearance of this new judicial figure, due to the entry into force of the Act of 15 June 2000, continues to redraw the pattern of protection of fundamental rights and freedoms within the rules of criminal evidence. The LCJ forms a highly effective pair with the public prosecutor, to whom the legislature may reserve the right to monitor only minor infringements of fundamental rights and freedoms caused by police investigations under his supervision[76]. As soon as an infringement becomes more serious, it will only meet the requirements of a fair trial if it involves a genuine judge with the necessary guarantees of independence and impartiality. This system clearly tends to overshadow the investigating judge, who would have had to be called upon for many procedural acts that are now entrusted to the LCJ, acting at the request of the public prosecutor[77] .

[71] These are judicial supervision, house arrest and pre-trial detention governed by articles 137 to 150 C.c.P.

[72] The key figures for the justice system for 2021 show that 2,792,471 cases will be dealt with and 17,694 new cases for examining magistrates.

[73] On the poor execution of the preliminary investigation : J. Dechepy-Tellier, *Les mutations de la chambre de l'instruction : propositions pour une reconstruction de l'avant-procès pénal autour d'une juridiction du second degré*, *op. cit.* 20 to 92.

[74] Article 58 of Act no. 2016-731 of 3 June 2016.

[75] Following the creation of the new article 706-95 C.C.P. by Act no. 2004-204 of 9 March 2004.

[76] This is the case, for example, for the monitoring of police custody by the public prosecutor throughout the period provided for by ordinary law (*48 hours including extensions*) - article 63 II C.C.P.

[77] This is the case, for example, for house searches without the prior consent of the occupant of the premises during a preliminary police investigation (*Article 76 C.C.P.*) ; geolocation when it requires the installation of a beacon requiring intrusion into a dwelling (*Article 230-34 2° C.C.P.)* ; or remote access to correspondence stored via electronic communications accessible by means of a computer identifier *(Article 706-95-1 C.C.P.*).

Secondly, the list of investigative acts contains references to the rules of law applicable in the flagrante *delicto* investigation. For example, the legal hours and procedures for authenticating the conduct of a home search carried out as part of a police investigation are applicable, by simple reference, in the context of a preliminary investigation[78]. The same logic applies to subpoenas issued to public bodies and legal entities under private law with a view to obtaining information useful in ascertaining the truth[79] and to the seizure of computer data[80] .

Thirdly, the legislator sometimes authorizes new investigative techniques or the use of data collected during an investigation, without specifying the framework in which this is possible. As a result, by adding to the "*common provisions*" of the Code of Criminal Procedure[81] , the legislator is increasingly equating police investigations with preparatory investigations. This is particularly clear from the rules governing geolocation, since this technique can be used in both of these contexts and for the same offenses[82]. The figure of the judicial authority supervising geolocation changes only according to the procedural framework in which it is used, and this is to follow the logic according to which the preliminary investigation is a prosecution method involving the public prosecutor as prosecuting party, so that control of the investigations must escape him. The only real impact of the scheme described is that a geolocation authorized by an investigating judge rather than a public prosecutor may be carried out for a maximum of four months, renewable, and not just one month[83] . The idea is that the longer the duration of a geolocation, the greater the impact on the right to privacy. Consequently, the protection of individual freedom and fundamental rights must be of a higher quality if it's to be considered effective, which means that the intervention of a prosecutor who isn't statutorily fully independent must be rejected. This approach seems to have become a "*model of its kind*" for the legislature, since it has just used it identically to authorize the capture and fixing of images in public places by means of airborne devices[84].

Finally, it's clear from the case law that the lists of evidence-gathering procedures established and regulated by the CCP are by no means exhaustive or restrictive. Traditionally, it has been accepted that the examining magistrate isn't obliged to use only the investigative acts specified in the Code to seek evidence of the materiality and imputability of

[78] Article 95 C.C.P. relating to the investigation refers to articles 57 and 59 C.C.P. relating to the flagrante delicto investigation.
[79] Referral to article 60-2 C.C.P. (*investigation in flagrante* delicto) by the provisions of article 99-4 C.C.P. (*preparatory investigation*).
[80] Reference to article 57-1 C.C.P. (*investigation in flagrante* delicto) by the provisions of article 97-1 C.C.P. (*preparatory investigation*).
[81] Articles 230-1 to 230-53 C.C.P. Act n°2023-1059 of 20 November 2023 about the Ministry of Justice's policy and programming document 2023-2027 continues this trend with the creation of remote activation of connected devices.
[82] Felony or misdemeanor punishable by at least 3 years' imprisonment (*article 230-32 1° C.C.P.*).
[83] Article 230-33 C.C.P.
[84] Articles 230-47 to 230-53 C.C.P. created by Act no. 2022-52 of 24 January 2022.

