The Investigation and Prosecution of Terrorist Suspects in France

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Contents

Executive Summary

This study provides an account of criminal investigations in France and the ways in which counter-terrorism investigations are conducted. It is organised into three sections.

Part 1 gives a general background to French criminal procedure, setting out the basic model of police investigations supervised by either the *procureur* (the public prosecutor) or the *juge d'instruction*. It explains the nature of the judicial function within the French legal process, as well as the organisation of the police, *gendarmerie* and intelligence services. The centralised nature of the procedure is described, together with the inquisitorial roots of the legal system, its dependence on written evidence and the relatively diminished role afforded the defence lawyer as a result of judicial supervision.

Part 2 looks in detail at the features of the two models of judicially supervised investigation. The vast majority of cases, including the period of police detention and questioning, the *garde à vue* (GAV), are supervised by the *procureur*. Supervision is distant, bureaucratic and largely retrospective. The *procureur* is not present during the interrogation of the suspect, supervision consisting of police initiated reporting to the *procureur* by telephone or fax. The lawyer may see the suspect for 30 minutes at the start of GAV, but may not be present during interrogations that are not tape recorded, but noted down in summary form. The dependence of the *procureur* upon the police as partners in the investigation and prosecution of crime, militates against supervision as surveillance or as anything which challenges the police. The defence has no pre-trial role beyond the 30 minute interview with the suspect.

In a small number of the most serious cases, the investigation is the responsibility of the *juge d'instruction*. Once an *information* has been opened (ie the case passed to the *juge d'instruction*), the suspect may only be questioned by the *juge d'instruction*. All other acts of investigation are delegated to (or often initiated by) the police. Carried out under the authority and supervision of the *juge d'instruction*, they are considered acts of judicial investigation. The *procureur*, defence and victim may request that certain acts of investigation are carried out and may mount procedural challenges during the enquiry. In practice, the defence is very much the weaker party, the victim rarely becoming involved in the investigation. As a fellow judicial officer (*magistrat*) the *procureur* is professionally closer to the *juge d'instruction*, sharing (in theory at least) the same public interest centred ideology. The cement that holds the process together is trust – trust between police and *magistrat* and between different types of *magistrats* (*procureur* and *juge d'instruction*). In this, the defence lawyer scores poorly – as a lawyer (*avocat*) she is something of a professional outsider and representing the interests of the suspected criminal rather than the public, she cannot enjoy the close trust and working relationships that exist between *procureur* and *juge d'instruction*. The defence is therefore unable to participate in the pre-trial investigation on the same footing as the *procureur*. This is significant as the dossier of evidence produced during the *instruction* is afforded a high degree of credibility as the product of a judicial enquiry – a search for the truth that

includes evidence that inculpates and exculpates the suspect. In practice, the *procureur* is seen to dominate the enquiry. She shapes the investigation before opening the *information*; she is in frequent contact with her colleague the *juge d'instruction*; and she has the ear of the *juge* in a way that the defence does not. This close cooperation (interestingly a hallmark of counter-terrorism cases) has been severely criticised in the recent Outreau enquiry as undermining the functional independence of the two *magistrats*.

Part 3 looks at the features of counter-terrorism investigations in France. There is no special jurisdiction, terrorism cases being dealt with through the ordinary courts, albeit using exceptional procedures. Suspects can be questioned by the police for up to six days, seeing their lawyer only after three days of detention. There is an emphasis on prevention and disruption as well as on repression. Terrorism offences are defined in broad terms, allowing investigation and prosecution before any concrete act has taken place and more controversially, the arrest, detention and questioning of tens of individuals suspected of associating with others involved in terrorist networks. These high profile 'sweeps' result in the vast majority of those detained being released without charge. The *magistrats* consider this justified given the high stakes and the possibility of obtaining useful information from those questioned; civil liberties organisations consider this a form of social and political control and an unwarranted infringement of individual freedom. In this, the offence of *association des malfaiteurs* is the cornerstone. Thirdly, the investigation of terrorist activity is highly centralised and highly specialised. All cases are dealt with in Paris by a small group of *procureurs* and *juges d'instruction* who work closely together. Intelligence plays a key part in these investigations and the *juges d'instruction* enjoy a very close working relationship with the DST. Officers carry out an administrative function in intelligence gathering under the control of the Interior Minister, but may also act as judicial police under the supervision of the judiciary. In this way, intelligence can be 'judicialised' when it is produced under the supervision of a *magistrat* and so be made admissible as evidence. The work of intelligence officers was previously jealously guarded by the interior ministry, but their use by the judiciary in criminal investigations is now a key feature in counter-terrorism cases.

This close cooperation is seen as a strength, providing an impressive armoury of tools and powers and allowing investigations to utilise the widest range of information available. It is also seen as a weakness, the *juge d'instruction* being criticised for an unquestioning and excessive reliance upon information from intelligence sources. The weak role of the defence and the tradition of accepting material that is produced during the pre-trial enquiry as credible evidence, both raise serious concerns about the reliability of 'evidence' produced in this way. The recent Guantánamo case in France demonstrates the dangers of such an approach. The wide powers exercised by a small specialist group of *magistrats* in counter-terrorism cases is also criticised as being subject to inadequate control and accountability. Defence requests are rarely acceded to and the threshold of evidence required to challenge the evidence and findings of the *juge d'instruction* is high. The importance of defence scrutiny of the prosecution case is less significant in a procedure that considers the dossier to be the product of an independent and neutral judicial enquiry. Transposing such a procedure across to our more adversarial process

would be unacceptable – in requiring the judiciary to participate in the prosecution case and in eliminating the defence from any serious role of evidential scrutiny.

Introduction

This report has been commissioned by the Home Office as part of a wider review of the procedures in place for the investigation and prosecution of terrorism suspects in the run-up to planned consolidating legislation in the Spring of 2007. In particular, there is a concern in this jurisdiction that the criminal prosecution of some individuals considered to be terrorist suspects is not possible because of the inadmissibility of so-called 'intercept evidence' (evidence obtained through the interception of telecommunications) and the risk of endangering police and intelligence capabilities and sensitive sources.[1] A specific objective of the current review, therefore, is to determine whether the *instruction* procedure would enable the introduction as evidence of a wider range of material, whilst also ensuring the protection of sensitive sources, and intelligence-gathering techniques and capabilities. If such a procedure were to prove attractive, consideration would have to be given to the ways in which the *instruction* might be adapted to fit within the very different criminal process in place in this jurisdiction. A number of bodies and committees have given some consideration to the introduction of an investigating judge or similarly modified procedure in terrorism cases, but with only a limited background knowledge of the workings of French criminal procedure. Therefore, this study takes a comparative approach, addressing at some length the key differences between procedures in the two countries – both in terms of the investigation and prosecution of terrorism offences and of the wider criminal justice context within which investigation procedures take place.

The report relies upon data collected in earlier empirical research into the investigation and prosecution of crime in France, as well as a more recent survey of material relating to counter-terrorism. Useful background information was also obtained during a series of meetings in Paris with various officials and members of the judiciary dealing with counter-terrorism policy and investigations.

[1] The possibility of introducing 'intercept evidence' as evidence into criminal proceedings is the subject of separate inquiry.

1. French criminal procedure

In discussing the comparative functions of legal personnel in the two jurisdictions, it is important to be aware of differences in their professional status, role and training. One cannot assume, for example, that the role performed by the French public prosecutor (a judge with authority to direct the police investigation) can be transposed seamlessly onto that of the Crown Prosecutor (a lawyer, with no directing authority over the police). Neither can the defence role be understood in the same way in an inquisitorial procedure characterised by pre-trial judicial supervision, as it is in an adversarial process where defence and prosecution (rather than a central judicial enquirer) are responsible for the investigation and presentation of evidence. Equally, the relationships between those performing different functions is not the same –whether because of their status, the broadly adversarial or inquisitorial procedure within which they operate, or the occupational cultures and working relationships that develop between them. And finally, the credibility of evidence at trial will depend upon whether it is regarded as the prosecution case, the defence case, or the product of a judicial investigation.

This report therefore provides a general account of French criminal investigations, against which the more specialist policies and procedures in counter-terrorism cases can be understood.

a. The basic investigation procedure

The way in which investigations are carried out and supervised is described in greater detail later in the report, but below is a very simple overview against which the general features of the French criminal process can be read.

In France, most investigations are undertaken by the police under the supervision of the public prosecutor, the *procureur*. As a *magistrat*, the *procureur* has a judicial status along with the *juge d'instruction* and the trial judge. The *procureur* therefore provides judicial supervision of police powers and is responsible for the protection of individual rights and freedoms. In an *enquête préliminaire* the police may investigate for several months, gathering evidence via surveillance, witness statements etc. Any search of premises may only be conducted with the consent of the person concerned. If it is deemed to be necessary for the investigation, a judge may, at the request of the *procureur*, authorise the police to carry out a search without consent. Once a suspect is identified, the *procureur* must be informed, so that she can oversee the investigation. During the investigation of a recently committed offence (*enquête de flagrance*) the police enjoy wider powers (for example to search the suspect's premises without consent) for a period of up to 16 days. As with the *enquête préliminaire*, the police may investigate on their own initiative, but they must inform the *procureur* once a suspect is identified.

The police may arrest a suspect and place her in detention for questioning (*garde à vue*, GAV) for up to 24 hours. The *procureur* must be informed of this detention and can authorise its extension for a further 24 hours. The suspect may see a lawyer for 30 minutes at the start of detention. This will be the extent of the lawyer's involvement during the pre-trial investigation. Those suspected of drugs trafficking and various types of serious and organised crime can be detained for up to four days on the authority of a judge, or in the case of terrorism, for up to six days. In such instances, the suspect is prevented from seeing her lawyer for 72 hours. This is very significant given the absence of other safeguards such as tape recording or the presence of a judge or lawyer during interrogation. Whilst the *procureur* is responsible for the oversight of this period of detention, she is not present at the police station and is unlikely to have any contact with the suspect until the close of the GAV.

