The French Prosecutor in Question

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Abstract

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

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I. Introduction

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


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

4. See Jacqueline Hodgson, The Changing Role of the Crown Prosecutor, 79 CRIM. JUST. MATTERS 28, 28 (2010) [hereinafter Hodgson, Changing Role] ("In England and Wales, as in many other European countries and the United States, there is a general trend away from the courtroom disposition of cases and a corresponding expansion in the role of the police and the prosecutor.").
project is yet more radical, going beyond the redistribution of authority among existing legal actors and proposing the abolition of the juge d’instruction and the transfer of all investigative powers to the procureur.\(^5\)

The removal of France’s most iconic criminal justice figure has proved highly controversial.\(^6\) Although the juge d’instruction deals with only a small minority of criminal cases, these are often the most complex and sensitive investigations concerning terrorism, fraud, drug trafficking and, of course, political corruption. The prospect of removing these inquiries from a politically independent and immovable judge and delivering them into the hands of a public prosecutor who is hierarchically accountable to the executive has caused many commentators to fear for the future political independence of the criminal justice system.\(^7\)

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

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

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

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

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


10. See id. ¶ 114 (discussing the characteristics and powers of the investigating judge).
A further, though indirect, line of attack on the procureur’s role comes again from the ECtHR. In a series of cases beginning with Salduz v Turkey,11 the ECtHR has stressed the requirement that custodial legal advice be available to all suspects at the start of their police detention for interrogation as part of the requirement for a fair trial under Article 6 of the European Convention on Human Rights (ECHR).12 The court made clear that custodial legal advice should be meaningful and effective in preparing the suspect for interrogation and enabling her to prepare her defense.13 France currently allows suspects a thirty-minute consultation with a lawyer at the start of detention and again after twenty-four hours if detention is extended.14 The lawyer may know the date and nature of the charges, but has no access to the dossier of evidence and has no right to be present during the interrogation of her client.15 The lawyer’s role is therefore limited by constraints of time and of information. Furthermore, legal advice is delayed for forty-eight hours in cases of organized crime and seventy-two hours for drug trafficking and terrorism.16 Defense lawyers argued successfully before the French courts that this delay clearly breached the Salduz doctrine and went on to use the new question prioritaire de constitutionnalité procedure to challenge the compatibility of the garde à vue17 with the French constitution. In a landmark decision,18 clearly inspired by the jurisprudence of the ECtHR, the Conseil

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

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

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


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

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

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

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

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

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


\textsuperscript{20} This was presented to the Conseil d'etat on September 7, 2010.

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

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

\textsuperscript{23} Id.

\textsuperscript{24} See supra note 9 and accompanying text (discussing the first and Grand Chamber judgments in Medvedyev, opinions that questioned the judicial authority of the procureur).
linked with debate around the proper role and status of the procureur. Is she sufficiently independent to head up all criminal investigations within a procedural model in which defense rights are secondary to the supposed truth-seeking ideology and function of judicial supervision? And does she qualify as a judge for the purpose of authorizing the detention in police custody of a suspect for forty-eight hours, offering the kind of protection that has been claimed to justify the now-contented, diminished rights to custodial legal advice?

II. The Role and Professional Status of the Procureur

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

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

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

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

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

28. See President André Vallini & Rapporteur Philippe Houillon, Assemblée Nationale Rapport [National Assembly Report] No. 3125, June 6, 2006, at 446 [hereinafter National Assembly Report No. 3125] (noting that each year, around 9% of procureurs move to positions as juges du siège and some 6% move in the other direction). Juge du siège is a broad category of judges in France of which a juge d’instruction is one part, and the role of juges du siège includes making orders, judgments, and decisions. But see Alaine Salles, Interview with Denis Salas, Il manque une part d’autonomie au parquet français, Le Monde, May 8, 2009, at 9 (noting that 70% of procureurs have spent their
judicial officer in quite the same sense as the trial judge or even the juge d'instruction. These two are part of what is called the sitting judiciary, while the prosecutor is part of the standing judiciary. 29 This distinction has important implications for the independence of each. While the sitting judiciary is immovable and independent of the orders and authority of the executive, the parquet is hierarchically accountable to the minister of justice and to the executive. The Minister is free to issue written instructions to the parquet.30 She may also move, promote, or transfer procureurs or nominate her own political allies.31 This subordination to political authority risks undermining the political independence of the prosecutor as a judicial officer.32 On the other hand, it is considered an important means of ensuring that criminal justice policy is properly the responsibility of government and is not within the discretion of the individual procureur.33 Despite these differences between the two types of magistrat, the Constitutional Court has confirmed the status of the procureur as a judicial authority.34

The judicial status of the procureur is essential to the pivotal role that she plays within the criminal justice process, a role that goes far beyond the entire career in the prosecution service (the parquet)).

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

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

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

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

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

34. See CC decision No. 93-326DC, Aug. 11, 1993, J.O. 11599 (discussing the procureur’s pivotal role in the pre-trial detention decision).
prosecution of cases. Increasingly, she is a player in local criminal justice policy-making and inter-agency cooperation,\(^{35}\) such that *procureurs* have come to exercise "a hybrid function, half executive, half judicial and [they] have become the necessary interface between the judiciary, the state and civil society."\(^ {36}\) They also have the power to initiate alternatives to prosecution and trial such as mediation and a range of alternative sanctions.\(^ {37}\) Most recently, the *procureur* has been empowered to propose a reduced sentence to the accused in exchange for a guilty plea—a radical reform indeed for a jurisdiction that, until that time, did not even recognize a formal system of pleas.\(^ {38}\)

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

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


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

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

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

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

41. See Ministère de la Justice et des Libertés, Les chiffres-clés de la Justice 14 (2009) (finding that of the 668,946 legal proceedings, 23,409 came before the *juge d'instruction*).