the facts before him[85]. The law grants him a certain freedom to investigate, although this is necessarily limited by the imperative nature of the general principles of law relating, in particular, to the taking of evidence in criminal proceedings. This relative freedom may not unduly infringe privacy[86] or compromise the rights of the defense[87]. Until recently, this freedom was an added value in the preparation of criminal proceedings, since no real freedom of action had yet been expressly granted to the judicial police acting under the authority and control of the public prosecutor. Drawing a clear parallel with the powers of the examining magistrate, the Criminal Division of the Court of Cassation ruled that "*the public prosecutor has the power under articles 39-1 and 41 of the CCP to carry out video surveillance on the public highway, under his effective control and in accordance with the procedures he authorizes in terms of duration and scope, for the purpose of investigating breaches of criminal law*"[88]. This decision thus makes it clear that carrying out an act not governed by the law isn't fundamentally ruled out during a police investigation, as long as, like the investigating judge, the public prosecutor can carry out all the acts necessary to establish the truth.

However, there's an important qualification to this approach : the public prosecutor, subject to hierarchical subordination, can't ensure the same level of protection of freedoms as a judge. Accordingly, this solution means that it must be systematically verified that an act not governed by the law causes only a slight infringement of one or more fundamental rights[89].

This gradual assimilation of the police investigation to the pre-trial investigation and, by the same token, that between the public prosecutor and the investigating judge, sketches out a new form of procedural fairness.

2°) The emergence of a new procedural fairness

The introductory article of the CCP sets out the spirit of the rules of criminal procedure based on the requirement of fairness. Such a requirement is seen as a guarantee of the rights and freedoms of private parties to criminal proceedings, providing them with the means to avoid the over-power of the weapons used to defend the interests of society. This approach implies that the public prosecutor can't claim that the fairness and adversarial nature of the proceedings have been undermined, on the grounds that he's not the

[85] In accordance with the provisions of article 81 al. 1 C.C.P. "*the investigating judge shall, in accordance with the law, carry out all acts that he or she deems useful to establish the truth*".

[86] Crim., Dec. 11, 2018, n°18-82365 relating to the installation of a video surveillance system on the public highway.

[87] Crim., Dec. 12, 2000, no. 00-83.852 relating to the hearing of a witness under hypnosis.

[88] Crim. Dec. 8, 2020, no. 20-83.885.

[89] The Court of Cassation stated in its decision that "*the interference in private life that results from such a measure being by its very nature limited and proportionate in relation to the objective pursued, it is not contrary to Article 8 of the European Convention on Human Rights*". On the other hand, where the infringement of fundamental rights is serious, the public prosecutor can't take the initiative of authorizing such measures alone. Prior authorization or review by a judge is required. On this subject : See the case law on access to traffic and location data, 4 judgments handed down on 12 July 2022 by the Criminal Division of the Court of Cassation (*Appeals no. 21-83.710, no. 21-83.820, no. 21-84.096 and no. 20-86.652*).

beneficiary of the guarantee provided for in article 6§1 ECHR[90]. However, this approach doesn't mean that the public prosecutor systematically opposes the interests of suspects[91]. Although he doesn't take on the role of judge, the public prosecutor today borrows certain characteristics of a judge. The regular reforms of criminal procedure are gradually shifting the role of the public prosecutor towards protecting the essential aspects of a fair trial : impartiality in the conduct of investigations and access to the adversarial process.