At the end of the GAV, the *procureur* must decide whether to prosecute or release the suspect, or whether to send the case to the *juge d'instruction* (JI) for further investigation by opening an *information*. The JI cannot investigate on her own initiative. If she uncovers evidence of another crime during her investigation, this must be referred to the *procureur* who will decide whether to issue a supplementary instruction to the JI (or indeed to a different JI). If the *procureur* refers a case to the JI, the JI must have a preliminary interview with that person and determine whether there is serious or corroborating evidence that she has committed an offence. The JI enjoys wide powers and unless expressly forbidden, may undertake any investigation that assists in uncovering the truth. Virtually all aspects of the investigation may be delegated to the police through the procedure of *commission rogatoire*. There is one important exception to this: once a person is being investigated in this way, she may not be questioned by the police. Only the JI may interview her and she is entitled to have her lawyer present during any questioning. If a suspect is identified during the course of the enquiry, the JI may order the police to detain and question this suspect. Whilst the investigation is conducted by the JI, the *procureur* has access to the dossier and can request that specific investigations be carried out, as can the defence and victim. If these requests are refused, the JI must give reasons and her decision can be appealed to the *Chambre d'Instruction*. At the close of the *instruction*, the JI will report on which, if any, charges are made out and ready for prosecution.

b. Adversarial and inquisitorial models of criminal procedure

French criminal procedure is characterised typically (by those outside France) as being inquisitorial, in contrast to the system in place in England and Wales, which is generally described as adversarial. In fact, just as the system in England and Wales is not a pure representation of the adversarial model, so the French would describe their own criminal procedure as 'mixed', incorporating aspects of both models. Adversarial procedure assumes a broad equality between the opposing parties – prosecution and defence – each of whom is responsible for gathering evidence to support their case and advocating it before a neutral judge. The proceedings are oral, public and argued by both sides. Inquisitorial procedure dates back to the 13th century and is the product of a more institutionalised and centralised state role, which does not rest upon equality between the

parties. In its original 'pure' form, the enquiry and prosecution was conducted by a single individual, a representative of the state (rather than either 'party') who investigated, prosecuted, could instigate coercive measures and determined whether the case should go to trial.[2] The defence did not participate in any aspect of the pre-trial phase. The procedure was written, secret and not debated. The different emphases within the two procedures means that the locus of fact-finding takes place during the pre-trial period in an inquisitorial model and the trial during an adversarial model, corresponding to a longer investigation period in the former and a longer trial in the latter.

Contemporary French criminal procedure is better described as 'mixed', rather than 'inquisitorial' in that it retains some of the inquisitorial principles and structure, but is not conducted wholly in secret and there is some opportunity for the parties to participate: the defence lawyer has enjoyed a limited presence in the *instruction* investigation since 1898. More recently, France has introduced a number of changes which, whilst modest in the context of an adversarial process, have given the defence a greater role in both the pre-trial and trial procedure – for example, allowing the defence lawyer to see her client for 30 minutes during police detention; allowing the defence to present arguments against the pre-trial detention of her client.[3] Whilst some might characterise such reforms as representing a move towards a more adversarial procedure, this would be misleading: such a move has been explicitly rejected by ministers sponsoring the reforms of the last decade. Instead, the changes have been influenced primarily by the developing jurisprudence of the European Court of Human Rights (ECtHR) and are described in France as part of a move to strengthen the principle of *contradictoire* – that of greater participation and the ability for both sides to debate the issues. The European Convention on Human Rights (ECHR) is now increasingly present in debate around criminal justice law reform in France[4] but it brings with it a real tension. It is resisted by some as an unwanted 'external' influence (particularly by the political Right) and even among those in favour of the changes it brings, the translation of Convention guarantees into the French inquisitorial context can be problematic; the requirements of Articles 5 and 6 are often understood in adversarial terms, and therefore are not considered to be wholly appropriate to French criminal procedure, within which the central role of the judge or *magistrat* is revered.[5] The development of pre-trial defence rights has been particularly challenging in this respect, creating tensions with prevailing legal cultures at the legislative, judicial and investigative level (Hodgson 2004b). Given the careful balance that must be struck between the parties within our own adversarial procedure in order to ensure fairness and equality of arms, the significance of the different role

[2] See Delmas-Marty (1991:19-20).
[3] Although the term pre-trial detention is used, it should be noted that this also refers to detention whilst the *instruction* investigation is ongoing, before any decision to prosecute has been made.
[4] See eg the Commissions preceding each of these reforms: Delmas-Marty (1991); Truche (1997).
[5] The protections under criminal procedure were indeed inspired by British law and Madsen (2004:64) suggests that this discouraged France from allowing the right of individual petition to the European Court of Human Rights.

assigned to the defence within the French model of judicially supervised investigations should not be underestimated.

c. A centralised investigation

Whilst the UK system focuses very much on the roles of the individual parties (police/prosecution and defence), the French legal process continues to have a state-centred conception of Justice. During the pre-trial phase in particular, the focus of the investigation is said to be the offence, rather than the suspect.[6] The judge maintains a central role during the investigation. As a *magistrat* representing the public interest (rather than that of the prosecution or defence) she is charged with searching for the truth, gathering evidence which might exculpate as well as incriminate the suspect. The defence rights of the accused have been somewhat neglected, in part because the public interest orientation of the *magistrat* is considered sufficient protection and also, because the accused has been seen traditionally as an object of the search for the truth, rather than a party to the proceedings.[7] The balance has been shifted to some extent during the *instruction*, but in the majority of cases investigated by the police under the supervision of the *procureur*, the defence has no real opportunity to participate in the pre-trial investigation. This is extremely significant given the importance attached to written evidence gathered during the pre-trial phase and the lack of oral testimony at trial. As noted above, when comparing French criminal procedure with that in England and Wales, the diminished role enjoyed by the defence in France is part of the fundamental difference in the two procedures – in the roles of the parties, the checks and balances in place and the ways in which the rights of the accused are safeguarded.

d. The importance of written evidence

In France, great emphasis is placed upon written evidence. All official activity must be recorded in a standardised form and preserved for possible later review. The evidence collected during the investigation is placed in the case dossier (the organisation of which is provided for in the CPP), which then forms the centrepiece of the trial, the central point of reference from which the judge will question the accused. In most instances, the evidence of witnesses will be accepted in written form, with no need for live testimony.[8] Those accustomed to the oral tradition of adversarial procedure may mistrust a written statement, preferring to judge the evidence in the context of the witness presenting it. For

[6] In practice of course, it is generally the identification of a suspect which triggers the investigation in France, just as in Britain (though an '*information contre X'* can be established where there is no suspect).

[7] The victim is considered a party to the case in France and this has also been used to constrain the development of defence rights. For example, the legal representation of the suspect held in police custody, it is argued, would create an imbalance, placing the interests of the defence above those of the victim.

[8] In the *cour d'assises*, where the most serious cases are tried, witnesses are called and may be questioned directly by the *procureur* and defence *avocat.*

the French, on the other hand, there is a certain objectivity in the written form which avoids the manipulation of clever advocates. As a *juge d'instruction* told us:

> Here, evidence relates to what is written. In your country, it is about witnesses, with all of their subjectivity, if they are not manipulated. Here, we do not place much trust in what is said. [B1]

Within Anglo-American scholarship there is an established research literature addressing the dangers of written statements, especially of confessions, pointing to the importance of the conditions in which they are obtained.[9] This is not the case in France. As one *procureur* we observed warned an accused who wished to correct something in his statement taken by the police: 'I am paid to read the dossier of evidence. I believe what I read...This is written and signed.' The mood is now changing after the revelations of the Outreau affair[10] and the unreliability of many witness statements made in response to obviously leading questions and taken in conditions where 'contamination' of evidence was almost inevitable.

e. The policing and intelligence function

The policing function is similarly defined in England and Wales and in France, as the maintenance of public order and the prevention and detection of crime. The overarching ideology, however, is presented in somewhat different terms. In France, the police act on behalf of the state, whereas in England and Wales, they are said to act on behalf of the public – the notion of policing by consent. The range of activities assumed as part of the general policing function also differs: French police, for example, carry out work which would be undertaken in England and Wales by H.M. Immigration and by MI5. There are also important structural and organisational differences between the corps of officers who undertake policing work in the two countries. In England and Wales there are forty three independent police forces, with overall accountability to the Home Secretary, but like many other European countries, the policing function in France is carried out by both the *police nationale* and the *gendarmerie nationale*. The *police nationale* (comprising some 120,000 officers) tends to operate in and around cities and they are under the Minister of the Interior. The *gendarmerie* (comprising some 85,000 officers) have tended to operate in less urban locations and they are part of the army, under the Minister of Defence. In addition, there are some 3,000 small municipal police forces, employed, managed and paid for at the local level, accountable to the mayor. Together with the further division

[9] See, eg, the wealth of empirical work conducted prior to and post PACE.

[10] For those unfamiliar with the case, it concerned accusations of child sexual abuse made by a number of children and adults in the town of Outreau in Northern France. 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. Seven of the 17 defendants were acquitted in the cour d'assises; six more by the cour d'appel in December 2005. Between them, they served almost 26 years in *détention provisoire* while the *juge d'instruction* carried out his investigation and one suspect, François Mourmand, died in custody. Four of the original 17 remain convicted and in prison, and have not appealed.

between judicial and administrative functions, this makes the system of policing in France somewhat complex.

In addition to the existence of two policing bodies, both police and gendarmes have two distinct policing roles – administrative and judicial. The distinction is crucial as the officer's powers will depend upon the capacity in which she is acting.[11] The administrative role is characterised as preventative, ensuring the maintenance of public order, whilst the judicial function concerns the investigation of a specifically identified crime. Put simply, one is before the commission of an offence (or concerning more general criminal investigation), the other is after (concerning a specific case). In practice, the distinction is not always clear and actions which begin as administrative (such as policing a public demonstration or gathering intelligence) may become judicial policing matters once offences are committed.