42. See C. Pr. Pén., supra note 14, art. 80 (stating that the *juge d'instruction* can only investigate cases referred by the *procureur*); id. art. 82 (stating that the *juge d'instruction*
d'instruction will question the accused 43—known as the mise en examen once the accused is a suspect in the instruction process—instruct experts where necessary, 44 and carry out any acts of investigation she considers useful in her search for the truth. 45 These are two different models of judicial supervision. While the procureur oversees what is essentially a police investigation, the juge d'instruction is personally responsible for the instruction inquiry; she may delegate specific acts of investigation to named police officers, but not the questioning of the accused. 46

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

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

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

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

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


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

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

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

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

51. See Jacqueline Hodgson, The Role Played by the Juge in the Protection of the Suspect's Rights During the Police Investigation, in Justice on Trial: The French 'Juge' in Question 207, 221 n.32 (2004) (noting that one senior procureur said: "What is the role
out a judicial function in authorizing the detention of suspects in garde à vue for up to forty-eight hours.\textsuperscript{52} Any extension beyond this, in cases of suspected drug trafficking, organized crime or terrorism, may only be ordered by the juge des libertés et de la détention—a magistrat du siège who is also independent of the investigation.\textsuperscript{53} It seems the procureur is sufficiently judicial to authorize detention for two days, but no longer.\textsuperscript{54} If this duality of judicial and investigative power is a problem for the juge d’instruction, it is all the more so for the prosecutor, who is not a magistrat du siège and yet is authorized to place a suspect in police detention for up to two days.\textsuperscript{55} What is the significance of the distinction between the procureur and the juges du siège? If the latter represent a purer judicial model in the sense that they are removed from the parties in the case and tend to have a more adjudicative role, does it make sense to see the procureur as a judicial authority? And if the juge d’instruction’s former power to detain suspects was considered a serious conflict of interest, what justification is there for the procureur’s authority to do the same thing—albeit for a shorter period of time? Surely it would be more appropriate for this decision to be made by a magistrat du siège such as the judge authorized to extend garde à vue beyond forty-eight hours, the juge des libertés et de la détention.

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

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

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

\textsuperscript{55} See supra note 51 and accompanying text (discussing the duality of the procureur).
III. Judicial Corporatism

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

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

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

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

56. See *NATIONAL ASSEMBLY REPORT NO. 3125, supra* note 28, at 447–49 (presenting opinions of several French magistrates on the relationship between the *parquet* and the *siège*).
57. See *id.* (noting that most of the *magistrats* interviewed preferred to preserve the current system).
58. *HODGSON, FRENCH, supra* note 1, at 70.
59. *Id.*
However, this closeness and the sense of being members of the same "club," can also have an adverse effect on the independence of each. As the Outreau affair demonstrates, this can also be problematic when different magistrats place too much trust in their colleagues, unquestioningly adopt the same approach and the same perspective, and the system of checks and balances breaks down.

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

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


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

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

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

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

66. See C. PR. PÉN., supra note 14, art. 1-P ("Criminal procedure should be fair and accusatorial and preserve a balance between the rights of the parties.").
impact on the way in which the judge will receive the evidence; judges afford more credibility to material presented in the prosecution dossier as part of a public-interest-centered neutral judicial investigation than they afford to self-interested evidence put forward by the defense.\footnote{67}{See Hodgson, Changing Role, supra note 4, at 5 (noting the argument that, unlike the adversarial model which requires "both sides to be active," the inquisitorial model "is of a more neutral centralised enquiry in which the prosecutor plays the part of judicial investigator or supervisor").} It is therefore crucial that the defense is able to have some input into the pre-trial investigation and some influence over the evidence that the magistrat will present in the case. If the independence of the procureur is further called into question, the corresponding limitations on defense rights must be as well.

A. Outreau

The findings of the Parliamentary inquiry into the Outreau case demonstrated the systematic nature of this judicial corporatism, the difficulties experienced by defense lawyers trying to assert their rights to participate in the case investigation, and the disastrous effects that this unchecked concentration of power can have. While the focus of criticism has been on the juge d'instruction acting in the case, Fabrice Burgaud, the problems identified are inextricably linked to the role and independence of the procureur.\footnote{68}{See National Assembly Report No. 3125, supra note 28, at 513–26 (offering a summary of the problems identified by the inquiry).} The case concerned accusations of child sexual abuse made by a number of children and adults in the town of Outreau in Northern France.\footnote{69}{See id. at 21 (introducing the details of the affair).} When the case came to trial in July 2004, two of the accused retracted their statements against their co-accused and the prosecution case collapsed.\footnote{70}{Id.} Seven of the seventeen defendants were acquitted in the cour d’assises (trial court) and six more by the Paris cour d’assises, on appeal, in December 2005.\footnote{71}{Id.} Between them, they served almost twenty-six years in détention provisoire while the juge d'instruction carried out his investigation and one suspect, François Mourmand, died in custody.\footnote{72}{Id. at 22.}
The repercussions of the case were enormous, resulting in the establishment of the first ever Parliamentary inquiry into a criminal case as well as a full investigation by the Ministry of Justice. As an instruction, this was a case to which all of the safeguards and cross-checks of the defense’s right to participate in the judicial investigation attached: The defense could challenge and propose evidence. In the case of disagreement, the parties could make appeals to the Chambre de l’instruction. However, the report was critical of the single-case viewpoint offered by the procureur and juge d’instruction and the absence of reflexivity among magistrats: Although the case passed through the hands of some sixty different magistrats, none of them challenged either the central case thesis or the methods of investigation. The Parliamentary inquiry found that the procureur dominated the investigation rather than acting as any form of check, and both he and the juge d’instruction adopted a wholly prosecutorial perspective to the case—they worked only à charge (with an eye towards discovering incriminating evidence). The fact that the juge d’instruction, in his submission to the cour d’assises, simply copied and pasted his final case conclusions from those of the procureur underlines the unity of perspective of the juge d’instruction and the prosecutor. They saw the suspects’ declarations of innocence as justifying repressive measures, and the commission of inquiry was shocked to hear that the procureur and juge d’instruction considered such assertions as good reason to keep suspects in detention during the investigation.

Throughout this process, the juge d’instruction systematically prevented the defense from participating in the inquiry, from challenging...
his findings and methods, and from stimulating investigation à décharge.\textsuperscript{80} Statements were taken from the children making the accusations in ways that produced unreliable evidence, but the \textit{juge d'instruction} did not permit the defense to examine these witnesses on the grounds that it might traumatize the children further.\textsuperscript{81}

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

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

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

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

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

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

\textsuperscript{84} See id. (providing the accounts of several people who were critical of the joint deception).

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

\textsuperscript{86} See id. at 280–81 (indicating that the solidarity between the \textit{Chambre de l'instruction} and the \textit{juge} and \textit{parquet} was a problem of judicial culture).
their treatment by magistrats, one can consider the French criminal justice to be accusatorial and fair. 87

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

B. Terrorism Investigations

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

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

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

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


91. See id. at 12–13 (discussing the roles of the DST). This body has both administrative and judicial attributes. Id. It works on prevention and repression of terrorist activities as well as general counter-espionage work. Id.
relationship in ordinary cases, and it is even more pronounced among this specialist corps of individuals. As with all instruction investigations, the defense, as well as the procureur and the victim or partie civile, have the right to request that certain acts of investigation be carried out by the juge d'instruction, as well as to challenge the procedural legality of the procedure and to apply for bail to the juge des libertés et de la détention. Appeal against refusal by either judge lies to the Chambre de l'instruction. The defense has been present in the instruction since 1897 when she first gained the right to be present during the judicial questioning of her client and to have access to the dossier of evidence. The reforms of 2000 strengthened her ability to participate in the investigation and broadly gave her the same opportunities as the procureur. This is potentially an important counterbalance in the instruction process, an opportunity to ensure that the juge has considered all lines of inquiry and remains alive to defense as well as prosecution concerns—investigating à charge et à décharge (from both the prosecution and the defense perspective).

