The Prosecution and the legal system in France

1- The organization of the French judiciary is characterized by its pyramidal nature and its strict separation between the ordinary court system and the administrative court system. The ordinary court system distinguishes between civil and criminal justice. Within the ordinary court system civil matters are, in certain cases, heard in first instance by specialized courts whilst criminal matters, which have an inquisitorial type procedure, are heard by distinct criminal courts according to the seriousness of the crime.

Civil law applies to issues between private individuals (i.e. personal matters or matters of property). In case of civil actions, plaintiffs may receive damages, but neither fines nor imprisonment may be imposed. Civil actions are judged mostly by the District Court and the Regional Court, depending on the amount of the financial compensation directly related to the seriousness of the loss or damage suffered by the claimant.

Criminal law ensures that laws are enforced. Here too, cases may be heard in courts of original jurisdiction or in the court of appellate jurisdiction. The courts of first instance include the Police court for petty offences and the Correctional court for crimes such as unarmed robbery or fraud. The former can impose sentences such as fines and the latter can impose penalties ranging from community service to a ten-year prison sentence. Offences carrying such sentences are also called “offences triable either way” or “in-between offences” taking into account the criterion of the seriousness of the offence. The Assize court is competent for serious crimes such as armed robbery, rape and murder, for which sentences up to life imprisonment may be imposed. The appeal courts may re-examine the verdicts of these courts. Hearings are public, except under special circumstances which could be linked to the nature of the offence, the age of the offender (e.g. the juvenile courts.)

Finally for both criminal and civil matters, the final stage can be reached by seizing the Supreme Court or more precisely the Court of cassation only ruling on a point of law. So at the top of the ordinary court hierarchy stands the Court of Cassation. It is the judge of judges' decisions. It may also give its opinion upon the request of other courts of law, contribute to the drawing-up of jurisprudence and be the guarantor of the application of the law by the courts.

2- The independence of the judiciary is a basic condition of a state truly governed by the rule of law. In France such independence is laid down in the Constitution which entrusts the President of the Republic with being its guarantor. A High Council of the Judiciary assists him in this task and is also the monitoring body with power over appointments and discipline.

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1 In French the “Tribunal d’Instance”.
2 In French the “Tribunal de Grande Instance”
3 Disputes between private individuals in civil matters when the amount at stake is below 7600 euros will fall with the jurisdiction of the District Court. Beyond 7600 euros, the case will fall within the remit of the Regional Court.
4 As far as the administrative court system is concerned, the highest court is the Council of State (« Conseil d’Etat »). Administrative tribunals settle disputes between a public body and a private entity or between two public bodies, the Council of State, being the supreme administrative court in France.
5 “This Supreme Court having jurisdiction over the whole of France, consists of five civil chambers and one criminal chamber. The first three divisions are called the First, Second and Third division, the remaining two the Commercial and Financial Divisions and the other the Social Division”. “The Court of Cassation is not a court that you should appeal to unless the case is one which is not covered by the law”. P. De Cruz, Comparative law in a changing world, p. 72.
6 Article 64 of the French Constitution: “The President of the Republic shall be the guarantor of the independence of the Judicial Authority”.

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Its prerogatives are more significant concerning the judges of the ordinary courts, whose permanence is constitutional\(^7\), than the public prosecutors who come under the responsibility of the Minister of Justice\(^8\).

3-The very first appearance of the prosecution in France dates back to the 12\(^{th}\) century. During this period called the “Ancien Régime”, criticism arose against a common practice by which a case would enter the criminal justice process if and only if there had been a private denunciation. Thus no action would be undertaken unless the victim and/or his or her relatives would point out the accused. This undermined the efficiency of the system as it soon put severe pressure on private prosecution not to initiate any action\(^9\). As a remedy, judges delegated the power to investigate and initiate proceedings to public officials. Gradually they supplanted individuals as they took charge of criminal investigations, consequently tending to infringe the rights of the victims as well as those of the accused.