The judicial/administrative distinction is also significant and potentially problematic, given that officers depend upon a different hierarchy for each of the two functions. As *police judiciaire* conducting criminal investigations and so performing acts which impact upon the liberties of the individual, they are under the Minister of Justice, with day to day answerability to *magistrats*. The police organisation and administrative function (crime prevention; public order – notably the policing of demonstrations; traffic control; political intelligence gathering) is under the Minister of the Interior, with answerability to the *préfet*[12] (or, in some larger cities the *préfet de police*) at the level of *département*. This offers the potential for a government minister, either directly, or through the prefecture system, to exert political influence over the wider operation of the policing role, particularly in relation to the *police nationale*. At the local level, the *préfet* is responsible for the implementation of government policy and makes operational policing decisions affecting the types of offences and areas to be targeted and the mounting of particular police operations, as well as gathering political intelligence. Given the *préfet*'s accountability to the interior ministry, it is perhaps not surprising that Horton (1995:30-31) notes that a number of these policies are 'overtly political'.

Within the administrative function of the police (the responsibility of the interior ministry), there are a number of specialist counter-terrorist divisions under the *Direction Générale de la Police Nationale* (DGPN). The *Direction de la Surveillance du Territoire* (DST) has both administrative and judicial attributes and so works directly on prevention and repression of terrorist activities, as well as general counter-espionage missions. As described in section three below, this dual administrative/judicial role has been exploited

[11] Officers must first undergo a period of training before acquiring the status of *officier de police judiciaire*, (OPJ) which then enables them to carry out arrests and to detain and question suspects in police detention (*garde à vue*), as well as authorising them to sign the all important statements of evidence (*procès verbaux*) which appear in the dossier, or case file. They are assisted by *agents de police judiciaire* (APJ) who may perform some of the same tasks under the supervision of the OPJ.

[12] As a local representative of the government, the *préfet* has a wide range of responsibilities, of which policing is only one.

by the *juge d'instruction*, who works closely with the DST in counter-terrorism investigations. In addition, the *Direction Centrale des Renseignements Généraux* (DCRG) monitors dangerous groups and the *Direction Centrale de la Police Judiciaire* (DCJP) carries out numerous investigations through its *Division Nationale Anti-Terroriste* (DNAT). Finally, created in 1984, the *Unité de Coordination de la Lutte Anti-Terroriste* (UCLAT) exchanges information with the judicial authorities and brings together all the information supplied by the operational agencies in the Ministries of Defence, Interior and Economy, Finance and Industry, through the daily analysis and synthesis of information gathered about terrorism. In Paris, the *prefecture* maintains specialist administrative and judicial police units and under the operational control of the Minister of the Interior, the *gendarmerie* works in counter-terrorism across the country. The *gendarmerie* is part of the army and so as well as working under the Interior Minister in its administrative function and the Minister of Justice in judicial operations, it is also under the Minister of Defence. This is of particular importance in intelligence gathering work outside France.

f. The role and status of legal personnel

To lawyers in the common law world, the judicial function centres upon the adjudication of issues, primarily at trial.[13] This is distinct from the two phases of investigation and of prosecution (which must themselves be kept separate) reflected in the relatively passive, umpireal role of the trial judge. Thus, in England and Wales, the judge plays no part in the gathering or presentation of evidence and only rarely will she question the witnesses or defendant. The parties are responsible for the investigation, selection and presentation of evidence supporting their case, and the court must reach its verdict on the evidence before it. In France, however, the judicial function is a more broadly defined concept, encompassing as it does, the trial judge, the *juge d'instruction* and the *procureur*. These three are all *magistrats*, referred to collectively as the *magistrature*. A distinction is made between the standing judiciary (the *procureur*, referred to collectively as the *parquet*) and the sitting judiciary (the *juge d'instruction* and the trial judge). Whilst the *parquet* is responsible for the prosecution of cases and works within a hierarchy headed by the Minister of Justice, the sitting judiciary are independent of this form of executive control. Only the sitting judiciary may try a case and perform the adjudicative role undertaken by the judge in England and Wales and most, but not all coercive measures which impinge directly on the liberty of the individual, such as remands in custody and telephone tapping, are also authorised by this form of judge.

However, the role of the *juge d'instruction* as investigator has gradually declined, as that of the police and *procureur* has increased. Legislation over the last five years has shifted power yet further, enabling the *procureur* to access investigative powers that were previously only available during the *instruction* procedure – wiretaps being one of the most important. However, whilst in theory investigation is the responsibility of a

[13] Increasingly in England and Wales the judge may also be required to rule in pre-trial hearings (eg under the CPIA 1996) and there are a number of coercive powers, the exercise of which require judicial authorisation.

magistrat, in practice it is carried out by the police under the supervision of either the *procureur* or the *juge d'instruction*. As a result, one of the most intrusive infringements of an individual's liberty – the detention of a suspect (and until recently, a witness) in police custody without charge – is authorised not by the sitting judiciary, but by the police, overseen (in the vast majority of cases) by the *procureur*.

The selection and training of the French judiciary is also very different from that in this jurisdiction. Unlike England and Wales, France has a career judiciary, the *magistrature*. Entrance to this career judiciary is by competitive examination, followed by a period of centralised training at the national school, the *Ecole Nationale de la Magistrature* (ENM). Recruits go on to specialise in one of the three functions, but their common training and status as *magistrats* means that they can and do move between these. Much importance is attached to belonging to this judicial corps, where, through the instilling of a universal professional ethos, the law graduate is transformed into a *magistrat*, a judicial officer entrusted with the protection of the public interest and the application of the law. The process of socialisation is a rapid one and there is an almost familial bond which the competitive entrance examination and demanding training creates between individuals who are already characterised by a strong social resemblance. This common status (a relic from the time when all three functions were carried out by a single judge) and the resulting ties of collegiality and ideology which bind them together as *magistrats*, militate against a clear separation of prosecution and investigation roles from within a wider judicial function.[14] As one *juge d'instruction* explained in my earlier research:[15]

> The unity of a single corps which includes the functions of prosecution, of investigation and of judgment. We are the same, we come out of the same school, we know each other. That is the real problem…I am often shocked by the way in which people talk about certain cases before and after the court hearing. That is already an encroachment on the independence of each…I once heard a judge say, 'but of course we must defend the police.'…That is the real debate. It is all the product of the ideology of society, the profile of the state. Our problem is based on having multiple functions coming out of the same school…Even I question myself: Do I work as a judge, investigator or partner of the police and *gendarmerie*? I do not know. [B1][16]

This closeness between those of the same professional status, performing different functions, is a central characteristic of French criminal procedure. *Magistrats* all train

[14] This is demonstrated physically by the position of the *procureur* on a raised platform alongside the bench, whilst the defence lawyer stands on the floor with the accused. The Delmas-Marty Commission (1991:180) recommended that the *parquet* stand at the same level as the defence, symbolising the separation between prosecution and judgment and greater equality between the parties.

[15] This data is part of an earlier study. See Hodgson 2005. Interviewees are labelled by letter (representing field sites A-F) and a number within each site.

[16] Compare Samet's (2000:33) description of whether the *juge d'instruction* is Solomon or Maigret.

together and then specialise in one of the three principal functions. They inhabit the same building in most instances and enjoy frequent contact. As *magistrats* they share a common ideology – their role is to apply the law and to protect the rights of the individual and the public interest. The defence lawyer, in contrast, as an *avocat*, is very much a professional outsider; she has neither the professional status nor the ideology of the *magistrat*. Whilst the *procureur* and the *juge d'instruction* are said to act in the pubic interest, the lawyer acts in the interests of her client, the accused. In this way, that which binds together the prosecutor, investigator and trial judge, also sets them apart from the defence lawyer. As we will see, this is of enormous significance in a criminal procedure that places great emphasis on evidence gathered during the pre-trial phase.

The report following the Outreau affair criticised the ways in which the functionally separate roles of the *procureur* and JI are seen to overlap considerably in practice and indeed the general absence of reflexivity among *magistrats*: although the case passed through the hands of some sixty different *magistrats*, none of these challenged either the central case thesis or the methods of investigation (2006:276). The procedure was denounced by those defending the accused as a form of 'judicial corporatism'. As we shall see, given the difficulty for the defence to exert any influence over the pre-trial enquiry, it is crucial that the *procureur* and *juge d'instruction* are able to act independently. Whilst checks are carried out and the decisions of *magistrats* monitored, these safeguards are all operated by **other** *magistrats*. The Outreau report recommended that the *parquet* should have a career path and standing that is different from the judiciary, creating a greater degree of separation between the two roles. This has been contested by *procureurs* who insist on the importance of their status as *magistrats*, guarantors of individual rights and freedoms, and oppose fiercely changes that in their view, will reduce them to the status of *fonctionnaires* or bureaucrats.[17]

These recommendations are interesting when we apply them to the counter-terrorism context, where cases are handled very differently: the *juge d'instruction* in the Outreau cases was young, inexperienced and working alone; in terrorism cases, *juges* will be experienced (generally, and in terrorism investigations) and work in teams. The *juge d'instruction* in the Outreau affair was criticised for being unduly influenced by the *procureur*: the explicit policy in counter-terrorism cases is that *procureur* and *juge d'instruction* should work together closely. Whilst terrorism investigations were excluded from the proposed post-Outreau reforms such as the tape recording of the first interview between suspect and JI, it is important to note the implications that this might have for the wider system of checks and balances, particularly given the very different hierarchies within which the two *magistrats* are placed. The judicial lead that has been taken on counter-terrorism policy in France has been described as depoliticising the issue, yet the close involvement of the *procureur* under the Minister of Interior brings the investigation very much within the sphere of government influence.

g. Prosecution Independence

[17] See Jean-Louis Nadal (Procureur général de la Cour de cassation) 'Un risque pour notre justice et nos libertés' *Le Monde*, 2 June 2006, p18.

Judicial independence is as important in France as it is in England and Wales, but it operates rather differently within the state-centred tradition of the Republic. The relationship between the state and the judiciary is a complicated one.[18] Judicial independence is a necessary guarantee of the fair and impartial administration of the law, but within the French republican tradition, the judicial role must be subordinate to that of those elected in the name of the people. This is demonstrated in a number of ways: the 'purges' of the higher ranking judiciary which have accompanied major political change[19]; the judiciary's status as an *autorité* rather than a *pouvoir*; its lack of power to review the operation of administrative bodies[20]; and the powerful executive control exercised over the career, discipline and functioning of *magistrats* through the Minister of Justice. In this way, the role of the law is seen as largely subordinate to the interests of the state[21] and instrumental in promoting its values and ideals.