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

93. See Hodgson, Guilty, supra note 2, at 39–40 (describing the relationship between the magistrats and the police).
94. Hodgson, French, supra note 1, at 120–21.
95. Hodgson, Guilty, supra note 2, at 43.
96. See Hodgson, French, supra note 1, at 117.
97. Id. at 118–21(describing the expanded rights of the defense attorney).
98. See Hodgson, Guilty, supra note 2, at 42 (discussing the often ongoing relationships between the various branches over multiple investigations).
99. See id. at 43 n.69 ("As magistrats acknowledged to us, it is very difficult for the defence to review the dossier during the investigation, given its length and complexity.").
100. See supra Part III.A (discussing the Outreau inquiry and outlining the ways in which the defense is on the periphery of investigation and trial procedures).
France and elsewhere that terrorism is a crime and will be treated as such, the political and foreign policy contexts of terrorism add to the risk that the defense perspective will be subordinated to security concerns in these investigations. Recent terrorist trials suggest that the defense faces enormous hurdles when challenging the evidential basis of the prosecution, and this was confirmed in my own research. Judicial corporatism is amplified in the closed world of counter-terrorism judges and judicial counter-checks are of little assistance to the defense. When explaining their role as specialist judges within the Chambre de l’instruction, the juges stated that they would rarely make a ruling against the juge d’instruction. It was clear that they trusted and favored the approach of the fellow magistrat, the juge, over that of the defense lawyer.

IV. The Independence of the Procureur

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

101. See generally Hodgson, Guilty, supra note 2.
102. See id. at 43 ("It is exceptional that [the Chambre de l'instruction] would rule against the juge d'instruction . . . .").
103. See supra notes 39–40 and accompanying text (describing the procureur’s role as pre-trial judicial authority).
104. See supra Part II (discussing the role and status of the procureur).
105. See supra Part IV.B (discussing the status of the procureur and of a judge in Medvedyev).
106. See infra Part IV.A (discussing the Léger Commission).
Medvedyev, cast serious doubt on the procureur’s status as a judicial authority. I will examine these two contrasting approaches in turn.

A. Chronicle of a Death Foretold: Léger

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

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

107. See infra Part IV.B (discussing the status of the procureur in Medvedyev).
108. PHILIPPE LÉGER, RAPPORT DU COMITÉ DE RÉFLEXION SUR LA JUSTICE PÉNALE I (2009) [hereinafter LÉGER REPORT].
109. See id. (detailing the Commission’s brief in the opening address to the President and the Prime Minister).
110. As a result of this announcement, two members of the Commission resigned.
111. See Yves Laurin, Le President de la République et L’autorité Judiciaire, 34 RECUEIL LE DALLOZ 2396, 2396–97 (2007) (questioning the President’s mixture of justice and politics when he set out major themes for justice reform and addressed the re-opening of the Cour de cassation).
112. See Editorial, Rapport Léger, Mais Pas Insignificant, 30 RECUEIL LE DALLOZ 2025, 2025 (2009) (describing the commission as docile in carrying out the wishes of the President).
113. See Nathalie Guibert, Le Prince, le Juge et le Bourreau, LE MONDE, Jan. 16, 2009, [hereinafter Guibert, Le Prince] available at 2009 WLNR 792706 (questioning the need for reforms as set out by groups like the Léger Commission). The nature of the parquet’s subordination to the executive is illustrated by an episode on January 8, 2009, when procureurs in Nancy were reprimanded by their superiors for standing and applauding the speech of the president of the court when it returned after the holiday recess. Id. The
greater due process rights than those subject to a police investigation overseen by the procureur.¹¹⁴ The suspect may have her lawyer present in any interrogation by the juge d’instruction—the police are not permitted to interrogate the suspect once the information has been opened and she is formally under judicial investigation as a mise en examen—and she has access to the dossier throughout the inquiry.¹¹⁵ All parties—the suspect, prosecutor, and victim—may ask the juge to carry out any specific acts of investigation including the commissioning of expert reports.¹¹⁶ The idea is that all parties have the opportunity to influence the content and direction of the inquiry so that the juge d’instruction is not captive to one particular case theory, even if, as discussed above, this does not always work well in practice, given the professional bonds that exist between juge and procureur as magistrats.¹¹⁷ In cases that the procureur oversees, neither the suspect nor her lawyer has any rights to participate in the pre-trial inquiry.¹¹⁸ Together with the sharp rise in the number of people placed in police custody for interrogation,¹¹⁹ this means that in most cases, the primary evidence against the accused is not that obtained through a judicial inquiry, but is rather evidence, such as confessions, that the police obtain

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

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

¹¹⁵. Id.

¹¹⁶. Id. at 120–21.

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

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

¹¹⁹. See Les Gardes à Vue Ont Bondi de 23% entre 2004 et 2009, LE MONDE, July 23, 2010, http://www.lemonde.fr/societe/article/2010/07/23/les-gardes-a-vue-ont-bondi-de-23-entre-2004-et-2009_1391731_3224.html#ens_id=1389987 (last visited Sept. 11, 2010) (reporting that the number of people placed in garde à vue has risen by nearly a quarter in five years (23% between 2004 and 2009), according to official statistics analyzed by the Institut national des hautes études de la sécurité et de la justice) (on file with the Washington and Lee Law Review); see also Isabelle Mandraud & Alain Salles, Les Statistiques Officielles Sous-estiment le Nombre Réel des Gardes à Vues, LE MONDE, Jan. 28, 2010, at 12 (reporting that since 2001, there has been a 72% increase, but noting that the precise figures vary depending on whether those held for traffic offenses are included—they are generally excluded from the official statistics); Christine Lazergeres, Les Désordres de la Garde à Vue, 30 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 274, 275 (2010) (revealing that over 100,000 gardes à vue last more than twenty-four hours). See generally INSTITUT NATIONAL DES HAUTES ÉTUDES DE LA SÉCURITÉ ET DE LA JUSTICE, LA GARDE À VUE EN FRANCE (2010), http://www.inhesj.fr/articles/accueil/ondrp/publications/focus-h155a173.html (last visited Sept. 11, 2010) (on file with the Washington and Lee Law Review).
before the end of the garde à vue.120 Therefore, in the absence of any corresponding strengthening of either the political independence of the procureur, the due process rights of the suspect, or the legal aid funding necessary to make these rights effective, there is a real concern that such a reform represents a retrograde step, which threatens to undermine the independence of the judicial process.121