The criminal process formerly described as oral, public and adversarial became written, non adversarial and ruled by secrecy. The establishment of these public officials clearly showed the shift from the accusatorial to the inquisitorial system. These characteristics were predominant after the investigating or examining judge was officially instituted in 1791\(^10\). For that reason there has been a long-standing assertion that the French ‘Ministère public’ belongs to the ‘inquisitorial’ system. But on top of that it has since then been assimilated to the prosecution of all offenders, maintaining public security and contributing to the protection of the common interest.

Members of the prosecution are called in French “magistrats du parquet”. The word ‘parquet’ literally means "wooden floor". This is because during trials the prosecution pleaded standing on the floor as opposed to the judges who used to sit on an elevated platform. This also explains why judges are sometimes referred to as "sitting magistrates" or "magistrates of the Seat"\(^11\) while prosecutors are sometimes referred to as "standing magistrates"\(^12\).

This has so far remained unchanged which is why the core of the legal system is a body of civil servants: the magistrates. The “sitting magistrates” deliver verdicts, act as judges and presiding judges in the various courts whereas the “standing magistrates”, or Prosecution defend public order and demand that the Law be enforced in the name of society as a whole and of the State. This group consists of public prosecutors who are assisted by clerks, whose task among others is to note verdicts and sentences.

4-In France, to become a magistrate, education and training are different from those to become a lawyer\(^13\). Yet legal education is the same. There about 50 000 lawyers in France, as compared to 8200 magistrates (prosecutors and judges).\(^14\)

7 Article 64 of the French Constitution: “Judges shall be irremovable from office”.
8 Article 5 Ord. 58-1270 of 22 dec. 1958 “members of the prosecution report to their immediate superiors and are under the authority of the Keeper of the Seals, Minister of Justice”. See also article 30 of the Criminal Code of Procedure (CCP).
10 The investigating judge conducts the investigations in the case of severe crimes or complex enquiries. Despite the high media and fictional coverage of the judges, they are actually used in a small minority of cases, either the most severe crimes (murder, rape, etc.), and for moderately serious crimes (embezzlement, misuse of public funds, corruption, etc.) when the case has a certain complexity.
11 Magistrature assise ou magistrats du siège
12 Magistrature debout
13 The student has to pass a bar examination called the ‘CRFPA’= centre régional de formation à la profession d’avocat’. Upon passing the bar, the graduate become a probationary lawyer for at least 3 years, during which time there is a further course work and practical training. When the training period is completed, the French law graduate becomes a lawyer (‘avocat’).
14 Ministry of Justice, 2009
Thus once the student has undertaken a law degree and a master in law, he has to pass an annual competitive national examination. The student prepares it by taking a special program in his or her last year of law studies. The successful candidate must then undergo a period of formal studies at the National School of the Judiciary located in Bordeaux. This period is then followed by a series of short practical internships in various police departments, law offices, prisons, courts and the Ministry of Justice in Paris. The trainee chooses its area of specialisation and determines whether he wants to work as a judge or as a prosecutor. There is a final exam and the student is ranked on the basis of his or her grades and evaluations of supervisors and then assigned to his or her first position in the judicial system.

Although all the magistrates are trained and selected at the National School for Magistrates, members of the prosecution in France are in charge of the public action. Unlike the judge, the prosecution is the main part in the criminal trial since it represents the public interests with the public action facing the offender. In French it is said to be a “public party” within the criminal process.

Hence members of the prosecution currently have both rights and duties, arising from the Constitution, statutory provisions and regulations among which the main ones are the Code of Criminal procedure, the 22th December 1958 Ordinance and a couple of Organic Laws and Decrees.

6- Since the prosecutor acts on behalf of the society, he is entitled with particular rights all through the criminal process, from the early stage of the process with the decision whether to prosecute until the trial has taken place. He always remains the only party that represents the public action even when the victim is not an actor within the criminal justice process.

Yet he holds two main powers that seem to be contradictory: the management of the police investigations and the power to decide whether or not a case should enter the criminal justice process. That makes his position in the system difficult to define as he is connected to both the Executive (1) and the judicial powers (2).