In theory, the independence of all *magistrats* is guaranteed by article 64 of the French Constitution, which guarantees the independence of *l'autorité judiciaire*. However, it is clear that the *parquet* and the sitting judiciary do not enjoy independence of quite the same nature. Perrodet (2002:422) notes that article 64 has not been interpreted to apply to all *magsitrats* and two attempts (in 1993 and 1999) to ensure that *procureurs* are expressly included, have failed. There are also differences in the way in which the professional development of the *procureur* is overseen, compared with other *magistrats*. Perhaps the most controversial threat to the independence of the *procureur*, however, is her subordinate relationship to the Minister of Justice. The Minister's ability to issue instructions in individual cases, together with the powerful influence she enjoys over the career of the *procureur*, has, historically, created a tension between the independence of the *parquet* on the one hand and the requirement that she be democratically accountable to a government minister on the other. Whilst not an issue in most ordinary cases, this tension has been demonstrated most clearly in a number of high profile affairs, where the Minister has issued instructions in individual cases concerning politicians and business people.[22] Since 1993 any instructions concerning a case are required to be in writing and placed in the case dossier, but in practice this rule has been circumvented and the Truche Commission (1997:24-5) noted that less formal communications continue to be issued and are often treated as instructions. The hierarchical culture of instruction and

[18] For a comparative analysis of the political and constitutional position of judges, see Guarnieri and Pederzoli (2002), especially ch 3.
[19] This was most aggressive during the Third Republic, but was also apparent during and after the Vichy regime. See further Badinter (1995) and Royer (2000).
[20] There do exist administrative courts to this effect, however.
[21] Hazareesingh (1994:66). This extends to international as well as internal affairs: 'When the French state protected and even sanctioned the criminal actions of its own agents at home and abroad (as with the sinking of the *Rainbow Warrior* in 1985…) it demonstrated that international law was just as expedient a precept as domestic law.' Hazareesingh (1994:173).
[22] This is part of a wider tension in which the proper role of the executive within the repressive function is ill defined, leaving a 'lacuna' in the law. Breen (2003:226).

subordination is less easily broken, in particular given the influence of the Justice Minister upon the career progression and professional disciplining of the *procureur*.[23] Given the important role played by the *procureur* at all stages of the investigation, including those carried out by the *juge d'instruction*, the possibility of political influence is significant. In counter-terrorism cases, the *procureur* will work especially closely with the JI – both in individual cases and in the development of policy. The symbiosis of the Interior and Justice Ministries does not seem to be considered problematic in this context.

[23] As well as playing a key role in the appointment and promotion of *procureurs*, the Justice Minister is also responsible for their discipline, although she may only remove *procureurs* from office on the proposal of their superior and following the advice of the CSM. Some *procureurs* considered that the hierarchical ties would not be broken easily. 'Even if you cut off the hierarchy to the Minister of Justice – if he wants to intervene and the *procureur* is eager for promotion, he still can.' [*Procureur*, Area D].

2. The Structure of the French Criminal Investigation

Although only a small proportion of criminal cases generally are dealt with through the *instruction* procedure, it is the main focus of this section, as almost all counter-terrorism cases will be investigated by the *juge d'instruction*.

a. Investigations supervised by the procureur

Like the Crown Prosecution Service (CPS), the *procureur* in France is responsible for reviewing the evidence and determining whether or not to pursue a prosecution. But unlike the CPS, the *procureur* exercises a supervisory function over the police investigation. As a *magistrat*, she plays a more neutral and wide ranging role than that of a simple (more partisan) prosecutor: she is a judicial officer, responsible for directing the police investigation and overseeing the detention of suspects in police custody, including the protection of their due process rights.[24] Although the nature of the legally structured framework of supervision is different from that during *instruction*,[25] both the *procureur* and the *juge d'instruction* perform a dual investigative and judicial function. In this way, it is the *procureur*'s oversight of the police investigation that represents the most common form of pre-trial judicial supervision in France.

To those familiar with a more adversarial criminal process which shares out these functions differently and in particular, which anticipates that the defence lawyer (rather than the same person responsible for the investigation and prosecution of the offence) will play a role in monitoring the protection of pre-trial defence interests, this model of judicial supervision represents a remarkable concentration of power. But it is the *procureur*'s status and ideology as a *magistrat* (rather than just a prosecutor) which, in theory, justifies this position. Furthermore, as part of the *ministère public*, the *procureur* is part of a centralised hierarchy of authority, headed by a government minister, the Minister of Justice. Designed to ensure the legitimacy and democratic accountability of the *procureurs*, as well as a degree of centralisation and uniformity within the *parquet*, this hierarchical control defines and constrains the exercise of the *procureur*'s discretion.[26]

In terrorism cases, an *information* will be opened and a more detailed investigation carried out by the *juge d'instruction*, but in many instances preliminary enquiries

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[24] The broad nature of her function is underlined by her representation of the wider public interest in civil as well as criminal matters. A *procureur* in area D explained: 'I would act in society's interest if, for example, a large organisation was going into liquidation; I would consider the position of the employees. Or, if there was a take-over bid, I would scrutinise the offers made. Or, if a company wanted to replace all of their employees with machines.' See further Dintilhac (2002:39-40).

[25] Hodgson (2001:346-7).

[26] See further, Hodgson (2002).

(including detention and questioning in police custody) will be conducted under the authority of the *procureur*. The significance of this stage should not be overlooked. This is often a crucial point in the case and the information gathered at this stage can shape the future conduct of the enquiry. In particular, the police may question the suspect with no tape recordings and no lawyers present. This can last for two days in ordinary cases and up to six days in terrorism cases. Once the case is passed to the *juge d'instruction*, only the *juge* and not the police may question the suspect. This takes place in the offices of the *juge d'instruction*, the defence lawyer may be present and has access to the case dossier beforehand. A number of recent miscarriages of justice in France have demonstrated the defining influence of the period of police detention and questioning and the difficulty in establishing an alternative account once before the *juge d'instruction*.[27]

The nature of supervision by the *procureur* must be understood within its proper context. In contrast to the ways in which this is often understood in this jurisdiction, supervision is not characterised by close contact and direction: *procureurs* will be responsible for many cases across a number of police stations and any contact with officers will be by telephone or fax. Inadequate resources militate against more personal involvement, but even where caseloads are modest, *procureurs* do not aspire to a more surveillance-based approach. Quite simply, this is not how the task of supervision is understood. Moreover, the *procureur* is structurally dependent on the police in order to carry out her responsibility of investigating and prosecuting crime and it is perhaps unsurprising therefore, that rather than the ideal of a neutral and public interested oriented judicial officer, most *procureurs* identify strongly with police objectives and adopt a more crime control ideology. The result is that police supervision by the *procureur* remains distant and bureaucratic, based on mutual trust rather than knowledge of the case. It is not designed to interfere in the method of the investigation or the conduct of the period of police detention and questioning, but rather, to ensure the legal coherence of the output, preferably in the form of a confession.

Like all criminal investigations, the principal means of regulating the GAV period of the police investigation is supervision by a *magistrat*. The initial decision to detain a suspect is made by an *officier de police judiciaire* (OPJ), but the *procureur* must be informed at the outset, and her express authority is required for detention beyond twenty four hours; in a range of serious offences, detention may be extended for a further two periods of twenty four hours, up to a maximum of 96 hours or exceptionally in terrorism cases, six days. The purpose of advising the *procureur* in this way is to enable her to ensure that the GAV is conducted properly and the Commission Nationale Consultative des Droits de

[27] See eg the case of Patrick Dils, whose conviction for murder was quashed in April 2002. Interrogated by *gendarmes* in April 1987, Dils initially denied any involvement in the offence, but after spending the night in GAV, he finally admitted to the grotesque murder of two eight year old boys in Montigny-lès-Metz. He maintained his GAV admissions before the *juge d'instruction*, retracting them one month later in a letter to his lawyer. It was 15 years before his conviction was finally overturned in a dramatic hearing which had as its star witness, a self-confessed serial killer.

l'Homme (CNCDH) has underlined the significance of the *procureur*'s intervention as part of the constitutional guarantee that individual liberties must be judicially protected.

Informing the *procureur* marks the beginning of the judicial supervision of the GAV, the primary safeguard ensuring both the proper treatment of the suspect and the effective conduct of the investigation. However, the way in which this supervision should be effected is not stipulated by the law: there is no obligation beyond the provision of information by the police to the *procureur*, which may be done by telephone or by fax.[28] Neither is there a requirement that the *procureur* will attend the GAV, monitor closely the way in which it is conducted, or take measures to ensure the reliability of the evidence gathered. France has been heavily and repeatedly criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, for its poor treatment of those held in GAV – notably those held by the anti-terrorist squad.[29]

Immediately upon detention, the suspect must be informed of her rights[30] which now include having her employer or a member of her family informed of her detention within 3 hours[31]; to request a doctor[32] – also within 3 hours[33]; to see a lawyer for 30 minutes 'without delay'[34]; and to be informed of the nature of the offence in connection with which she is being detained.[35] The police must inform the lawyer of the date and nature of the offence for which the suspect is being held. Lawyer-client consultations must be in private, but the defence lawyer is not permitted access to the dossier of evidence, nor to be present during the interrogation of her client. Interviews are not tape recorded, but are noted down in the form of a statement. A formal record of detention must be kept,

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[28] There is no requirement even that the original copy of the fax informing the *procureur* of a person's detention in GAV appear in the final dossier. (Decision of the *Cour de cassation*, 03 April 2001, 01-80939). The terms in which the *procureur* was initially informed of the detention and the information on which she based her initial decision is not necessarily, therefore, on the file. This is surprising given the centrality of the case dossier during both investigation and trial and the importance of its review as part of the process of judicial supervision. It seems to suggest that the duty to advise the *procureur* is little more than a formality, rather than the provision of key information upon the basis of which decisions can be taken regarding further police action and the liberty of the detainee.