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

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


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

124. Id.

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


130. Id.

131. Davet, Charles Pasqua, supra note 128.

132. Id.
were accused of being political for applying the law to politicians, this decision is controversial. However, juge d’instruction Simeoni described her decision not as a choice, political or otherwise, but as the simple application of her legal duty to send a case before the court when she considers that an offense has been committed.\textsuperscript{133}

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

\begin{quote}
\textsuperscript{133} Id.  \\
\textsuperscript{134} Compare Mireille Delmas-Marty, La Mise En État Des Affaires Penale 125 (1991) (recommending a clear separation of investigation and judgment and greatly improved defense rights in order to develop a more accusatorial procedure), with LÉGER REPORT, supra note 108 (emphasizing the rights of the victim in making the procedure more accusatorial).  \\
\textsuperscript{135} See supra Part III.A (discussing the Outreau affair). The timing of the publication of the preliminary report of the Léger commission—just as juge d’instruction Burgaud, of Outreau fame, appeared before his professional disciplinary body, the Conseil supérieure de la magistrature—further underlines the differences between the two inquiries.  \\
\textsuperscript{136} LÉGER REPORT, supra note 108, at 513–25 (summarizing the recommendations and proposing to video record interrogations (recommendation 3), to give the lawyer access to the case file during the garde à vue (recommendation 4), and to establish a collegial system of instruction (recommendations 26–31), all of which would reinforce defense rights during the instruction).  \\
\textsuperscript{137} See generally id. at 353–84.  \\
\textsuperscript{138} See Alain Salles, La réforme de la justice consacre le pouvoir du parquet, LE MONDE, March 3, 2010, at 10 (noting that even though the legislature established such a structure, the death of the juge d’instruction would be a slow one).  \\
\textsuperscript{139} See LÉGER REPORT, supra note 108, at 7–8 (noting that a minority of the commission favored waiting to see how the new arrangement worked out before setting in motion another major upheaval in this area of criminal justice); see also Bernard Bouloc, Que Penser Des Propositions du "Comité Léger"?, 33 Recueil Le Dalloz 2264, 2264 (2009) (indicating his views as a member of the minority in the Commission).
\end{quote}
majority view of the Léger Commission superseded it and consequently it has been put back until 2011.140

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

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

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

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

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

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

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

146. Unsurprisingly, given that the report is not informed by any independent empirical research, there are many things the report does not take into account and there are gaps in the commission’s knowledge. For example, the Commission also argues that the opening of an information represents an unnecessary break in the inquiry, and that keeping the procureur in charge will maintain continuity. Id. at 8–9. In practice, the reverse is true. The instruction should allow a fresh approach and should not be a simple and unquestioning continuation of the police inquiry. It is often the case that the police officers request that the
Improving the coherence of the criminal process is clearly a part of the Léger commission’s report and indeed is a part of its claimed rationale in recommending the abolition of the juge d’instruction in order to create a single authority in charge of criminal investigations. ¹⁴⁷ However, although there is one authority in the form of the procureur, two separate procedural regimes of rights remain—the régime simple, which is essentially the same as that currently in place for procureur supervised investigations, and the régime renforcé, in which the suspect enjoys the rights currently available during the instruction.¹⁴⁸ In this way, one duality replaces another. Instead of giving suspects in all cases the rights that those currently investigated through the instruction procedure enjoy, the Léger proposals establish a two-tiered system in which the gravity of the offense will trigger a different regime of rights.¹⁴⁹ The suspect herself can request that she benefit from this regime and its application will be obligatory when she meets the same evidentiary threshold for the opening of an information.¹⁵⁰ The parquet can also initiate this procedure.¹⁵¹ The application of the instruction regime of rights will be obligatory when the suspect’s rights are seriously affected; when she risks a significant penalty; in the case of the most serious offenses, crimes; and in order for the suspect to be placed in custody or on conditional bail.¹⁵² It remains to be seen how much this will simplify matters and precisely what constitutes a significant penalty or when the suspect’s rights are "seriously affected"—arguably this is the case immediately upon arrest. Despite claims about reinforcing the rights of the accused, the net result looks like a system of weaker supervision, fewer defense rights, and no real political independence.

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

¹⁴⁷ See LÉGER REPORT, supra note 108, at 7 (explaining how the committee saw the overlap and confusion of roles as damaging to the criminal investigative process).
¹⁴⁸ Id. at 14.
¹⁴⁹ Id.
¹⁵⁰ Id. at 15.
¹⁵¹ Id.
¹⁵² Id.
¹⁵³ Id. at 18.
further proposes that the legislature should write the procureur’s duty to décharge into the CPP, as it is now for the juge d’instruction.154 While formalizing this duty should be welcomed, this process is unlikely to overcome the procureur’s prosecutorial orientation, which is the inevitable result of her dependence upon the police in carrying out her role in the investigation and prosecution of crime. To overcome this would require a huge legal, cultural, and occupational shift, a change which would be almost impossible to attain alongside the procureur’s retention of the prosecution function. Neither would it change the fact that the procureur is a prosecutor, which for the ECtHR, rules her out from being a judicial authority.155

B. Medvedyev v. France

In contrast to domestic policy, which seeks continually to expand the role of the procureur as the primary magistrat in charge of criminal investigations and case disposition, European case law has placed something of a question mark over the procureur’s judicial status. The case which has most recently brought this to the fore is that of Medvedyev v. France, which concerned the interception by the French authorities of a merchant ship, the Winner, registered in Cambodia.156 The vessel was suspected of carrying large quantities of drugs for distribution across Europe.157 After the Cambodian authorities gave their permission, the French Navy located and boarded the ship and brought it directly to Brest under the authority of the French procureur.158 This took approximately thirteen days due to the weather and the poor condition of the vessel.159 The French Navy confined the crew on the ship, and one was fatally wounded.160 The applicants claimed a breach of ECHR Article 5, paragraph 3: That after detention, they had not been brought promptly
before a judge. They had been detained for thirteen days on board the 
*Winner* before being brought to Brest and then the *juge d'instruction* about eight or nine hours later. In both its first judgment and the second hearing on appeal before the Grand Chamber, the court found no breach of ECHR Article 5, paragraph 3, as the applicants went before a judge as soon as was possible in the exceptional circumstances. The poor state of the *Winner* accounted for the slow journey to France; and, the number of suspects and the need for translators in order to question them once in French police custody meant that it was unavoidable that it would take several days before some were brought before a judge.