1) The prosecutor governs and manages the police investigations

7-The prosecutor has all the powers that a police officer of a specific rank in the hierarchy can have. Thus all the police powers, as far as their investigative mission is concerned, can be held by a public prosecutor except for those issued by the investigating magistrate to the judicial police officer through a specific document named the rogatory letter. This exception stems from the principle of the separation between the prosecutorial and the investigative Authorities. When managing an investigation the prosecutor has two main options: - Either the police investigate and have the obligation to report in due course everything to their district prosecutor. - Or the prosecutor decides to be part of the inquiry and feels free to take it over. He will be competent in that case to visit the place where the offence has been committed in order to ascertain a fact and give orders to police officers to do routine inquiries.

15 In French l’Ecole Nationale de la Magistrature’ also called in short l’ENM.
16 Namely the judicial police officer (‘officier de police judiciaire’): article 41 of the CCP.
17 Articles 14 to 17 of the CCP.
18 Article 40 of the CCP: “Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanor is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents”. This provision applies regardless of the legal framework of the inquiry: flagrancy or preliminary inquiries.
19 Three different prosecutors can be competent for the same case: - The one who has jurisdiction over the offence according to the place where it has occurred. - The one who has jurisdiction over the offence according to
Whilst the investigative police officer has specific powers and a liberty of action provided he reports everything to the district prosecutor, the latter still remains the one who holds the power of the effective management of the inquiry.

8. Besides when serious offences take place namely those carrying a sentence of at least 3 years imprisonment, the French prosecutor is entitled with specific powers. Some of them are as follows.

- He can issue a warrant of research against any person against whom there exist one or more plausible reasons to suspect that he or she has committed or attempted to commit an offence.\(^\text{20}\)
- He can search the suspect’s premises. This search has to start between 6am and 9pm.\(^\text{21}\)
- His agreement will be required by the judicial police officer who wants to hold the suspect in custody for more than 24 hours. As a matter of fact any judicial police officer has the power to stop and search a suspect and to hold him in custody for up to 24 hours. After time an extension may be allowed for a second period of 24 hours if the request is sent and agreed by the district prosecutor prior to the first 24 hour deadline.\(^\text{22}\)

Beyond 48 hours the judicial police officer will have to inform the district prosecutor for another extension. Any decision to extend the length of custody will then belong to the liberty and custody judge, on the initiative of the district prosecutor. Thus if the prosecution holds the power to control any custody, this power is limited and shared with a judge when the length of custody exceeds 48 hours.\(^\text{23}\)

9. Finally when the prosecutor deems this is appropriate, he will ask for some further investigations, giving competence to the investigating judge. The judicial investigation will then be bound to replace the police investigation and this will lead to a new stage in the criminal justice process.

The opening of such an investigation is actually compulsory when an indictable offence has been committed and falls under the discretionary power of the district prosecutor as far other offences are concerned.\(^\text{24}\)

Besides “the investigating judge may only investigate in accordance with a submission made by the district prosecutor. Where an offence not covered by the prosecution submissions is brought to the knowledge of the investigating judge, he must communicate forthwith to the district prosecutor the complaints or the official records which establish its existence. The district prosecutor may then require the investigating judge, by an additional submission, to investigate the additional facts (…)”.\(^\text{25}\)

2) The prosecutor holds the “public action”

10- These rights turn out to be effective at the earliest stage of the process to make sure the prosecutor is able to make the very first appropriate decision whether or not to prosecute.

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\(^{20}\) Articles 70, 77-4 of the CCP, Act no. 2004-204 of 9 March 2004. This Act brought significant changes, among them the definition of a “suspect” who used to be “any person for which there is reasonable ground to suspect that he/she has committed or tried to commit the offence”. More generally this Act was said to lean towards (pencher en faveur de) legal enforcement rather than the rights of the accused.

\(^{21}\) Article 59 of the CCP

\(^{22}\) Article 63 and 77 of the CCP

\(^{23}\) Article 706-88 of the CCP; however this provision applies only to those offences specified in article 706-73 of the CCP.