[29] See, for example, the Report (2001), para 22, which criticises the meagre progress made by France in this respect over the last 8 years. Poor conditions of detention were also highlighted in the reports following both the 1991 and 1996 visits.

[30] Art 63-1 CPP.

[31] Art 63-2 CPP.

[32] Art 63-3 CPP

[33] In the case of juveniles, the doctor must be requested immediately.

[34] Art 63-4 CPP

[35] Art 63-1 CPP. Telling the suspect that there is evidence suggesting that she has committed or attempted to commit an offence is not sufficient (Cass. 2e civ. 22 mai 2003, *Chiang Jiao Z*).

detailing the duration of the GAV, interrogation times, rest periods, meal times, when the suspect was told of her rights and whether she wished to exercise them. The requirement that the police inform the suspect of her right to silence was introduced in June 2000, but was then repealed by the following government in March 2003.

The *procureur*'s oversight is the principal safeguard during the investigation and police detention of the suspect. It is very difficult for the defence to play any part in the investigation, or to have any impact on the construction of the dossier. Her role during the GAV is limited to a 30 minute consultation with the suspect and many cases are then listed for trial shortly afterwards, effectively closing the investigation. There is no opportunity either in the structure of the criminal procedure or within informal working practices, for the defence to participate in the pre-trial investigation supervised by the *procureur*.

> Any image of a dossier constructed on the basis of real dialogue between prosecutor and defence with the latter using a reading of the dossier and client interview to prompt the prosecutor to order further investigations was a long way from reality. (Field and West 2003:295)

Additional safeguards, such as record keeping remain peripheral, concerned to bolster the legal bureaucratic form of the dossier, rather than the ways in which the evidence is constructed and produced. Due process safeguards are given a narrow construction and compliance with such protections is a matter of form rather than an indication of process, serving only to authenticate, rather than actively to regulate, the enquiry. The *procureur* is not concerned to scrutinise the process by which evidence is obtained in order to evaluate its credibility. Rather, it is the outcome and the legal form of the dossier that are taken to demonstrate the reliability of evidence. The dangers of such 'arm's length' supervision have been powerfully demonstrated in a number of French miscarriage of justice cases, where detainees have been persuaded to make false confessions to offences such as armed robbery[36] and child murder,[37] through a process of detention and interrogation which places no effective constraints upon the ways in which the police construct the evidence of suspects.

This process is potentially of even greater concern in counter-terrorism cases, where police-*procureur* relations are well established and interrogation in the GAV is likely to be underpinned by intelligence. With no proper recording of the interview and no hands-on judicial supervision, it is impossible to evaluate the production or the credibility of the evidence produced. Recent reform proposals to tape record police interrogations do not include terrorism cases, yet, the very different nature of the material that is put to the suspect makes accurate recording more, not less, important.

b. Investigations conducted or supervised by the juge d'instruction

[36] See the case of Joël Pierrot, whose conviction was quashed in May 2002.
[37] See the case of Patrick Dils, whose conviction was finally quashed in April 2002.

The *instruction* represents the paradigm model of investigation within French inquisitorial procedure, but its role has declined to the extent that today, less than five per cent of cases are dealt with in this way. This procedure is mandatory for the most serious offences (*crimes*) and at the discretion of the *procureur* for middle ranking and trivial offences (*délits* and *contraventions*). There must be serious or corroborating evidence making it likely that the person has acted as principal or accomplice in the commission of the offence for which the *information* is opened. Once this has been confirmed, in her task of investigating evidence for and against the suspect, the *juge d'instruction* (JI) is empowered to undertake any lawful investigation that she considers will assist in the discovery of the truth (Art 81 CPP) and the victim, accused and *procureur* may also ask for certain acts of investigation to be carried out. As a *juge du siège*, the *juge d'instruction* is not subject to the same hierarchical control as the *procureur* who, ultimately, is answerable to the Minister of Justice. In theory, this means that JI investigations are more independent of political scrutiny and control. In practice, the *procureur* remains implicated in all stages of the *instruction*. The relationship between the role of the *procureur* and the JI has come in for a great deal of criticism after the Outreau affair demonstrated a unity of approach between the two *magistrats*, undermining the independence of what should be two separate functions. This contrasts with counter-terrorism investigations, in which this unity of policy and approach is considered to be a strength and has been the policy developed by the judiciary and the Ministry of Justice over the last twenty years.

Given the different professional and political hierarchies within which the two work, it is important to note the ways in which the JI is dependent upon the *procureur*. The JI is not empowered to begin an investigation upon her own initiative; the authority to refer cases for investigation to the JI rests with the *procureur*.[38] This applies even once an *instruction* has commenced: if during the course of an enquiry the JI uncovers evidence relating to a separate offence, this may not be investigated under the existing *instruction*. Instead, the matter is referred back to the *parquet*, who must open a separate or supplementary *information* in order that evidence relating to the second offence may be investigated. In most instances, this procedure is unproblematic; the JI and *procureur* continue to work together and generally agree on the types of cases that will be investigated through *instruction* and whether investigations should be joined together. In some instances however, particularly those involving high profile and politically sensitive cases, JIs have accused the *parquet* of succumbing to political pressure to stymie investigations.[39] This discretion is part of the pivotal role played by the *procureur* in regulating the overall flow and destination of criminal cases. She is responsible for the supervision of the initial police enquiry, for the framing of any charges against the suspect,[40] for determining whether or not the case should proceed to some form of trial or

[38] The victim may also invoke the *instruction* procedure directly by constituting herself as *partie civile* in the case. This is less usual in ordinary cases, but more common in large fraud cases.

[39] See eg Halphen (2002).

[40] Framing the offence as a less serious *délit*, rather than the more serious *crime*, for example, avoids the need for an *instruction*. This may be considered desirable from the

alternative to trial, for determining in which level of court the case will be heard, for deciding whether an *information* should be opened, and if so, when (and on what basis) this will take place.

Although formal responsibility for the *instruction* rests with the JI, she is authorised to delegate much of her investigatory power to the police through the use of the *commission rogatoire*. Under this procedure, named police officers are authorised to conduct specific enquiries within a specified time frame, before then reporting back to the JI. In practice, the majority of the investigation is carried out by the police through this mechanism, the JI conducting personally only those acts of investigation that the law prevents her from delegating – principally the questioning of the suspect, known as the *mise en examen* (MEE) once the *instruction* has commenced. Thus, the *instruction* becomes an important mechanism through which police powers can be extended.[41] As a consequence, the impetus for opening an *information* comes directly from the police in some instances, in order that they can continue an investigation with the wider powers which might be delegated to them under the *instruction* procedure. In this way, delegation operated as a function of a police-dominated investigation, dictated not by the JI's assessment of the enquiry, but by that of the police.

Counter-terrorism cases would appear to be no different in this. Investigations are carried out by a specialised corps of *magistrats* who enjoy close relationships with police and intelligence officers. Cases are discussed while still at the intelligence stage and the police may ask that a judicial enquiry be started in order that they can extend their investigations in particular ways. This may be because they require greater powers that are only available in judicial investigations or, because they judge that their enquiry is sufficiently advanced and is ready to move from an intelligence operation to a judicially sanctioned process of evidence gathering.

Where a case has been identified as one that will be investigated through the *instruction* procedure, the *procureur* will frequently seek to retain the case for as long as possible before opening an *information*. There are several reasons for this. Firstly, it enables the *procureur* to shape the investigation towards her desired result. This might entail guiding the police to construct the case towards a particular (more serious) offence, or priming the suspect by using the threat of a remand in custody to elicit information. In most field sites we observed, the *procureur*'s retention of the case was not considered problematic, but some *juges d'instruction* expressed concern that they had not been involved in the enquiry from the outset and that the quality of evidence gathered was deficient as a result. The second (and related) reason for the *procureur* retaining the case is that it enables the suspect to be questioned by the police under the more coercive regime of the *garde à vue* (GAV), avoiding the delays and the safeguards of the *instruction*. Once an *information* has been opened, the suspect becomes the MEE and may only be questioned by the JI.

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perspective of resource efficiency or in order to continue the investigation without the scrutiny of the defence lawyer.

[41] The reform of 2004 makes some of these powers (notably the use of telephone taps) available without the need to open an *information*.

The defence lawyer also has access to the case dossier and may be present during any interrogation of her client. The police dominated environment of the GAV is therefore considered more likely to elicit a confession from the suspect. One *procureur* explained to us that this was the reason that cases were kept out of *instruction* for the maximum period during which they could still be investigated '*en flagrance*':

> That way, the police still enjoy wide powers and we can carry out the investigation ... we want to get the culprit ... The *juge d'instruction* is not going to interview the suspect three or four times, sit across the table from him and say 'Are you going to admit this?' The police station is a hostile environment. It's unpleasant and the police will use more pressure. And that does not make it unlawful – sometimes you need some pressure. [D3]

It was clear that the detention of the suspect during the investigation was used as a means of getting her or other witnesses to provide information.