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

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

161. Id. ¶ 28.
162. Id.
163. See Medvedyev v. France, App. No. 3394/03, Eur. Ct. H.R. ¶ 128 (2010) (supporting the judgment of the Fifth Section in light of new information that the applicants were brought before the *juge d'instruction* after eight or nine hours rather than the one or two days, as it was originally thought).
164. Id. ¶ 131.
166. See id. ¶ 58 (noting that the permission of the Cambodian authorities did not explicitly cover anything beyond the initial interception by the French authorities).
167. See id. ¶ 61 (detailing the ways that the French measures fell short of sufficient rights protections).
cour-européenne-a-rendu-un-arret-en-demi-teinte.html (last visited Sept. 11, 2010) (noting the
this part of the reasoning. The court relied only on the absence of a legal basis for detention that was sufficiently clear and of a requisite quality to satisfy the requirement of legal certainty. In essence, it did not need to discuss the judicial quality of the procureur because the detention was illegal in any event. However, the issue remains alive in the court’s pronouncement on what constitutes an independent judge, a topic that it discusses in relation to the alleged breach of ECHR Article 5, paragraph 3. In underlining the qualities that make the juge d’instruction a judicial authority for the purposes of the ECHR, the court calls the judicial status of the procureur into question. Relying on the same authorities that underpinned its comments on the non-judicial qualities of the procureur in its first judgment, the court stated that "[t]he judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority." Despite the claims of French government officials that this does not address directly the status of the procureur, it seems that the public prosecutor falls clearly outside of this definition.

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

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

171. See id. ¶ 128 (commenting that investigating possible drug trafficking does not entitle authorities to violate rights).
172. See id. ¶¶ 123–26 (clarifying the requirements for judicial independence).
173. Id. ¶ 124.
175. CC decision No. 93-326DC, Aug. 11, 1993, J.O. 11599.
the importance of judicial and prosecutorial independence both with respect of individual functions and as between functions. Paragraph 7 follows the ECtHR line of reasoning that any exercise of a judicial function in relation to ECHR Article 5, paragraph 3 and Article 6 must be by an officer independent of executive power and of the parties. For this reason, the Councils asked France to reconsider its proposal to abolish the juge d'instruction.

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

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

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

178. Id. ¶ 7.

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


181. See supra notes 9–10 and accompanying text (discussing the different functions of magistrats and the common training of all); see also Ministère de la Justice et des Libertés, Projet de loi: Tendant à limiter et à encadrer les gardes à vue 7–17 (2010), available at http://www.cercle-du-barreau.org/media/01/02/731278778.pdf (affirming the procureur’s duty to oversee the garde à vue and to safeguard the rights of the suspect without any additional measure to ensure the efficacy of this role).

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

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

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

183. See C. PR. PÉN., supra note 14, art. 30 (setting out this instructional hierarchy).
184. See Hodgson, French, supra note 1, at 80 (noting the clear limitations on the entire chain of command when it comes to passing on certain cases).
185. See C. PR. PÉN., supra note 14, art. 39-1, for an expression of this concept in the phrase: "La plume est serve mais la parole est libre."
186. See Hodgson, French, supra note 1, at 228–31 (explaining the national and local organization of the judiciary).
187. See Schiesser v. Switzerland, 34 Eur. Ct. H.R. (ser. A.) ¶ 38 (1979) (finding that Switzerland’s district attorneys are permissibly judicial officers under ECHR Article 5 even though they have both prosecutorial and investigative functions).
188. Id. ¶ 9.
189. Id. ¶¶ 12–14.
190. Id. ¶ 14.
fourteen days. Although the District Attorney is under the authority of the prosecutor, the court held that the District Attorney had received no special orders or instructions concerning her power to place someone in detention.

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

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

191. Id. ¶¶ 15–16.
192. Id. ¶ 35.
193. See id. ¶ 27 (stating that Article 5, paragraph 3 allows an arrested person to be brought before a judge or officer). The court noted that while "[i]t is implicit in such a choice that these categories are not identical . . . the Convention . . . presupposes that these authorities fulfil [sic] similar functions; it thus clearly recognises the existence of a certain analogy between judge and officer." Id. (citations omitted).
194. Id. ¶ 31.
195. Id. ¶ 34.
196. Id.
197. See Huber v. Switzerland, 188 Eur. Ct. H.R. (ser. A) ¶ 43 (1990) (holding that even though the District Attorney who investigated did not prosecute, he had nonetheless been "entitled to intervene in the . . . criminal proceedings" which called into doubt his impartiality and breached Article 5, paragraph 3).
198. Id. ¶ 39.
199. Id. ¶ 41.
auditeur-militair\textsuperscript{200} responsible for the arrest and detention of military personnel was held not to be independent of the parties at the preliminary stage of the proceedings because he was "liable" to become one of the parties at the next stage of the case.\textsuperscript{201} By analogy, the District Attorney here was not considered independent because he too was "liable" to become a party in the case: "Clearly the Convention does not rule out the possibility of the judicial officer who orders detention carrying out other duties, but his impartiality is capable of appearing open to doubt . . . if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority.\textsuperscript{202} 

Brincat v. Italy\textsuperscript{203} also concerned an alleged breach of ECHR Article 5, paragraph 3, and the court again held that it is the "objective appearances at the time of the decision on detention" that are material.\textsuperscript{204} It was believed that the public prosecutor who detained and questioned Brincat was entitled to go on to prosecute him and so the prosecutor was not independent from the parties in the way required of a judicial officer.\textsuperscript{205}

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

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

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


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

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.}
particular, her role in ordinary criminal cases in which she quite clearly
does exercise concurrently the role of investigator and prosecutor.