\(^{24}\) Article 79 of the CCP: “A preliminary judicial investigation is compulsory where a felony has been committed. In the absence of special provisions, it is optional for misdemeanors. It may also be initiated for petty offences if it is requested by the district prosecutor pursuant to article 44”.

\(^{25}\) Article 80 of the CCP
The statutory provisions state that: “the district prosecutor receives complaints and denunciations and decides how to deal with them, in accordance with the provisions of article 40-1 of the CCP”. Hence “where he considers that facts brought to his attention in accordance with the provisions of article 40 constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, the district prosecutor with territorial jurisdiction decides if it is appropriate: to initiate a prosecution; to implement alternative proceedings to a prosecution, in accordance with the provisions of articles 41-1 or 41-2; or to close the case without taking no further action, where the particular circumstances linked to the commission of the offence justify this”.

In other words the prosecution has three options when managing a case. It can decide to prosecute, to divert the case from prosecution or to end it with a no further action decision. This is mainly because France has chosen to follow the opportunity principle also called the principle of expediency rather than the principle of legality also known as the principle of compulsory prosecution.

As a consequence French prosecutors hold a broad discretionary power to avoid prosecution. Those who commit offences are not necessarily brought before the courts for an open determination of guilt and, if convicted, for sentencing.

Depending on the gathering of probative evidence, the magistrate will proceed with a public prosecution either by sending the offender directly before the court if the evidence of guilt is strong enough or by demanding the investigating magistrate to conduct some further investigations. On the contrary if he decides to make no further action, this decision should not be considered as final since it can be overruled if new facts emerge (e.g.: evidence of guilt).

More generally the decision whether to drop the case, divert the case from prosecution or initiate some criminal proceedings rests upon the prosecutor’s discretion.

11-Before making his decision, the prosecutor has to appreciate different elements.

Firstly the suspect’s behaviour has to fall into the legal definition of the offence. Here comes the issue of the legal principle which is part of article 7 of the European Convention on Human Rights. The principle by virtue of which “Nullum crimen, nulla poena sine lege” has indeed been incorporated in the principle of retrospectivity. Since there cannot be “no crime, no punishment without a previous penal law”, this implies the prosecutor has to make sure the crime corresponds well to a previous legal provision declaring it to be a penal offence. Furthermore the European Convention on Human Rights has been interpreted to require that offences must be defined with sufficient precision to meet a standard of certainty.

Secondly the prosecutor will have to evaluate the realistic and objective prospect of guilt. For most offences, establishing a criminal liability requires the existence of both Actus Reus and Mens Rea. The prosecutor will thus have to prove that the offender has done some act that is an instance of the type of action prohibited by the offence in question. Thus the actus reus can be defined as “the voluntary and wrongful act or omission that constitutes the physical components of a crime”. The prosecutor will also have to ensure that the offender knew that the committed act was prohibited.

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26 Article 40 of the CCP
27 Statutory provisions refer to the following expressions: “where it appears to the prosecutor”, “where the prosecutor considers that facts brought to his attention”, “where he believes that the fact”, “the prosecutor decides if it is appropriate”.
28 Article 7 prohibits the retrospective criminalization of acts and omissions. No person may be punished for an act that was not a criminal offence at the time of its commission. The article states that a criminal offence is one under either national or international law, which would permit a party to prosecute someone for a crime which was not illegal under their domestic law at the time, so long as it was prohibited by international law. The Article also prohibits a heavier penalty being imposed than was applicable at the time when the criminal act was committed.
The *mens rea* corresponds to be the guilty state of mind although the degree of *mens rea* can vary from malicious intent to recklessness or even negligence, depending on the gravity and the nature of the offence. In other words a case should not enter the criminal justice process unless the prosecutor is satisfied that the offender has performed an illegal action with the appropriate mind-set. These two elements must coincide in time. The offender must have the necessary *mens rea* at the moment he or she commits the *actus reus*.