> Let us not pretend otherwise, the *garde à vue* and *détention provisoire* are means of putting pressure on and obviously, we use them for that – it is [sic] one of our tools. The *garde à vue* is particularly effective, it forces the suspect to take stock. [*Juge d'instruction,* Area F]

As one *procureur* explained to us: 'The JI will lock a person up if he denies the offence or refuses to confess, but is often prepared to let him out if he does then talk or confess.' When asked how much pressure was permissible in order to obtain a confession, a JI in area A told us:

> Confessions are one piece of evidence among others. Obviously, it is much more convenient and lawyers like to have confessions. The confession remains the 'queen of evidence'…I remember a guy who was in *garde à vue* and who was going to be placed in detention…I was alone with him at this point. I told him, 'what matters for me is that the file is coherent and in good order so that I can make my decision. If you tell me just anything, you expose yourself to a risk.'…In fact he made admissions, the file was coherent and there was no need to place him in detention. I was not using detention as a threat or blackmail, but just playing straight with him, putting my cards on the table. I need to progress my enquiry…I just explained the criteria for placing someone in detention and he quickly understood. [A5]

(i) Judicial Questioning of the Accused

The nature of the judicial questioning of the MEE is very different from the interrogations that take place during the GAV. In contrast to the more hostile and coercive environment of the police station or the *gendarmerie*, once an *information* has been opened, the MEE is questioned by the JI in her offices in the *Palais de Justice*. The atmosphere is more that of the consulting room, the presence of the JI, her secretary and the defence lawyer maintaining a degree of reassuring formality rather than of

intimidating authority. The atmosphere is more relaxed and professional, and the MEE is treated with greater respect by the JI than by her GAV interrogators. She is addressed in the polite form '*vous*' rather than the more familiar '*tu*' and care is taken to ensure the accuracy of the interview record, the MEE usually being given an opportunity to correct any errors before the document is printed off and signed. Whilst police officers and *gendarmes* interviewing the suspect during the GAV often spoke to her in an aggressive way, the JIs we observed were generally much more effective communicators. They were able to relate complex and detailed facts in a straightforward manner, using vocabulary that was appropriate and readily understood by the layperson. The tone of the interview was generally conversational, the JI asking questions designed to verify information already on file whilst also prompting the MEE to provide an account in her own words. As a result, the MEE is more at ease than during the GAV and this less threatening atmosphere is more conducive to the answering of questions.

When the MEE appeared to be lying, however, the tone of the encounter changed and the JI was often more forceful.[42] In most instances, the lawyer was present, but she played no part in the interview process. Many clearly knew little or nothing about the case and had nothing to add at the close of questioning. The nature of any participation had to be judged carefully. On several occasions when the lawyer attempted to intervene during the questioning itself, the JI became angry and made it quite clear that it was she and not the lawyer who was in charge of the interview. The line drawn by the JI between legitimate defence assistance and unwarranted interference is a fine one. Lawyers in the Outreau case were critical of the *juge d'instruction*'s conduct of interrogations. Karine Duchaucholy,[43] who was ultimately acquitted, claimed that the JI did not listen to her account when it did not support the principal accusations, and that he then became angry and threatened to imprison one of her co-accused in order to make him confirm the accusations against her. She also claimed that her own lawyer was reduced to tears by one such confrontation.[44] There have also been accusations that counter-terrorism *juges d'instruction* do not engage in any real dialogue with the suspect, but adopt a wholly prosecution perspective and prepare long and complicated questions which they answer and then invite the suspect to comment on.[45] Despite writing to over 100 lawyers, the International Federation of Human Rights Leagues (FIDH) did not manage to elicit a single positive response to the way in which the *juges d'instruction* conducted their investigations. Lawyers complained that the *juges* drew the worst inferences from tenuous and circumstantial evidence and were unwilling to entertain explanations that contradicted their own views. Any intervention on the part of the lawyer was not well

[42] This was precisely what many of the defendants in the Outreau (2004) case alleged also. See the comments of one of the acquitted defendants, Karine Duchaucholy, discussed below.
[43] Although she was not placed in detention, M. Duchaucholy's son was removed from her care during the three year investigation.
[44] See *Liberation* 24 May 2004.
[45] Patrick Baudouin from the Paris-based International Federation of Human Rights Leagues (FIDH). See further the 1999 Report of the Federation, *Paving the Way for arbitrary justice*.

received. The FIDH report concluded that the *juges d'instruction* had become case hardened and inflexible.

(ii) The Scope of the *Information*

The preliminary police enquiry often provided the key witness statements and the all-important confession from the suspect, such that the dossier contained the kind of information that might be found in the CPS file in England and Wales. However, in opening an *information*, the verification of this evidence is then conducted by the JI, rather than the court.[46] Historically, the pre-trial investigation was the most important stage in inquisitorial procedure, the trial serving almost as a formality confirming the earlier findings. Whilst the trial has taken on a different form with both the *procureur* and defence lawyers playing a more active part, during the *instruction*, the emphasis continues to be on obtaining and evaluating all the relevant information during the pre-trial, rather than the trial phase.[47] In this way, the *instruction* characterises most strongly the inquisitorial roots of French criminal procedure, where issues are selected and debated not by the prosecution and defence at trial, but by a judge during a pre-trial investigation. There has been some debate in England and Wales over the possibility of entrusting a judge with a pre-trial role in terrorism cases, enabling her to make decisions on sensitive material. This would entail a significant shift towards the more inquisitorial procedure in France, where the tradition has been for the judge to determine issues pre-trial, rather than the parties.

The JI interviewed in area B contrasted the broadly adversarial and inquisitorial models in place in Britain and in France:

> [In England] you can perhaps overturn evidence, you can debate, you can question witnesses yourself, call them to give evidence at court. In France, this is not really the case. It is in the hands of the judge…usually, it takes place before trial…in England it happens at court, and here it takes place in my office. It is not done in public…what you need to understand by *décharge* is that it is about checking aspects of the case that are favourable to the MEE. Yes, we do that…That is what the lawyer does in England. He tries to demonstrate to the court the aspects of the case that are favourable to the individual. We are judges in an office. It is in this way that we truly function as judges, because even in preparing the dossier, there is this idea of balance. We try to include in our investigation, that which is favourable and that which is unfavourable…What is

[46] Where there is clear evidence against the accused, the case will, of course, be sent for trial after the *instruction*. However, unlike the procedure in England and Wales, many of the issues will already have been tested and verified by the JI and any challenges to the evidence or procedure resolved at the close of the *instruction*.

[47] The acquittal rate in the *cour d'assises*, where *crimes* are tried, is extremely low. Several JIs also told us that of all the cases they had sent to trial during the last decade, only two or three had resulted in acquittals.

> important is that this should be done by a judge. The function of justice is to defend the individual against himself. [B1]

During the *instruction* witnesses were re-interviewed, facts (even where uncontested) and assertions followed up, and expert evidence on both the crime and the parties was commissioned.[48] As a result, even relatively straightforward cases where the offence was not denied by the MEE could take many months to complete, because the *juge d'instruction* may wish to cast the investigative net further. In one case in area C, for example, the two young MEE admitted killing a girl of their own age who had been hitch hiking and had stayed the night at the home of one of them. They described how she had had sex with one of them, how they became 'disgusted' by her and how they had then decided that they wanted to 'get rid of her'; the physical evidence and that of witnesses corroborated their account. The JI told us:

> Here, I don't know that there has been a rape. Nobody has asked me to investigate that, not the *parquet* or anyone. But I will investigate that. I do not think that that happened, but I must check. I do not want a judge saying to me at a later date that this should have been looked into. But otherwise, this is quite a straightforward case – it will take less than a year…I have to enquire into their parents, their education, the sports club they mention going to and everything about them. It takes time.

In counter-terrorism cases, especially where the focus is upon prevention of acts that may take place rather than detection of those that have, the scope to investigate is huge. The JI has broad powers and an almost unlimited discretion to pursue the investigation in whatever direction she considers useful. Terrorist cells and networks extend across the globe and establishing their existence and membership will entail the investigation of tens if not hundreds of individuals. The danger is that such an enquiry becomes an intelligence gathering operation clothed in the legitimacy of a focused judicial investigation.

(iii) The ideology of the *juge d'instruction*

The ideology of the JI as a neutral judge acting in the public interest provides an external justification for her dual investigative and judicial function, but it is also internalised by the JI and forms an important part of her self-image. Her status as a *juge du siège* and her belief in her own ability to define the public interest rendered unproblematic (for her) the potentially conflicting roles that she was required to perform. They enabled her to consider the MEE's previous convictions without any fear that they might prejudice her view of the case; to determine the pre-trial detention of those she was investigating (this is now done by another judge); to discuss the investigation with the *procureur* without recognising the possibility that this might compromise her independence; and to view as unproblematic the absence of any corresponding dialogue with the defence.

[48] In offences of sexual violence, eg, both the MEE and the victim would be seen by a psychiatrist.

These claims to neutrality were undermined in practice by the close working relationships that she enjoyed with the police and *procureur*, in contrast with the defence lawyer who remained an outsider in the enquiry. Although both the defence and the victim are now given greater rights to (at least request to) participate in the procedure, the culture of the *instruction* remains one in which the defence role is marginalised. For the JI (as for the *procureur*), the defence served a legitimating function, acting as a demonstration and therefore as a guarantee of the fairness of the procedure. At best, the lawyer was able to act as a useful counter reflex within the *instruction* and a check upon the procedure. More usually, her presence was seen as a hindrance to be overcome. For example, one JI in area D explained that whilst legally the MEE should only be questioned about information that is in the dossier, without the presence of a lawyer the JI could adopt a more informal approach and ask questions about emerging lines of enquiry. Other tactics included deliberately delaying the recording of information within the dossier in order to prevent the defence *avocat* from seeing it. In counter-terrorism cases, the police and *juge d'instruction* enjoy a particularly close working relationship allowing them to exchange information informally, some of which might later be recorded in writing, but some of which would not. In this way, the defence is prevented from scrutinising the information on which the *juge* will base some of her questioning and which will inform her decision-making.

Our interview with a JI in area A illustrated the proximity between the *procureur* and the *juge d'instruction*.