V. The Procureur and the Garde à Vue

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

A. The Procureur Overseeing the Garde à Vue

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

206. LÉGER REPORT, supra note 108, at 8 (proposing that the investigation function
should be shifted to the procureur in the second recommendation).
207. See CC decision No. 93-326DC, Aug. 11, 1993, J.O. 11599 (affirming the judicial
status of both magistrats du siège and magistrats du parquet).
208. See supra note 88 and accompanying text (describing ECtHR-inspired proposals
that would increase procedural protections for defendants).
209. See HODGSON, FRENCH, supra note 1, at 143 (setting out the duties of the
procureur).
210. See id. (contrasting the inquisitorial and adversarial systems).
211. Id. at 143–44.
role has increased, such that she now handles around 96% of all criminal cases.\footnote{Hodgson, The Investigation, supra note 90, at 22.} Because the investigation is understood to be carried out by a neutral judicial figure (a magistrat) charged with pursuing both inculpatory and exculpatory inquiries, the defense’s role is very much diminished when compared to the adversarial procedure.\footnote{See Hodgson, French, supra note 1, at 104 (noting the difference in the defense’s role in each system).} The accused does not require the same safeguards as might be necessary when the police and prosecution are constructing the accusation: The judicial nature of the inquiry offers more protection and avoids the vulnerability of the accused in an adversarial procedure.\footnote{Id. at 146 (explaining why the accusatorial system requires fewer safeguards for the defense); Jacqueline Hodgson, Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights, in Human Rights Brought Home: Socio-Legal Perspectives of Human Rights in the National Context 198 (Simon Halliday & Patrick Schmidt eds., 2004) [hereinafter Hodgson, Human Rights] (describing the vulnerabilities of the accused in an adversarial procedure). In particular, the dependence on a defense lawyer is generally regarded as benefitting the rich and those involved in organized crime, as they will have the best lawyers. Id. at 202. The very poor rates of legal aid heighten this disparity between retained and assigned counsel.} Significantly, the magistrat affords the prosecution’s case greater credibility at trial than that of the defense because it is seen as the product of a judicial—or judicially supervised—inquiry into which the defense has had the opportunity to participate.\footnote{See Hodgson, The Investigation, supra note 90, at 2–3 (explaining that because the prosecution’s case is judicial in nature, it commands greater weight in the eyes of the magistrat).} This may be true in theory for the instruction, but there is no provision for defense participation in the 96% of criminal investigations that the procureur oversees.\footnote{Id. at 22. In a recent case in Paris, the procureur général de la Cour de cassation praised the quality of the procureur’s investigation, but suggested that the inquiry pass to the juge d’instruction in order that a wider investigation be conducted in which full defense rights of access to the dossier and the assistance of a lawyer would also be available. Laurence de Charette, Woerth: Curroye determine à garder son dossier, Le Figaro, Sept. 27, 2010, http://www.lefigaro.fr/actualite-france/2010/09/27/01016-20100927ARTFIG00637-woerth-courroye-determine-a-garder-son-dossier.php (last visited Nov. 16, 2010) (on file with the Washington and Lee Law Review). This caused some surprise. Id.}

The procureur’s responsibility for the conduct of the garde à vue is currently the most contested aspect of this supervisory function. During the 1990s, the suspect in garde à vue had access to a defense lawyer—albeit only for a thirty-minute consultation after twenty hours of detention until further legislation in 2000 allowed consultation at the outset—a doctor, and the basic rights to contact a friend or family member and to know the
charges against her. The principal safeguard, however, continues to be the judicial oversight provided by the \textit{procureur}. She must be informed once someone is placed in \textit{garde à vue}. \textsuperscript{219} She authorizes that detention and any extension of the \textit{garde à vue} for up to two days, and she may order the release of the suspect at any time. \textsuperscript{220} She then determines whether to prosecute, drop charges, pass the case to the \textit{juge d'instruction} for a more extensive inquiry, initiate mediation or an alternative to trial such as a guilty plea or \textit{composition pénale} or, in the case of drug trafficking, organized crime, or terrorism, to ask the \textit{juge des libertés et de la détention} to authorize further detention in police custody. \textsuperscript{221} Access to a lawyer may be delayed for forty-eight hours in instances of organized crime and seventy-two hours in cases of drug trafficking and terrorism, making the \textit{procureur}'s oversight all the more crucial in these cases. \textsuperscript{222} When questioned as to whether lawyers should have more extensive access to their clients in \textit{garde à vue} and, in particular, whether they should be permitted to be present during the police interrogation of the suspect, police officers always responded that there was no need, as the \textit{procureur} was responsible for authorizing and overseeing the period of detention. \textsuperscript{223}

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

\textsuperscript{218} Hodgson, \textit{The Investigation}, supra note 90, at 21.
\textsuperscript{219} \textit{Id.} at 8.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}; \textit{C. PR. PÉN.}, supra note 14, art. 63-4.
\textsuperscript{223} Hodgson, \textit{French}, supra note 1, at 133–35.
\textsuperscript{224} Hodgson, \textit{Human Rights}, supra note 214, at 200 (presenting research that suggests that judicial supervision is not as effective as proponents think it is).
\textsuperscript{225} \textit{See id.} at 199 (noting that most of the oversight is retrospective).
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
expectation that responsibility for the garde à vue will entail checking up on specific cases or sitting in on interrogations. Visits to the police station are rare and always announced in advance; to do otherwise would be regarded as a more intrusive surveillance-style of supervision that would undermine the all-important trust that exists between police and prosecutor. While officers are hierarchically accountable to the procureur and must report to her and gain authorization for measures such as placing someone in garde à vue, the procureur is also dependent upon the police to carry out her job of investigating crime. The procureur directs the police in their criminal investigation work, but the police hierarchy is responsible for operations and resources; cooperation is therefore essential. As a result of this mutual dependence, they both come to share a crime-control and prosecution-oriented perspective, in which the truth is equated with a confession. If supervision consisted of a set of orders from a superior, the system would cease to function.

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

228. Id.
229. The C. Pr. Pén. requires the procureur to visit each police station within her jurisdiction only once each year.
230. See Hodgson, French, supra note 1, at 76 (describing the mutual dependence between the police and the prosecutor).
231. See id. at 154–55 (explaining that the police and prosecution must cooperate because they each have requirements of the other).
232. Hodgson, The Investigation, supra note 90, at 19 (noting that a confession is the ultimate goal of the police and the prosecution).
233. Id. at 20–21. The March 2010 reform took up the Léger suggestion of having audio visual recordings not only for crimes but also—if requested by the police, procureur or suspect, for délits—unless the lawyer is present, but this has been abandoned in the September 2010 amended reform project. See Ministère de la Justice et des Libertés, Projet de loi: Tendant à limiter et à encadrer les gardes à vue 7–17 (2010), available at http://www.cercle-du-barreau.org/media/01/02/731278778.pdf (abandoning the previous suggestions about audio visual recordings). While the procureur’s duty to oversee the garde à vue is affirmed, she is required to do no more than at present. See id. (putting forth duties that represent the status quo for the procureur).
234. Id. at 8.
in garde à vue, the initial power to detain is that of a police officer. The Medvedyev decision generates further uncertainty. In direct conflict with the rulings of the French Constitutional Court, the decision questions whether the parquet is a judicial authority for the purpose of ECHR Article 5 and the detention of a person in garde à vue. A series of ECHR decisions further compounds the situation by articulating the minimum requirements for an adequate defense provision under ECHR Article 6. France has tended to justify its somewhat minimalist due process rights on the grounds of the protection that the system of judicial supervision offers suspects. The ECtHR has applied a "margin of appreciation" doctrine, allowing for the fact that different legal procedures and traditions might provide the same level of protection in different ways. However, the protection that prosecutorial supervision offers is debatable in practice, and now post-Medvedyev, also in law. This reasoning also looks increasingly weak as the more recent ECtHR jurisprudence lays down standards that are universal and not susceptible to dilution in favor of other types of safeguards that come into play at various points in the process. In contrast to earlier case law, which held that breaches of Article 6 ECHR at the start of an investigation may be remedied subsequently, resulting in a fair trial for the accused overall, in its recent case law the court has taken a more robust stance. It has insisted on the importance of custodial legal advice as a fundamental and freestanding right, the breach of which will result in the rights of the defense being "irretrievably prejudiced."