Many criticisms can be leveled at the role played by the public prosecutor. The institution is often criticized for lacking objectivity, neutrality, moderation or impartiality in the conduct of criminal investigations. Criticism is growing as the legislature increases the prerogatives of the public prosecutor and couldn't touch a judge, who inspires more confidence since some people attribute to him any prejudice. Traditionally, the requirement of impartiality attached to a fair trial referred only to judges and not to the representative of the prosecution or the defense. The public prosecutor didn't have to comply with this guarantee, although he remained subject to the duty of loyalty, which obliged him not to distort the reality of the case before the criminal court[92] . Prompted, no doubt, by the trend towards making the public prosecutor a central body in the preparation of criminal proceedings, the legislature didn't turn a deaf ear and wished to accompany the extension of the public prosecutor's prerogatives with new guarantees. It was against this backdrop that the Act of 25 July 2013 affirmed the requirement that "*the public prosecutor shall prosecute and enforce the law in accordance with the principle of impartiality to which he is bound*"[93]. This means that the public prosecutor must ensure that police investigations are conducted in a manner that is both inculpatory and exculpatory, and that respects the rights of all parties. In addition, by using the proportionality test for investigative acts and the principle of fairness in obtaining evidence and statements, the public prosecutor can specifically demonstrate his impartiality. While this development follows in the footsteps of the transformation of prosecutors into "*quasi-judges*", doubts inevitably remain. While individual judges may be challenged if their impartiality is called into question, this procedure can't apply to public prosecutors[94]. Similarly, the proven partiality of an investigator, despite being placed under the direction of a public prosecutor ensuring the impartiality of the investigations, has no effect on the validity of the proceedings unless it creates a disproportion[95].

Under these conditions, the obligation of the public prosecutor to be impartial would only have a deontological effect. It renews the spirit of its members by pushing them towards neutrality and freeing them from possible prejudices.

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[90] Crim. Sept. 8, 2015, no. 14-84.315.

[91] The relationship between the public prosecutor and the persons being prosecuted is necessarily different, since we are dealing with a situation after the prosecution, in which the same prosecutor assumes the role of prosecuting party or public accuser.

[92] Crim. Jan. 6, 1998, no. 97-81.466.

[93] Article 31 C.C.P.

[94] Article 669 al. 2 C.C.P.

[95] Crim. Jan. 22, 2014, no. 13-81.289.

In the same vein, the adversarial principle, another fundamental guarantee attached to any kind of trial, has undergone spectacular development in French criminal procedure. Whereas, until recently, it was confined to the post-prosecution period, being intimately linked to the status of "*party*" to the trial, it made its appearance in the police investigation phase with the Law of 3 June 2016[96]. This text created an adversarial phase, control of which was immediately entrusted to the public prosecutor, for long-term police investigations. The essential idea here is to grant access to the procedural file to persons involved in the police investigation and having interests to defend, without however being (*at least yet*) parties. This development has therefore sent out a new message : the public prosecutor plays an active part in procedural fairness by gauging concrete access to the rights of the defense, and by acting as a judge to whom a request for an act would be addressed.

The considerable renewal of the judicial function of the public prosecutor's office, which is identified with investigations prior to the decision on public action, is consequently reflected in the rules governing this very decision-making process.

B) The public prosecutor's latitude in terms of criminal response options

Although the functions of the public prosecutor's office are very varied, the initiation of public proceedings with a view to requesting the application of the law before the criminal courts is essential. The public prosecutor's office is involved in the entire criminal response process to the commission of an offense, since if it supervises police investigations it's essentially with a view to taking a decision on the public prosecution, in the light of the information gathered by this investigation, and to bringing the case before a court if necessary. When the criminal trial ends in a final conviction, it's still the role of the public prosecutor to ensure that the penalties imposed are enforced[97]. It's through the public prosecutor that the meaning of the sentence is given concrete expression.

As regards criminal prosecutions, the law gives the public prosecutor considerable power. He not only decides whether to prosecute, but also how. In this respect, he may decide that, after a preliminary police's investigation, the prosecution will take the form of a direct summons to appear before the criminal court without opening an investigation. Such a decision does not deprive the person concerned of a fair and equitable trial since, before the trial courts, he enjoys guarantees equivalent to those he would have enjoyed before an investigating judge[98] .

[96] This law led to the revision of article 77-2 C.C.P., which has since been further amended by the Act of 22 December 2021. Henceforth, the public prosecutor may either indicate to the accused and identified victims that all or part of the case file is available to them ; or receive such a request in a wider range of cases (*art. 77-2 II C.C.P.*).

[97] Article 708 C.C.P.

[98] Crim, PPRC, Feb. 11, 2014, no. 13-88059.

This gives the prosecutor a certain degree of discretion in deciding what action to take on the complaints and reports[99] he receives. This is clear from the terms of article 40-1 CCP which states that if the identity and domicile of the perpetrator of an offense are known, the public prosecutor "*shall decide whether it's appropriate*" to prosecute, to implement an alternative prosecution procedure or to discontinue the proceedings, provided that this is justified by the particular circumstances in which the offense was committed.