> We [*juges d'instruction*] are cut off from our *juges du siège* colleagues and I feel closer to the *parquet*. We work together quite closely, so we remain a little distant from the trial phase…I see my *juges du siège* colleagues very much less. We do not work together…The *parquet* works before and after me. Our work is complementary. When I receive a dossier, I always bear in mind that I am working for the *parquet*. Our work is very complementary. We are on the same wavelength. [A5]

This ideological proximity is reinforced by the physical proximity between the two *magistrats* and the fact that they both enjoy working relationships with the police in a way that the defence does not. In a large case of trafficking in stolen cars in area C, the JI, *procureur* and three police officers met in the JI's office to discuss extending the scope of the investigation. They established which charges related to which of the five principal suspects (and which were unnecessary at this stage and would only slow things down), the evidence gathered so far and the extent to which an additional suspect could be investigated under the current *instruction* procedure, or whether a supplementary *réquisitoire* was required. It was decided to extend the scope of the *instruction* and a *commission rogatoire* was issued immediately in order that the new suspect could be investigated. In many ways, such a meeting was a sensible and useful way to proceed, but it also underlines the extent to which the JI is dependent upon the police and works alongside the *procureur*. The JI will not be prosecuting the case and may therefore retain a degree of detachment from it, but there is no real sense in which defence interests are or

could be represented at this stage. The JI is, at most, able to ensure procedural fairness, but to involve the defence in the progress or conduct of the investigation would risk jeopardising it altogether. How then, is the *instruction* different from an ordinary police investigation? Principally, in providing a more meaningful level of investigatory supervision; but to claim that the defence can ever be on an equal footing with the *procureur* is fanciful. She is marginalised professionally as an *avocat*, and in representing the narrow interests of the accused she can never occupy the privileged place in the enquiry enjoyed by the *procureur*.

As a result of the JI's dependence upon the police and the *procureur*, her view of the case often comes to mirror theirs and the investigation can become the construction of a case against the MEE. In my own research, I observed that although evidence was verified, the JI did not seek to challenge findings or assumptions with the kind of vigour that a defence lawyer might; once a case theory was in place, there was little incentive for the JI to prove herself wrong. Most JIs agreed that the guilt of the MEE was clear from the outset and whilst some considered it important to investigate more closely evidence obtained from the preliminary enquiry, others regarded this as an unnecessary burden, a result of the MEE 'playing the system' and refusing to face up to the evidence. As one JI in area F told us:

> The presumption of innocence exists in theory but not in practice…The search for the truth is quite easy, but they [MEE] just refuse to confess. They hide behind the presumption of innocence and exploit any doubt in the evidence.

The obvious danger of this approach was demonstrated in the recent 'Outreau case' mentioned above, in which seventeen people were accused of raping and sexually assaulting their own children and those of their friends and neighbours. Seven of these were acquitted at the trial in July 2004, six of whom had spent nearly three years in detention during the investigation by the *juge d'instruction*, Fabrice Burgaud.[49] The handling of the case was strongly criticised by the accused who considered that both the JI, and the psychiatrists and psychologists evaluating the evidence of the children (some of whom were aged between two and five years), failed to act in an impartial way, seeking to strengthen the case against them, rather than to conduct a more thorough and wide ranging enquiry as the law requires. The *instruction* remained captive to the accusations made during the initial police enquiry, failing to challenge or displace the original case theory. The Justice Minister, Dominique Perben, apologised publicly to those acquitted[50] and set up a working party to look at possible improvements to the processes of *instruction* and detention and the use of expert evidence. The report

[49] Of the ten convicted, the sentences ranged from twenty years in prison to an eighteen month suspended sentence.
[50] They were later awarded compensation also.

suggested that JIs should not work alone in their first post, and that complex and sensitive cases such as the Outreau affair, should be handled by two JIs rather than one.[51]

In this sense, the specialist counter-terrorism judges in Paris have set the trend. By definition, their cases are lengthy and complex. Their practice is to work in teams in order that information and investigative techniques are shared, allowing links to be made between cases and for the development of a shared body of expertise. However, the lack of independence between *juge d'instruction* and *procureur* was of equal concern, as was the inability for the defence to exert any influence over the pre-trial investigation. These are also features in terrorism cases as some recent trials (discussed below) demonstrate.

(iv) Delegating the investigation to the police: the *commission rogatoire*

In our interviews, observations and questionnaires, both the *procureur* and the *juge d'instruction* characterised their relationship with police and *gendarmes* as one of trust. This is the lynchpin of police-judicial relations. Although responsible for the conduct and direction of the enquiry, the JI recognised her dependence upon officers to carry out the investigation and so the need to have trust in them.

> I have total trust in [the police]. We have excellent supervision over investigators, who continually keep us informed, so the work is very, very good. Besides, we do not have the time to check everything. In the end, it is also a question of knowing the officers. Some of them, you can trust, others, less so…it is better not to be too 'matey' with officers because sometimes we need to check on them. That is also part of our role. [A5]

> [The JI's relationship with the police] is primarily one of trust. We do not have the means to exercise total control over the investigation. We verify their questions and they keep us informed of what they have done. We are all guarantors that the procedure has been respected. There needs to be an exchange. The JI is in charge and is responsible for the case, the police are the men working on the ground…I tell them what I would like to be done. The police can put forward their suggestions, but at the end of the day they ask and I direct. I need a tidy file at the end of the day, with the evidence and procedure in order. [*Juge d'instruction,* Area D]

> Researcher: Is this usual, to delegate to the police rather than to do it yourself?
> JI: Yes, always. I do not have time to go myself, so that is the norm for the police to do it.
> Researcher: How can you control the police when it is the file you are supervising in practice?

[51] The JI in the Outreau case, despite his youth and inexperience, had refused the assistance of a colleague. The working party report suggests that the *chambre d'instruction* should have the power to require joint investigation in such cases.

> JI: Good question! But you can. It is experience really. There are good and bad police and you get to know them.
> [*Juge d'instruction*, Area C]

As noted above, the opening of an *instruction* was on the initiative of the police as well as of the *procureur*. This proactive approach on the part of the police continued throughout the investigation, with officers often coming to see the JI to request a *commission rogatoire* in order that they could carry out specific investigations. In counter-terrorism cases this kind of working relationship between police, intelligence officers and *magistrats* was also regarded as crucial. As noted above, this is a sensible way of conducting an investigation. However, this is not the production of the prosecution case as would be presented by the CPS in England and Wales. This is a judicial enquiry that claims to allow the participation of all parties and to produce evidence that has already been judicially scrutinised. In this sense it represents a form of pre-judgment, with the result that there is perceived to be less need for evidence to be opened up for debate at trial. Yet, there is little opportunity to test the evidential basis of the case during the investigation and even repeated requests and appeals to the *Chambre d'Instruction* have failed to drive a wedge between the seemingly immovable agreement between *magistrats* of all types. This is the claim of lawyers in terrorism cases such as the recent Guantánamo dossier. In the Outreau affair, in the process of investigation, review and appeal to the *Chambre d'Instruction*, the file passed through the hands of over 60 *magistrats*, none of whom sounded the alarm in what was revealed to be an enquiry built on inference and supposition.

The major advantage that the *instruction* appears to offer over the system of unsupervised police investigations in England and Wales, is that although the JI will often be convinced of the MEE's guilt and so will not search for inculpating and exculpating evidence to an equal degree, the simple fact of her presence in the enquiry makes the outright fabrication of evidence difficult. Although not looking to disprove evidence suggesting the guilt of the MEE (the defence case generally being poorly represented through the enquiry), the JI will seek to verify information and to produce a case that is solid and which will withstand scrutiny at trial. Were the police to fabricate evidence, it is always possible that this would be uncovered by complementary enquiries ordered by the JI or through the judicial questioning of a witness.

However, whilst the JI is concerned to verify facts and expert opinions, she is less concerned with the way in which evidence is obtained and so with the reliability of its construction. The case of Patrick Dils, noted above, demonstrates that the nature of the *instruction* is such that it may be inadequate to interrogate or to displace flawed evidence produced during the preliminary police enquiry. Dils' confession was not fabricated, but it was produced in a way that made it wholly unreliable, as were the confessions of several other men whom the same officer had persuaded to confess. The subsequent *instruction* did not challenge the reliability of the confession evidence, but rather, lent it added credibility. In the Outreau affair discussed above, the *instruction* was again insufficiently robust in its interrogation of the evidence. In addition, the experts instructed to assess the evidence of the child victims adopted a prosecution perspective,

imposing their own judgment on the veracity of the accusations, rather than acting as neutral professionals contributing information to the enquiry. There are accusations that the JI in counter-terrorism cases is insufficiently distanced from investigating officers and over reliant on intelligence-based information, without subjecting it to proper scrutiny.

Added to this is the fact that in most instances, the same officers who began the investigation continued to act under *commission rogatoire* once the *instruction* began – unsurprisingly, as they are often the impetus for the opening of an *information* as described above. The continuity that this provides between the preliminary enquiry and the *instruction* may be resource efficient, but in their questionnaire responses, a small number of police officers suggested that the *instruction* would be more effective if fresh officers were brought in to investigate, thus avoiding the same investigatory assumptions and pitfalls of the preliminary enquiry. This is obviously of even greater pertinence in counter-terrorism cases where intelligence gathered within the administrative enquiry will be converted into 'evidence' by the device of the same officers making statements in the judicial enquiry in their capacity as 'judicial' police.

(v) The Defence Role During *Instruction*

Given the importance of the pre-trial judicial role in producing evidence that is deemed reliable and credible, the role of the defence in this process is of particular interest. During the *instruction*, defence participation focuses upon influencing the construction and content of the dossier which, as the product of a judicially supervised investigation, forms the evidential centrepiece of the trial. Conceived of in this way, the defence role does not challenge the basic principle of judicial supervision, as the *avocat* engages with the investigation through the *magistrat*, who is then able to mediate and control the influence which the defence has upon the enquiry, and so the dossier. The lawyer is not cast as a primary actor in the process (as she is in adversarial procedure), but rather, functions more as an auxiliary to the *magistrat*: she may scrutinise the results of the investigation, challenge irregularities in the procedure, request that certain investigations be carried out and be present during the interviews of her client and other witnesses.

> [Defence lawyers] do not bring anything to the case – it is not their job to. I investigate the affair and their role is primarily to ensure that the correct procedure has been followed and to challenge any irregularities. [*Juge d'instruction*, area D]

Recent reform of article 82-1 CPP now allows the defence and the *partie civile* to request the *juge d'instruction* to carry out any investigations which they consider will assist in the discovery of the truth, placing them on a more equal footing with the *procureur*. Whilst this offers the potential for the defence lawyer to play a greater part in the conduct of the *instruction*, there are a number of obstacles to the realisation of this role in practice. Firstly, as noted above, all defence involvement in the investigation is articulated through the *juge d'instruction* who therefore exercises an important control over the extent to which the defence is able to participate effectively. This may be limited by an overbearing questioning style and a refusal to engage with the lawyer. Or the lawyer's

role may be sidelined in more subtle ways. For example, in some instances statements were not put in the file until after the lawyer had consulted it (or sometimes not at all), in order that the accused remained ignorant of the evidence against her.