This way of reasoning is essential to protect the following principles: the principle of the presumption of innocence which directly leads to the principle that the burden of proof lies upon the prosecution. Because it is for the prosecution to prove that someone is guilty beyond reasonable doubt, the offender has to be presumed innocent until proven guilty. As a consequence this is not for the defendant to prove he or she is innocent but for the prosecutor to prove the offender is guilty. The French Constitutional Council and the European court on Human Rights have acknowledged this assertion. Another consequence would be that any doubt should benefit the accused. The well-know maxim “in dubio pro reo” by which a defendant may not be convicted by the court when doubts about his or her guilt remain, is protected under French criminal law as well as under European law.

Thirdly he will also have to check that no defences are likely to be raised: objective defences (law permission, self-defence…) as well as subjective defences (diminished responsibility, duress by threat…). Finally he will determine if the suspect will be prosecuted under the offender’s or the accomplice’s statute.

**12**-During the criminal process he will remain active: he will communicate with the police, the investigating judge and the potential victim if there is any.

As mentioned above, if during the judicial investigation new facts emerge and where they are not related to the current case, he can “require the examining judge to open a separate investigation, or send the case to the trial court, or order an inquiry, or decide to drop the case, or proceed to one of the measures provided for in articles 41-1 to 41-3, or transfer the complaint or the official reports to the district prosecutor who is territorially competent”.

Being a party in the criminal justice process he has the rights the defence has. For instance if he considers a pre-trial detention is necessary, he can appeal the decision made by the liberty and custody judge to release the offender with or without bail.

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29 Sometime *mens rea* might not be required at all. In strict liability crimes, the only requirement for conviction is that the prosecution proves *actus reus* exists and that the offender has committed an act, or a failure to act; the motive or intention of the defendant being ignored unless it forms part of their defense (e.g. Road traffic offences).

30 Preliminary article § III (Inserted by Law no. 2000-516 of 15 June 2000 Article 1): “Every person suspected or prosecuted is presumed innocent as long as his guilt has not been established”. Article 6§2 ECHR: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.


32 E.g. for indictable offences article 359 of the CCP: “Any decision unfavourable to the accused is taken by a majority of at least eight votes where the assize court rules in the first instance, and by a majority of at least ten votes where the assize court rules on appeal”; Article 362 of the CCP: “The sentencing decision is reached by an absolute majority of voters”; Article 6§1 ECHR.

33 In France the distinction is not made between general or specific defences as it is in the English law system.

34 Article 80 §4 of the CCP

35 Article 137-1 of the CCP: “Pre-trial detention is ordered and extended by the liberty and custody judge”.
It important to note, in accordance with the presumption of innocence, that the principle remains the release of the accused and the exception his or her detention. This appeal will be heard by the investigating chamber.

He can also seize the investigate chamber if it appears a nullity has been committed during the judicial investigation.

Once the judicial investigation is over, the file is sent to the prosecutor for him to make his written and reasoned submissions on the case.

At this stage and before the trial takes place, he still has the possibility with the consent of the victim and the offender to divert the case from prosecution or to implement the ‘guilty plea’ procedure.

These options only depend on the prosecution’s will according to its legal power to judicial discretion.

At the trial the prosecutor, acting on the behalf of the society, questions and examines the accused and the witness (es). The lawyers representing the accused and the victims if any will then go through a cross-examination. But either way the parties will be able to do so only by asking the president for permission to speak since the presiding judge “maintains order in court and conducts the proceedings.”

Because the prosecution in France is organized into a strong hierarchy, “the public prosecutor is bound to make written submissions in conformity with the instructions given under the conditions set out in articles 36, 37 and 44” of the Criminal Code of Procedure.

Yet the prosecutor “is free to make such oral submissions as it believes to be in the interest of justice”. The Court of cassation itself has made it clear that “the public prosecution is independent within the course of its functions, and during the court hearing, its word is free.”

Once “the investigation made in the course of the hearing is ended, the civil party is heard”, the prosecutor presents his submissions and his point of view on the case through an oral indictment.

“The accused and his advocates present their defence arguments. The civil party may reply, but the accused and his advocate must, in any circumstances, have the final word.