The public prosecutor isn't completely free to decide whether or not to prosecute.

Firstly, the law itself obliges him to initiate them, by means of an investigation, as soon as the facts reported to him appear to be of a serious crime. However, this obligation needs to be put into perspective, as the public prosecutor has the power to classify the facts[100] and thereby disqualify them. Also, driven by a desire to relieve congestion in an assize court, the prosecutor may be tempted to choose a less serious classification than that which is apparent from the situation. Furthermore, without disguising the facts in this way, the public prosecutor isn't subject to any deadline for requesting the opening of an investigation. He's thus free not to request it immediately in order to retain control of the situation. This control over the use of the preliminary investigation is less and less hampered by the fact that the alleged victim of the facts, who meets the conditions for admissibility of a civil action[101], can himself request that the matter be referred to the investigating judge by lodging a complaint with the civil party. For several years now, the legislature has been seeking to reduce the autonomy of the injured party by two means. Firstly, it has taken account of the seriousness of the facts to exclude the right to bring a civil action in the case of minor offenses and to prevent direct access to the examining magistrate in the case of serious offenses[102]. Secondly, it reduces the number of cases in which an investigation is actually opened following a complaint from the victim by recognizing more cases in which the investigating judge may refuse to inform[103].

Secondly, while a victim's complaint is by no means a necessary precondition for prosecution[104], some offenses require it in exceptional cases,

[99] There are many sources of information since, in addition to any witnesses to an unlawful situation, the Public Prosecutor is informed by any authority, public officer or civil servant who acquires knowledge of a crime or offense in the performance of their duties (*Article 40 in fine C.C.P.*).

[100] The public prosecutor isn't bound by the classification given by the investigators to the facts recorded in their reports (*Crim., Jan. 23, 2001, no. 00-84439*).

[101] Article 2 C.C.P. gives the benefit of a civil action to any person who claims to have been directly harmed by an offense that causes him a loss that is both certain and personal.

[102] Article 85 C.C.P.

[103] Article 86 C.C.P.

[104] Crim, May. 9,1885. It should be noted that the prior complaint from the tax authorities previously necessary for the prosecution of tax fraud and known as the "*Bercy lock*", is a prerequisite having been abolished by Act no. 2018-898 of 23 October 2018 *on the fight against fraud.*

as they essentially affect the privacy of individuals and have much less impact on the social order[105].

Lastly, the freedom to prosecute must be reconciled with the unavailability of the public prosecution, which prevents the prosecutor from dropping the charge and halting the course of the trial[106].

But the extent of the prosecutor's decision-making power can be measured above all by the spectacular development of alternatives to prosecution and decision-making tools.

The first type of criminal response doesn't involve prosecution, but nevertheless subjects the person who admits to the offense to one or more obligations, the full performance of which extinguishes the prosecution[107]. This is essentially the case with the "*settlement*" scheme, which the public prosecutor may propose directly or through an authorized person, and the purpose of which is to subject the person concerned to one or more obligations, principally that of paying a composition fine to the Treasury. Since it was introduced by the Act of 23 June 1999, this alternative has become much more widespread. It's no longer reserved for individuals of legal age[108] and for a list of specific offenses[109], and authorizes the public prosecutor to use an extremely wide range of measures, similar to the personalization tools available to a judge concerned with choosing and motivating the appropriate criminal sanction for the offender and his situation[110]. The transformation of the public prosecutor into a "*quasi-judge*" is clear in this respect, since the reform introduced in 2019[111], the president of the criminal court is no longer required to validate certain settlements[112].

The latter represent measures that the public prosecutor can initiate with the offender when they are likely to ensure compensation for the damage caused to the victim, put an end to the disorder resulting from the offense or contribute to the rehabilitation of the offender. The idea is to give the public prosecutor the opportunity to avoid bringing a case before a criminal court when it appears to him that the situation can be resolved by

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[105] E.g. : invasion of privacy - Article 226-6 P.C.

[106] Crim, Feb. 20, 2007, Criminal Gazette, no. 52.

[107] These alternative measures are the settlement (*Articles 41-2, 41-3 and 41-3-1 A C.C.P.*) and the judicial convention on public's interest (*Articles 41-1-2 and 41-1-3 C.C.P.)*, which only concern legal entities accused of one or more breaches of economic transparency and probity, or in environmental matters.