235. Id. at 7.
237. See, e.g., Salduz v. Turkey, App. No. 36391/02, Eur. Ct. H.R. ¶¶ 50–55 (2008) ("Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.").
238. See Hodgson, French, supra note 1, at 28–29 (noting the Minister of Justice’s comments in defense of judicial supervision procedure).
239. See Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct. H.R. ¶ 47 (1976) (explaining that the margin of appreciation doctrine allows the court to take into effect the fact that the Convention will be interpreted differently in different signatory states and that judges are obliged to take into account the cultural, historic, and philosophical differences of the state).
241. See id. ¶ 54 ("Any exception to the enjoyment of [the] right [to legal advice] should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges . . . ").
242. Id. ¶ 55.
B. The Call for Greater Defense Rights

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

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

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

244. *Id.*


249. *Id.* ¶¶ 14, 17.

challenge the prosecution’s case at trial under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent.\textsuperscript{251}

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

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

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

\textsuperscript{251}. \textit{Id.} \ ¶ 23.


\textsuperscript{253}. \textit{Id.} \ ¶ 55.


\textsuperscript{255}. \textit{Id.} \ ¶ 14.

\textsuperscript{256}. \textit{Id.}

\textsuperscript{257}. \textit{Id.} \ ¶ 13.

\textsuperscript{258}. \textit{Id.}

\textsuperscript{259}. \textit{Id.} \ ¶¶ 26, 31.
interrogation, and that he had not been adequately informed of his right to silence.\textsuperscript{260} He alleged that these facts constituted a violation of Article 6 ECHR.\textsuperscript{261}

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

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

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

France has felt the impact of these decisions; lawyers have challenged successfully the compatibility of French criminal procedure with the guarantees of the ECHR.\textsuperscript{268} The first case that received publicity was a

\begin{table}
\begin{tabular}{ll}
260. & \textit{Id.} ¶ 50. \\
261. & \textit{Id.} ¶ 49. \\
262. & \textit{Id.} ¶ 66. \\
263. & \textit{Id.} ¶ 77. \\
264. & \textit{Id.} ¶ 73. \\
266. & \textit{See Pishchalnikov v. Russia}, App. No. 7025/04, Eur. Ct. H.R. ¶¶ 79–80 (2009), (finding that being informed of the right to remain silent and being provided a form stating rights prior to confession was not enough to assume a waiver of the right to legal representation). \\
267. & \textit{Id.} ¶ 92. \\
268. & \textit{See André Giudicelli, Chroniques, 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT}
\end{tabular}
\end{table}
decision of the Bobigny juge de la détention et des libertés on November 30, 2009.269 The judge found that the garde à vue did not conform to Article 6 ECHR: The suspect had been denied his right to a lawyer at the start of the garde à vue and during interrogation.270 Basing any conviction on incriminating statements obtained in this way caused irretrievable prejudice to the rights of the defense.271 A string of further cases followed.272 On December 30, 2009, the tribunal correctionnel in Bobigny went further and set out what was required under Article 6 ECHR. In addition to those rights set out in the French CPP, the suspect is entitled to the immediate assistance of a lawyer for moral support, to discuss her defense, and to prepare for interrogation. The lawyer in turn must have access to the dossier or to information on the charges faced by her client. Informing the lawyer of the date and nature of the offense, as stipulated by CPP Article 63-4, was wholly inadequate as it provided no information on the evidence against the suspect, preventing her from preparing for interrogation or the confrontation with the complainant.273 Her right to legal assistance, in the sense required by the ECHR, had not been respected.274 A month later, the Paris tribunal correctionnel ruled as inadmissible five gardes à vue for the same reasons.275 It also struck out the prosecution’s proceedings on the grounds that they were not the result of an inquiry à charge et à décharge, but were based on a wholly prosecution-oriented investigation conducted through the garde à vue, in which the defense had no opportunity to participate.276 In Nancy, the court excluded evidence obtained in the absence of a lawyer, but left the rest of

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270. TGI Bobigny, supra note 269; Maron & Haas, Tandis, supra note 268, at 12.
271. TGI Bobigny, supra note 269; Maron & Haas, Tandis, supra note 268, at 12.
272. See generally Maron & Haas, Tandis, supra note 268 (discussing this string of cases).
273. Id. at 13.
274. Id.
275. Id. at 13–15.
276. Id.
the proceedings intact.277 The appellants were held on suspicion of drug trafficking and so denied access to a lawyer for seventy-two hours.278

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

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

277. Id. at 17.
278. Id.
280. Id.
282. Id.
modest when compared with the more ambitious and ECtHR-inspired proposals made by a number of politicians to allow suspects access to a lawyer during police interrogation from the outset of the garde à vue; to allow the lawyer access to the case file; and to remove the exceptional procedures in which protections such as custodial legal advice can be delayed.284 Strengthening suspects’ access to lawyers is important, but it also requires appropriate funding in order to be effective. Criminal defense lawyers are not well paid,285 and the structure of the profession means that they tend not to specialize.286 Earlier and more extensive access to suspects held in garde à vue will increase legal aid costs substantially if it is to be available to all. This is all the more important given that the central plank of protection for suspects—supervision of the garde à vue by the procureur—is increasingly in question.287

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

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


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

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

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

289. See Pascale Robert-Diard, Nouvelle offensive des avocats contre les conditions de garde à vue: Ils veulent profiter de l’entrée en vigueur d’une disposition de la réforme constitutionnelle, LE MONDE, Mar. 2, 2010, available at 2010 WLNR 4265268 (explaining that Parisian lawyers used the adoption of the new provision as an occasion to challenge several articles of the C. PR. PÉN. in what eventually became CC Decision No. 2010-14/22QPC).
brings into effect Article 61-1 of the Constitution, adopted on July 23, 2008. It provides that in a case before the court, where it is maintained that a legislative provision offends against the rights and freedoms guaranteed by the Constitution, the Conseil constitutionnel can be required to rule on the question through a reference from the Conseil d’Etat or the Cour de cassation. The Parisian lawyers questioned whether CPP Articles 62, 63, 63-1, 63-4, 77 and 706-73 offend the rights and freedoms guaranteed by the constitution, namely, the principle of respect for the rights of the defense, of a fair trial, of individual freedom, of freedom of movement—the right not to be subject to arrest unless strictly necessary—and the principle of equality. They supported their claims with reference to the principles set out in the ECtHR jurisprudence, arguing that custodial legal advice must be real, effective, and available throughout the period of detention—including the interrogation of the suspect—and that the lawyer must have access to the dossier of evidence in order to be able to advise the client effectively.