It is important to remind that: “except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction. The judge may only base his decision on evidence which was submitted in the course of the hearing and discussed before him” on an adversarial basis. Finally the presiding judge declares the hearing closed.

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36 Article 137 of the CCP: “The person under judicial examination, presumed innocent, remains at liberty. However, if the investigation so requires, or as a precautionary measure, he may be subjected to one or more obligations of judicial supervision. If this does not serve its purpose, he may, in exceptional cases, be remanded in custody”.
37 Article 185 §1 of the CCP: “The district prosecutor has the right to lodge an appeal before the investigating chamber against any order made by the investigating judge or the liberty and custody judge”.
38 Article 173 of the CCP: “If the district prosecutor considers a nullity has been committed, he orders the investigating judge to send him the case file in order to transmit it to the investigating chamber, files an annulment application with this chamber and informs the parties thereof”.
39 Article 175 §2 of the CCP
40 Article 41-1 and 41-2 of the CCP.
41 Article 495-7 to 495-16 of the CCP
42 Article 312 of the CCP
43 Article 309 of the CCP
44 Article 33 of the CCP
45 Criminal chamber of the Court of cassation, 31st May 1978
46 Article 346 of the CCP
47 Article 427 of the CCP
Members of the prosecution, the district prosecutor as well as the prosecutor or attorney general, retain the right to appeal the case. The case is then brought before the Court of appeal criminal division. As a last resort, the decision “may be quashed in the event of a violation of the law upon a cassation application filed” by members of the prosecution. “The application is brought before the criminal chamber of the Court of Cassation”.

**PS:** - The prosecutor is in charge of the appropriate execution of sentences imposed by the trial judge. This is because the execution of sentences is carried out “upon an application made by” the public prosecution office “after the decision has become final”. He can also be competent in other areas of the sentencing process and ensures the enforcement of court decisions (e.g: parole, community service work).

- The prosecutor is clearly involved in the European Judicial co-operation, particularly the European Arrest Warrant procedure. He is competent to implement an arrest warrant issued by national judicial authorities in the form of a European Arrest Warrant in order to allow the transfer of criminals either for trial or detention.

- To a certain extent the prosecutor is in charge of the implementation of local policy in accordance with the Minister of Justice’s guidelines. He also coordinates local conventions on security and prevention implemented by local authorities.

13- **A duty to clear the case up** : the obligation for the prosecutor to give an answer to criminal cases as often as possible was reassessed with the enactment of the Act 2004. The legislator rephrased in terms of priority, the three options offered to the prosecutor. As a consequence, the new provision implemented officially and explicitly the prosecution’s duty to find a systematic answer so as to clear a criminal case up even though, in theory, the prosecution still holds discretionary powers in its decision whether or not to prosecute.

As mentioned above, when the behaviour falls clearly and without any doubt into the legal definition of a criminal offence (i.e. *actus reus* and *mens rea* are constituted) and when the offender has been identified, the prosecutor has to consider whether it is more appropriate to prosecute, divert the case from prosecution or drop the case by initiating a no further action. Despite the discretionary power held by the prosecutor, the third option is to be chosen, if and only if, “this would be justified by particular circumstances directly linked to the facts themselves” (e.g.: factors related to the public order or the specific situation of the offender).

In a nutshell and as far as the criminal policy is concerned, the prosecutor has to keep in mind that a duty to clear the case up lies upon him. Moreover the opportunity principle is all the more undermined since the Minister of Justice, if he or she cannot enjoin any prosecutor to initiate a no further action on a particular case, can nevertheless enjoin any prosecutor to initiate a prosecution even though the district prosecutor did not initially plan to do so. Despite these limits, the opportunity principle is still the one to be followed even if it is clear that it is limited by these statutory provisions.

48 Article 497 of the CCP
49 Article 567 of the CCP
50 Article 707-1 and 708 §1 of the CCP
51 Article 32 of the CCP
52 Article 733-1 of the CCP
53 Article 695-11 to 695-51 of the CCP
54 Article 39-1 of the CCP
55 Article 30 of the CCP: “the Minister of Justice (…) may denounce violations of the criminal law of which he has knowledge to the prosecutor general, and charge him, by means of written instructions attached to the case file, to initiate prosecutions or to cause them to be initiated, or to seize the competent court of such written orders that the Minister considers to be appropriate”
As a matter of fact there is no such general obligation as to systematically prosecute a case and in most cases the final decision will remain under the district prosecutor’s jurisdiction.