[108] Both adults (*Article 41-2 C.C.P.)*, minors aged 13 and over (*Articles L.422-3 and L.422-4 J.C.J.C.*) and legal entities (*Article 41-3-1 A C.C.P.*) are subject to settlement. It should be noted that Act no. 2014-896 of 15 August 2014 created the measure of penal transaction by judicial police officer, which was then repealed by the 2019 reform, due to a lack of practical application.

[109] Since the entry into force of Act no. 2004-204 of 9 March 2004, penal composition has been available for all offenses punishable by a fine or imprisonment of up to 5 years.

[110] The public prosecutor may now propose that the offender perform unpaid work, take a citizenship or thematic course, not issue cheques, not leave the country, not meet certain people or go to certain places, submit to a therapeutic injunction, etc. See 1° to 19° of article 41-2 CCP.

[111] Act no. 2019-222 of 23 March 2019.

[112] This is the case for all settlements proposed by the public prosecutor in relation to a minor offense or an offense punishable by up to 3 years' imprisonment, provided that the proposed fine does not exceed €3,000.

a means that, when successful, leads to the case being closed or the statute of limitations running out. Once again, the legislature intends to further encourage this type of decision by being inventive with regard to the means entrusted to the prosecutor[113].

A decision to discontinue proceedings is considered to be a purely administrative decision, which the public prosecutor can reverse as long as the statute of limitations hasn't expired. There are a wide variety of reasons for such a decision, including legal grounds, failure to solve a crime, the appropriateness of prosecuting, or even the insignificance of the damage, the personality of the offender or the actual compensation paid to the victim[114]. The law only requires the public prosecutor to give reasons for his decision, taking the risk that his hierarchical superior, the public prosecutor at the Court of Appeal, may consider the decision to be deficient following a challenge sent to him by the person who reported the facts[115].

The public prosecutor is the cornerstone of the French criminal justice system, benefiting from functional changes that give him greater autonomy both in conducting police investigations and in deciding on the direction of criminal cases. However, this hitherto unchallenged trend can only be consistent with the guarantees of a fair trial if the public prosecutor's office undergoes a formal change in its status at the same time. Such a change is certainly underway, but there is far from unanimity as to the stage of development it has now reached.

Part 2: The formal transformation of the French public prosecutor's office

French criminal procedure seems to be set on a course, chosen by the legislature, that involves reconciling the maintenance of the traditional figure of the investigating judge with the gradual, though not radical, change in the status of a public prosecutor's office now used as the spearhead of a new form of procedural fairness. In terms of the purely formal evolution of the institution, while the statutory independence of public prosecutors remains a wish of some, the reality is undoubtedly centered on maintaining the link between these magistrates and the executive while seeking to clean up this link by rejecting harmful interference. The formal transformation of the Public Prosecutor's Office that is currently taking place is therefore undoubtedly relative in that it aims to build confidence in the operation of the justice system by maintaining the link between the Public Prosecutor's Office and the Minister of Justice. However, many arguments have been put forward to justify the need for a radical change in the status of the public prosecutor's office, bringing it into line with the status of judges. There are **thus two approaches to the formal transformation of the public**

[113] Article 41-1 C.C.P., which concentrates the decision-making tools, is constantly being added to by the legislator. For example, in 2021 alone, two new acts (*No. 2021-401 of 8 April 2021 and No. 2021-1729 of 22 December 2021*) have respectively added restitution or restoration of the premises or things damaged by the offense, and a probationary criminal warning.

[114] J. Dechepy-Tellier, *La procédure pénale en schémas*, Ellipses, 4th edition, 2022, p. 458.

[115] Article 40-3 CCP. It should be noted that, following a hierarchical appeal against a decision to discontinue proceedings, the general prosecutor may instruct the public prosecutor to initiate proceedings - article 36 CCP.

prosecutor's office : one of a relativist nature, which is currently being pursued (§1) ; and the other of an absolutist nature, which some would like to see (§2).

§1) Relativist approach to the formal transformation of the public prosecutor's office

For several years now, the legislature has been working to strengthen the guarantees of judicial independence in order to avoid a feeling of mistrust towards the judiciary. It's undoubtedly aware of the context of suspicion towards members of the public prosecutor's office, which it hasn't yet managed to put an end to[116]. The reason for this suspicion is that the constitutionally enshrined principle of the unity of the judiciary[117], which includes public prosecutors within the authority that guards individual freedom, appears to be contradicted by the fact that the same magistrates are subject to the authority of the Keeper of the Seals.