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

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291. Conseil constitutionnel, Ordinance No. 58-1067 Constituting an Institutional Act on the Constitutional Council, § 23-4 (2009), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en_ordinance_58_1067.pdf. The ruling must take place within three months; the question of compatibility must not have been previously decided and it must relate to a new matter or one that is of a serious nature.


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

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

Although they had been examined when the original legislation was passed in 1993, the Conseil considered that the circumstances of their operation had changed considerably over the last twenty years. More specifically, the number of cases dealt with through the instruction procedure has declined, while those under the authority of the procureur have increased. The temps réel procedure means that many cases are prosecuted and disposed of on the basis of evidence gathered during the period of the garde à vue; this has now become the principal phase on which the dossier is based and on which the accused is judged. There has also been a huge rise in the number of people placed in garde à vue in poor material conditions; recourse to detention is systematic even in minor cases such that there is a banalisation of the use of the garde à vue.

Having set out why it believed it necessary to re-examine these provisions, the Conseil went on to examine the balance struck between the need to investigate crime and maintain public order on the one hand, and the obligation to ensure the proper exercise of constitutionally guaranteed freedoms on the other. It concluded that the provisions regarding police custody did not strike the balance in the appropriate way. In particular, resort to the garde à vue as a repressive measure is too frequent and too easily authorized by the police in the first instance; the suspect is not told of her right to silence and is not afforded effective assistance from her defense.
lawyer, irrespective of the circumstances of the case or the need to preserve evidence or protect an individual.304

The Justice Minister was required to develop the March 2010 reform project to take account of this new decision.305 The amended project, set out in September 2010, concerns ordinary cases, leaving the exceptional regime for organized crime, drug trafficking, and terrorism in place.306 The *Conseil constitutionnel* stated that it lacked jurisdiction to consider these measures; the government has interpreted this rather more ambitiously as a positive endorsement of their constitutionality.307 The suspect will be informed of her right to silence308 and may inform a friend and her employer (rather than in the alternative, as at present) of her detention.309 But the most significant proposal, predictably, is to allow lawyers to be present during the interrogation of the suspect in *garde à vue*.310 However, there are a number of important limitations. Consultation remains limited to thirty minutes and the second consultation remains at twenty-four hours

304. *Id.* ¶¶ 27–28.


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


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

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

310. *Id.* art. 77:19.
—rather than at twelve hours as proposed in March.\textsuperscript{311} If the police feel that the necessities of the investigation require the lawyer’s presence in interrogation to be delayed, the \textit{procureur} can authorize this for up to twelve hours in order to assemble or to preserve evidence.\textsuperscript{312} Access to the suspect’s statements can be delayed for the same reason.\textsuperscript{313} Furthermore, while the March reform proposed allowing lawyers to ask questions at the close of interrogation, they are now permitted simply to make written observations.\textsuperscript{314}

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

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

\begin{itemize}
\item \textsuperscript{311} \textit{Id.} art. 73:18.
\item \textsuperscript{312} \textit{Id.} art. 73:19.
\item \textsuperscript{313} \textit{Id.} art. 73:18.
\item \textsuperscript{314} \textit{Id.} art. 73:20.
\item \textsuperscript{317} \textit{Projet de loi, supra} note 306, art. 73:1, 73:2.
\end{itemize}
describe interrogation as creating the "intimacy of a confessional" which establishes a relationship of trust that allows the suspect to "relieve her conscience," they portray the arrival of the lawyer as "inviting silence and reinforcing her sense of impunity."\(^{318}\)

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

**VI. Conclusion**

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

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

321. *Id.*

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

the executive and of the parties in the case to qualify as a judicial authority.\textsuperscript{324}

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

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

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

\begin{itemize}
\item \textsuperscript{325} See Didier, supra note 283 (noting the French government’s reaction).
\item \textsuperscript{326} See id. (noting the arguments that the French government has formulated to avoid being bound by these new precedents).
\item \textsuperscript{327} See generally Hodgson, Human Rights, supra note 214, at 185–208.
\item \textsuperscript{328} CC Decision No. 2010-14/22QPC, July 30, 2010, J.O. 105, ¶ 29.
\end{itemize}
through a natural resistance to criticism, but also because they were seen as an attack on French legal culture and an attempt to set down requirements for a more adversarial procedure at the European level. *Salduz* in particular represents a move away from the doctrine of the margin of appreciation through which national differences are tolerated and rejects the argument that breaches at one stage of the procedure can be remedied at a later point. Instead, it holds that custodial legal advice is a universal and freestanding right, irrespective of procedural tradition. This fear and demonization of the defense lawyer manifests itself whenever there is some strengthening of defense rights, and it was again apparent in the reactions of some *Le Monde* readers to the breaking news of the Conseil constitutionnel's decision on the *garde à vue*.330

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

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

332. Even the Léger committee opposed the presence of the lawyer in the *garde à vue* from the outset on the grounds that this would compromise the effectiveness of the inquiry. *Léger Report*, supra note 108, at 18. Research has established that across jurisdictions, the initial period of detention and interrogation is very often determinative of the case’s outcome. *Hodgson, The Investigation*, supra note 90, at 19. It is therefore paramount that due process safeguards are in place in order to ensure that the evidence is thorough and reliable. However, the Léger committee frames its view in terms of the first hours of investigation being determinative of the discovery of the truth, and it does not want a
supervision of the police investigation is open to challenge in practice and in law. In contrast to the rights of the defense during the instruction, the lawyer’s structural exclusion from the pre-trial phase has made it impossible for her to participate and undermines the promise of a procedure that is contradictoire. If the Justice Minister is serious about requiring the parquet to investigate à décharge, it must recognize and support the lawyer’s role in helping to achieve this requirement. This can only strengthen the independence of the procureur’s role, which is paramount given that 96% of investigations are under her authority and that figure may soon rise to 100%. 333

defense lawyer getting in the way of this process. See LÉGER REPORT, supra note 108, at 17–26 (explaining this view in the fifth recommendation).
333. Hodgson, The Investigation, supra note 90, at 22.