14- In case the prosecutor chooses to drop the case, the decision not to go further with the case is a mere administrative decision which means no ‘classical’ appeal can be lodged against it. However the district prosecutor has to indicate the legal or factual reasons that justify this course of action. Such a decision can be contested before the line authority which, if it considers the prosecutor has made the wrong decision, may enjoin him to proceed with a prosecution.

The victims namely those “claiming to have suffered harm” from an offence “may petition to become a civil party by filing a complaint with the competent investigating judge in accordance with the provisions of articles 52 and 706-42 of the Criminal Code of Procedure. The provisions state that the civil action is available when the district prosecutor has decided to drop the case. In this situation the investigating judge “orders the complaint to be sent to the district prosecutor for him to draft his or her submissions (...). The district prosecutor may only send the investigating judge submissions not to investigate where the facts of the case cannot lead to a lawful prosecution for reasons relating to the right to prosecute, or where, if the facts were shown to exist, they would not amount to any criminal offence. Where the investigating judge decides otherwise, he must make a reasoned order. Besides where the investigating judge makes an order declining to investigate, he may apply the provisions of articles 177-2 and 177-3 of the Criminal Code of Procedure.

Here lies another limit of the principle of expediency.

15- A duty to inform: Finally when making its decision whether to prosecute, divert or drop the case, the prosecution will be under a general duty to inform the plaintiff, the victim if any and any person involved in the process, i.e. all the persons bound to denounce anything they would be aware of when acting in the course of their functions.

To sum up, the Prosecution, according to its judicial discretion, is the only authority to retain the power to decide whether or not to prosecute, acting thus on the behalf of the public interest. But there at least are three curtailments to this power:
- Firstly the statutory guidelines strongly recommend clearing the case up as often as practicable.
- Secondly if the government, particularly the Minister of Justice, can enjoin to prosecute, he or she cannot enjoin not to do so without committing an abuse of power.
- Thirdly if the district prosecutor decides to discontinue a case, the victim can still proceed with a prosecution. The victim will contest the decision not to go further by referring directly to the investigating judge when the offence is serious or, through a ‘subpoena’ for other offences.

As a conclusion and to summarize the prosecutor’s powers may be divided in 4 parts: the leading of the criminal investigation, the decision whether or not to initiate criminal proceeding, the communication with the parties (offender, victim) before the prosecution actually becomes a quite powerful party in the criminal justice process, representing the public interest.

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56 This can also be explained by the fact that a no further action decision is never a final one since the case can be re-opened if relevant facts emerge.
57 Article 40-2 of the CCP; this provision came in force on the 31st December 2007
58 Article 40-3 of the CPP
59 See also article 2 of the CCP which states that “any person civil action aimed at the reparation of the damage suffered because of is open to all offences provided the victim has personally suffered damage directly caused by the offence”.
60 Article 85 of the CCP
61 Article 86 of the CCP
62 Article 40-2 of the CCP
NB: The prosecutor’s role under the ‘Léger’ commission on the reform of France’s Criminal Procedure and Criminal Code

The Léger Committee, an ad hoc government committee tasked with formulating far-reaching recommendations to improve France's criminal justice system, released its final report on September 1, 2009.

Several recommendations were formulated, among which the most important are the abolition of the investigating judge system and the increased prosecution presence throughout the criminal justice process.

Over years the ambiguous role and functions of the examining judge have been more and more criticized. Therefore the overlapping of investigative power and jurisdictional power are no longer acceptable. The time has come for the investigating magistrate to make way for a magistrate who would supervise investigations but who would no longer direct them,” said President Sarkozy.