Unlike their colleagues on the bench, public prosecutors have no guarantee of security of tenure [118] and their disciplinary system and conditions of appointment are always left to the discretion of the Minister of Justice.

This ambivalence has prompted reactions from both some French legal scholars[119] and the Court of cassation. The former has long argued that the desire to abolish the investigating judge, which would result in the preparation of the substantive criminal trial being concentrated in the hands of the public prosecutor, should be accompanied by new statutory guarantees for the benefit of the latter. For the second, the public prosecutor was initially not considered to be a judicial authority within the meaning of Article 5§3 ECHR because he didn't offer the guarantees of independence and impartiality required by this text and because he was the prosecuting party[120]. This decision followed on immediately from the Strasbourg Court's ruling refusing to treat the French public prosecutor's office as a genuine judicial authority, especially as regards the protection of the right to liberty and security[121]. This was in contrast to the view of the Constitutional Council, which considered that magistrates were indeed members of the judicial authority, the guardian of individual freedom[122]. In its view, the subordination of members of the public prosecutor's office to the Keeper of the Seals is limited by the freedom of action granted to these magistrates, in

[116] This is evidenced by the entry into force of an act specifically dedicated to restoring confidence in the judiciary - Act no. 2021-1729 of 22 December 2021, cited above.
[117] Principle reaffirmed by Cons. const. July. 22, 2016, no. 2016-555 PPRC.
[118] Covered by article 4, paragraph 1 of the aforementioned Order no. 58-1270 of 22 December 1958.
[119] M. Delmas-Marty (ed.), *La mise en état des affaires pénales*, *Commission justice pénale et droits de l'homme*, Rapports, Doc. fr, 1991, spec. p. 129 ; P. Truche (ed.), *Rapport au Président de la République de la commission de réflexion sur la justice*, 1997, p. 10.
[120] Crim. Dec. 15, 2010, no. 10-83.674, bull. crim. no. 207; Crim. Jan. 18, 2011, no. 10-84.980, bull. crim. no. 8; Position endorsed by the Plenary Assembly, June. 15, 2012, no. 10-85.678.
[121] ECHR, 23 November 2010, 5th section, n°37104/06, *Moulin c/ France*, A.J.D.A., 2011. 889, chrono. L. Burgorgue-Larsen. S. Lavric, « Affaire *Moulin contre France* : le parquet dans la tourmente », Dalloz, 24 novembre 2010.
[122] Cons. const., Dec. 8, 2017, no. 2017-680 PPRC.

particular because their speech in court remains free[123]. However, the submission of public prosecutors to the aforementioned obligation of impartiality led the Criminal Division of the Court of Cassation to align itself with the vision of the Constitutional Council, in a spectacular reversal[124] .

For its part, outlining the characteristic features of the concept of judicial authority, the Court of Justice of the European Union (*CJEU*) ruled that the French public prosecutor had the necessary guarantees of independence to issue a European arrest warrant. It doesn't object to a prosecuting authority being an integral part of the judicial authority, provided it enjoys certain guarantees of independence and effective supervision is provided for. Moreover, it draws attention to the fact that the desired independence must derive in particular from the status of the authority in question, which mustn't run the risk of its decisions being directed by the executive because of a subordinate relationship[125].

This approach by the CJEU hasn't failed to raise eyebrows in France, and some have seen it as a flagrant denial of "*the legal evidence of the hierarchical and statutory dependence of the public prosecutor's office on the Minister of Justice*"[126]. It can, however, be understood from the point of view of the very intensity of the subordination of public prosecutors when it emerges from their status. On this point, the change is once again very real in France.

Firstly, it's noteworthy that the closer relationship between the High Judicial Council (*HJC*) and the public prosecutors clearly tempers the latter's subordination to the Minister of Justice. The HJC, which appeared in the Act of 30 August 1883 on the reform of the organisation of the judiciary and became autonomous with the adoption of the Constitution of 27 October 1946, was initially responsible only for the management of judges. Public prosecutors, on the other hand, were managed directly by the Minister of Justice. Gradually, an interface emerged, no doubt thanks to the case law of the Constitutional Council in favor of attaching the public prosecutor's office to the judicial authority, but also to the work of the Vedel committee[127], which wanted to establish a public prosecutor's office responsible for ensuring "*equal application of the law*"[128]. A consultative commission for the public prosecutor's office gives an opinion on proposed appointments to the public prosecutor's office by the minister, and a disciplinary commission does the same for sanctions. Since the Organic Law of 27 July 1993, a single Council has been responsible for all magistrates, with the creation of two panels, one for the judiciary and the other for the public prosecutor's department, whose views are harmonized at plenary meetings. The HJC's powers in matters of appointment and discipline therefore absorb the powers of the aforementioned committees. However, the HJC only gives a simple opinion on proposals for the appointment of public prosecutors and isn't

[123] Article 33 C.C.P.
[124] Crim. May. 6, 2014, no. 13-82.281.
[125] CJEU, 1st Ch. Dec. 12, 2019, Case C-566/19 PPU, *Parquet général du Grand-Duché de Luxembourg.*
[126] O. Cahn, *A Christmas Carol Luxembourgeois : la CJUE consacre l'indépendance du parquet français*, Rev. UE 1/2020.
[127] Consultative Committee for a revision of the Constitution, chaired by G. Vedel, which submitted its report to the President of the Republic on 15 February 1993.
[128] Op. cit. p. 51

consulted on appointments made by the Council of Ministers, which concern public prosecutors at appeal courts and the public prosecutor at the Court of Cassation.

The major innovations of the 2008 constitutional reform[129] are as much to submit to the opinion of the Supreme Administrative Court the draft appointments of public prosecutors appointed until then by the Council of Ministers alone[130], as to put an end to the presidency and vice-presidency of the Supreme Administrative Court, which until then had been held by the Head of State and the Keeper of the Seals respectively[131] .

In addition, the most recent Ministers of Justice have undertaken to systematically follow the opinions on appointments and discipline issued by the panel responsible for public prosecutors and, *de facto*, no unfavorable opinion from the panel responsible for public prosecutors has been overruled since 2008, which in reality means that all magistrates receive identical treatment. This practice, whereby the Keeper of the Seals systematically follows the opinion of the Council, even though he isn't constitutionally obliged to do so, was followed for the first time between 1997 and 2002. In practice, an unfavorable opinion from the panel responsible for public prosecutors has not been overruled since 2008.

Despite these significant advances, some continue to advocate a radical solution, namely that of aligning the status of the public prosecutor's office with that of the head office. This prospect could be justified, in part, by the problem of information feedback on sensitive cases[132], whereby the Minister of Justice is free to request any information he wishes on all ongoing proceedings, unconditionally and without control[133]. According to senior magistrates, the effect of this practice is to cast "*doubt and suspicion on the use that may be made of this information by the Director of Criminal Affairs and Pardons (...) and then by the Minister of Justice and his cabinet*". In their view, it warned of "*possible secret ministerial advice on the direction of investigations*"[134]. However, although the practice was challenged on the basis of a priority question of constitutionality, claiming that it was contrary to the principles of independence of the judiciary and separation of powers [135] , the

[129] Constitutional Act no. 2008-724 of 23 July 2008 *on the modernisation of the institutions of the Fifth Republic.*

[130] It should also be noted that since the reform carried out by Organic Law no. 2016-1090 of 8 August 2016 *on statutory guarantees, ethical obligations and the recruitment of magistrates and on the Supreme Council of the Judiciary*, all public prosecutors are now appointed by simple decree of the President of the Republic.

[131] Since then, the chairmanship of the HJC has been held by the public prosecutor of the Court of cassation (*art. 65 para. 3 of the Constitution*).

[132] They take the form of specific reports identified in articles 35 and 39-1 C.C.P.

[133] This practice dates back to the 1820's when public prosecutors wrote reports on the political situation in their region, which they sent to their superiors. It's governed by the circular of 31 January 2014 presenting and applying Act no. 2013-669 of 25 July 2013.

[134] Inaugural national conference of first's présidents, *Statut du parquet français : la note de la Conférence des premiers présidents au CSM*, Dalloz actualité, Le droit en débats, 2 September 2020.

[135] Such a contradiction would stem from the infringement of the freedom to take public action by the reporting system.

Constitutional Council ruled that it complied with the constitutional provisions[136].

This new demonstration of the protectionism accorded by the Constitutional Council to the status of the public prosecutor's office isn't entirely reassuring. An absolutist approach to the formal transformation of the institution continues to be favored by some.