Because the examining judge had two conflicting powers (which is still the case at present date), the report stated that the examining magistrate was both a judge and an investigator. The report deduced that “he was not completely a judge and not completely an investigator”. Besides the fact that the both prosecution and the investigating judge held the same powers at different stages of the CJ process was confusing for all the parties including the public. It was obvious that if it should be the end of the examining judge all his powers would naturally be transferred to the prosecutor.

Yet these additional competences to the prosecution were soon widely suspected as being part of an attempt by political authorities to increase their influence on the handling of sensitive cases. The strong hierarchy in the French prosecution system became another issue since in other european countries where there are no investigating judges, prosecutors do not depend on political power. Consequently a part of the legal society demanded, as a prerequisite condition to these new powers, a review of the prosecution status in favor of independence towards the executive power. Members of the committee did not share this point of view, considering the dependent relationship between the prosecution and the Executive being a perk rather than a drawback. In order to counter-balance this dependency on the executive branch, the commission suggested appointing an independent judge to be known as the ‘inquiry and liberties judge’, who will be in charge of authorizing procedures, such as phone-tapping, that infringe on civil liberties.

Members of the committee also recommended a change in the role and functions of the trial judge. We know that the inquisitorial nature of the French criminal procedure led to the implementation of an active judge who participates in the fact-finding inquiry by questioning witnesses even in adversarial proceedings. The rules of admissibility of evidence allow the judge to act more like an inquisitor than a mere referee. As previously mentioned, the trial judge “maintains order in court and conducts the proceedings”. The Léger commission has promoted the shift from an active to a passive judge who would act as a neutral referee. Hence the parties; the prosecution, the defence and the victim, would hold more powers and the trial judge would not conduct the proceeding any longer but would only maintain order in court. This would lead to more fairness and strengthen the adversarial principle.

Thus the district prosecutor turned out to be the primary beneficiary of such a reform. The situation appeared to be even more problematic since the French prosecutor who, for a long time, has been considered a part of the judiciary, seems to be more no longer entitled to claim this right. The European Court on Human rights has indeed recently asserted, that “it must be acknowledged (...) that the public prosecutor is not a “competent legal authority” within the meaning the Court's case-law gives to that notion: as the applicants pointed out, he lacks the independence in respect of the executive to qualify as such”.

France has appealed the case. If the European Court was to confirm its first decision, France would be bound to draw the appropriate inferences from that decision and would reform its system accordingly. The debate remains open although the government does not seem yet to be willing to surrender.

63 The Constitutional Council used to consider “that the judicial authority which, under article 66 of the French Constitution is the guardian of the freedom of the individual, includes both public prosecutors and judges”; Cons. Council, dec. n° 93-326, 11th Aug. 1993.
64 ECHR, Medvedyev and others v/ France, 10th July 2008; in the same way as far as the sentencing power was concerned, the Constitutional Council, when seized in 1995, stated that a sentence could not be imposed by the a public prosecutor but required the intervention a judge so that the measure would be in conformity with the Constitution; Cons. Council, Decis. n° 95-360, 2nd Feb. 1995.
**French Justice and the European Union**

From July to December 2008, France held the rotating presidency of the European Union. As such, and in the French tradition of a Europe of Justice, the Court of Appeal of Paris gathered on the 9th and 10th of October 2008, Chiefs of Courts of Appeal of the European Union Capitals on a central matter: “A better Administration of Justice”.

The Appeal Jurisdiction has had little occasion to express itself on European issues. However, it has always had an important part to play as a second degree jurisdiction positioned between Tribunals and Supreme Court, as well as a national and European jurisdiction.

The purpose of this meeting was to reinforce a judicial co-operation both on civil and criminal matter, to offer Chiefs of Appeals Courts an opportunity to share their practices and experiences and improve the administration of Justice.

The Europe of Justice would certainly benefit from its 27 member states inputs and would gain being unified and more efficient. Those particular questions still remain keys points to the Justice of tomorrow.

This meeting has given a European dimension to Appeal justice and has allowed France to launch its major project: “A Network of European Courts of Appeal”. This project will also bring closer second degree jurisdictions and established a direct dialogue between them.