§2) Absolutist approach to the formal transfer of the Public Prosecutor's Office

One of the distinctive features of the French justice system is the unity of the judiciary, seen as a principle of constitutional value. This principle has long been the subject of intense debate. Some would like to see this unity maintained on the sole condition that prosecutors become statutorily independent, while others believe that it's now time to effectively separate the prosecution service from the judiciary. Two methods are thus emerging, each absolute, for effecting the formal transformation of the public prosecutor's office.

If the statutes of magistrates are to be aligned, the practice of the HJC giving its assent to the appointment and discipline of public prosecutors must be enshrined. The government mustn't be able to override an unfavorable opinion from the HJC. This is also the approach taken by the HJC itself, which, in an opinion dated 15 September 2020, called for the alignment in question because it would help "*to strengthen the confidence that citizens must be able to place in the justice system*". The HJC goes even further, expressing the wish to be able to make proposals regarding the appointment of public prosecutors, so that it can take responsibility for the choice.

The solution of a clearer separation between prosecutors and judges would make it possible to avoid entanglements and confusion in the respective roles of prosecutors and judges. Prosecutors, whose role is to be the prosecuting party in any criminal case brought to their attention, should be organized both statutorily and functionally differently from judges, whose main task would be to decide the merits of the case in complete independence.

These two solutions necessarily involve rethinking French criminal procedure, essentially in terms of its institutional structure, its stages and its overall balance. They have also given rise to numerous discussions during the Estates General on Justice, which was launched in October 2021 and whose eponymous committee submitted its report on 8 July 2022[137] .

The work that came out of the Estates General once again showed a certain attachment to the figure of the investigating judge. The solitude of this function was seen as synonymous with the efficiency of investigations and performance in international cooperation in criminal matters. For the majority option, the slowness of the preliminary investigation, which all too often runs up against the reasonable time limit, needs to be resolved through a variety of solutions, including better measures to combat abusive filing of civil actions, reducing certain time limits, speeding up the process of closing

[136] Cons. const. no. 2021-927, sept. 14, 2021, PPRC, Rec. Dalloz 2021, p.1674.

[137] This report is available online at the following address https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/285620.pdf

the investigation and reducing the number of tedious formalities. Above all, the proposal has been made to create a new procedure for appearing in court for the purposes of a supplementary investigation, under which security measures could be decided during the police investigation and for a fixed period. Such a prospect would certainly reduce the need for a proper investigation and would continue the trend towards extending the prerogatives of the public prosecutor acting jointly with the liberty and custody judge.

What emerges from these recent proposals is a firm desire to maintain the French tradition, which continually seeks to reconcile a hybrid approach to the functions of the public prosecutor with the requirements of the judicial guarantee, imposing a significant involvement of a fully independent judge, from the phase of preparation of the judgment on the merits. For its part, the doctrine continues to try to convince us that a change in the procedural model that tempers the over-power of the public prosecutor's office by the reaction of a judge in charge of investigations and liberties, who is himself subject to review by a higher collegiate court, is the desirable development[138].

It has to be said that, for the time being, even though the opportunity to rethink the entire French criminal justice system has arisen once again with the creation of the European Public Prosecutor's Office, the legislature has opted for the co-existence of two models of public prosecutor's office rather than making the choice of homogeneity[139]. The French delegate European Public Prosecutors are not subject to the national provisions relating to hierarchy, the powers of the Minister of Justice and the functions relating to the deployment of criminal policy[140]. They are therefore much more independent than the members of the national public prosecutor's office. In addition, the investigating judge is sidelined and his powers are divided between the delegated European Public Prosecutors and the judge responsible for liberties and detention.

All this gives the impression of an experimental phase. The legislature hasn't yet decided to go back on the tripartite division of criminal functions, and the creation of the European Public Prosecutor's Office gives it the opportunity to observe a new model of criminal procedure in which the prosecutor, who is slightly more independent than at present but not entirely so, acts under the watchful eye of a judge who protects individual freedoms.

The French public prosecutor's office has clearly not completed its transformation.

Johan Dechepy-Tellier
Senior Lecturer
Qualified to direct research
Rouen Normandy University
johan.dechepy@univrouen.fr

[138] Look at the alternative model proposed by J. Dechepy-Tellier *in Les mutations de la chambre de l'instruction*, *op. cit.* pp. 467 and next.
[139] J. Leblois-Happe, « *Les dispositions de la loi du 24 décembre 2020 relatives au Parquet européen ou l'avènement du procureur « augmenté »* », A.J. pénal 2021 p. 64.
[140] Article 696-109 al. 2 C.C.P.