> We have to work from the dossier, but we know things which are not in the dossier. We should therefore not use them, but sometimes we know things and keep quiet to be more efficient in the enquiry. It is not unfair…it can really help in interrogation. [*Juge d'instruction*, area D]

Magistrats and police also told us that this happens in counter-terrorism cases, where the use of intelligence plays an important part in evidence gathering – whether through questioning the suspect or from other sources.

Secondly, increasing the degree of defence participation will require a change in the legal professional cultures of the defence lawyer as well as the *magistrat*. In most instances, the *avocat* does not challenge the pre-trial dominance of the *juge d'instruction*, accepting the subsidiary role allotted to her within the inquisitorial model. In counter-terrorism cases we were told that, where available, lawyers do not ask for tape recordings in order to verify conversations. Field and West (2003) describe a defence culture of re-reading the dossier in a way that is most favourable to the client, rather than engaging in the outright challenge of issues or evidence which go to culpability. Given the heavy reliance placed upon written evidence at trial and the absence of oral testimony in many instances, the most fruitful lines of enquiry (and bases for court room advocacy) for the defence were weaknesses and inconsistencies in the witness statements, forensic evidence or expert reports. It is only the criminal specialist who is likely to go beyond this reactive process of deconstruction, to seek to influence the conduct of the investigation and to engage in an effective defence strategy before and at trial – though such lawyers were very much in the minority as both the organisation of the Bar and the structure of the legal aid system militates against legal specialism. But even for those specialist lawyers adopting a more proactive posture, the most successful approach was achieved through a subtle process of informal requests and careful manoeuvring, establishing and then exploiting doubts and ambiguities. The centrality of the case dossier at all stages of the criminal process and the lawyer's dependence upon the *juge d'instruction* as the investigator upon whose evidence the court will base its decision, means that outright challenge and confrontation would be inappropriate and the establishment of a wholly separate defence case risky. In England and Wales, the defence may seek to dispute evidence produced by the police by bringing their own witnesses to contradict the prosecution case. To do this within an inquisitorial procedure (without channelling such claims through the pre-trial enquiry) where investigations are understood to be judicially supervised, is to challenge the integrity of the judiciary itself. Furthermore, in its subsidiary role, the status of the defence in France as a party to the proceedings is inferior to that of the *magistrat* and the lawyer is trusted less than the (judicially supervised) police. This places a clear constraint on her ability to engage in any form of proactive defence. For example, when I asked whether the defence would call witnesses independently at trial, a *juge d'instruction* in area D told me:

> The lawyer can produce a witness statement, yes, but that has less validity than if the statement was taken by a police officer because we do not know the circumstances. It could have been taken with a gun to the witness' head. If taken by the police, we know that it was taken under proper conditions.[52]

This view was also supported in Field and West's study (2003:296-7) in which lawyers told them that they would not generally interview defence witnesses for fear of tainting their testimony.

The working party set up after the Outreau case (2005) recommended the appointment of two *juges d'instruction* in complex and sensitive cases, in order that the workload could be shared and theories and ideas cross-checked, thus avoiding the 'tunnel vision' of case construction. Implicitly, this recognises the limitation of the defence role. The lawyer is unable to participate in a way that might effectively displace the case theory and assumptions of the *juge d'instruction.*

[52] Given the fact that several suspects were shot during police interrogation in the 1990s, this statement struck me as particularly ironic.

3. Counter-Terrorism Investigations

In its recent White Paper on Domestic Security Against Terrorism, France adopts the definition of terrorism proposed by the United Nations Secretary General in 2005:

> …any action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act.[53]

In the French criminal code (*Code Pénale*, CP), acts committed by individuals or groups that have as a goal to gravely trouble public order by intimidation or terror are defined as terrorist offences under art 421-1 CP.

a. Features of French counter-terrorism investigations

There are a number of defining features of France's approach to counter-terrorism investigations, all of which date back to the mid-1980s, when France was faced with the more familiar 'home-grown' terrorism from the extreme left (Action Directe) and from the national separatist groups (centring on the Basque country, Brittany and Corsica) but also a new form of terrorism with which it was ill-equipped to deal – that from the Middle East, designed to influence France's foreign policy there.[54]

> None of the various French intelligence and police agencies had given any warning that such attacks were imminent or even possible. They were, moreover, unable to immediately identify the attacks as coming from foreign terrorists, despite the perpetrators wanting them to know. (Shapiro and Suzan, 2003:67)

As a result of its shortcomings in dealing with terrorist threats from outside the country, France determined to increase its capacity for suppression by strengthening the police and judicial apparatus. This entailed not only the expansion of repressive powers, but perhaps more importantly, developing centralised and coordinated counter-terrorism policies.

> As a result, France has developed, largely by costly trial and error, a fairly effective, although controversial, system for fighting terrorism at home. That system, of course, is uniquely French, tailored to France's particular threats and

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[53] *In Larger Freedom: Towards Security, Development and Human Rights for All* Report of the Secretary General of the United Nations for Decision by Heads of State and Government in September 2005 (New York: March 2005).

[54] In late 1980, there were several attacks on Jewish targets. On 3rd October 1980, a bomb planted in the saddlebag of a motorbike exploded outside a synagogue in Rue Copernic in Paris, killing four passers-by and wounding 11 others. Shapiro and Suzan (2003:67).

> capacities as well as to France's distinct civic culture. (Shapiro and Suzan, 2003:68)

We might identify three characteristics of the French approach to counter-terrorism.

(i) Exceptional procedures, but no special jurisdiction.

There are exceptional procedures within the ordinary criminal process for the investigation of serious organised crime such as terrorism and drugs trafficking, but there has been a conscious decision to avoid a specialist jurisdiction dealing with terrorism cases, maintaining the emphasis upon a judicial rather than political response. During the Algerian conflict in the 1960s, a separate State Security Court (*Cour de sûreté de l'Etat*) had been established charged with investigating, prosecuting and trying offences against the internal and external security of the state. Sitting in secret and composed partly of military officers, this was seen ultimately as a tool of political oppression and was dismantled in 1981 when Mitterand took power. Neither is there extraordinary legislation for the treatment of terrorist suspects in France, but as in the UK, there are specific terrorist offences, wider police powers, weaker suspects' rights and specialist procedures for counter-terrorism investigations. For example, the police may carry out searches and seizures at night and may install bugging devices in cars and homes. Witnesses and even investigators may remain anonymous in some circumstances. The police may detain suspects for questioning for up to four days (rather than two days in ordinary cases) and the suspect is not allowed access to a lawyer for 72 hours (rather than at the start of detention in non-terrorist cases).[55] Where there is an imminent risk of attack or the necessity of international cooperation, police detention may extend to six days. This is up to six days of interrogations that are neither tape recorded[56] nor carried out in the presence of a lawyer or judge, but recorded as summary statements for later review. This period of detention is said to be subject to judicial supervision, but we have seen in section two that this degree of oversight can offer only minimal protection. This kind of procedure is well established in the more inquisitorial process in France, in which the judge's pre-trial role dominates the structure of the criminal process and in particular, renders the defence role of secondary importance.

(ii) Emphasis upon disruption and prevention alongside repression

There is an emphasis upon prevention and disruption of terrorist-related activity, alongside repression. To this end, the criminal law has adapted to provide increasingly

[55] After this detention, the case may continue to be investigated for several years by the *juge d'instruction*, though the police may not question the suspect during this time, only the *juge* herself. This contrasts with the UK, where the suspect may be detained by the police for 28 days, after which time, assuming that a prosecution is brought, any further investigation will not include questioning of the accused by anybody.

[56] Note that the post-Outreau reforms going through Parliament in October 2006 includes the tape recording of interrogations during the GAV and before the *juge d'instruction*, but organised crime offences (terrorism, drugs trafficking) are excepted from this.

wide definitions of terrorist activity, allowing *magistrats* to collect information about individuals and the development of terrorist cells or networks, as well as more traditional evidence to identify the perpetrators of an act already committed. For example, in 1996, the definition of acts of terrorism was expanded to include "the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles [of the criminal code]" – known as *association de malfaiteurs*.[57] This widened the scope of the *magistrats*' powers significantly, allowing them to open investigations into those involved with terrorist organisations (within and outside France)[58] before any terrorist act had taken place and is described in the government's recent White Paper (2006:53) as "the cornerstone of the system".[59] This offence pushes back the boundary of criminality, enabling the judge to act very much earlier when no act has been committed, but when the 'suspect' is perhaps buying materials, is in the very early stages of preparation towards a terrorist act, or is simply associating with a group established to prepare acts of terrorism – even when the judge is unable to identify a specific date or terrorist target to which these activities are linked. In this way, through the close cooperation with the intelligence services (described below) the specialist corps of *magistrats* working in counter-terrorism, has come to use its judicial powers proactively in the prevention as well as the investigation of terrorism and as a result, it has created "a competency that almost amounted to an intelligence service in and of itself" (Shapiro and Suzan, 2003:78).

(iii) A specialist and centralised corps of *magistrats*

There is a high degree of specialisation and centralisation in counter-terrorism investigations entailing co-operation between police, intelligence services, the *parquet*, *juges d'instruction* and politicians. Until the 1980s, Shapiro and Suzan (2003:75) note that "at least seven different police services in four different cabinet ministries had a variety of overlapping responsibilities in matters relating to terrorism. Worse, these agencies rarely met and often actively distrusted and misled each other…" After a series of attacks in Paris in 1986 which left eleven people dead, there was a concerted effort to strengthen the capacity of both the police and the judiciary in the field of counter-

[57] There are clear parallels here with the recently introduced UK offence of acts preparatory to terrorism under the Terrorism Act 2006.

[58] The law is very flexible concerning territoriality. See eg the arrest in June 2003 of Christian Ganczarski, a German national suspected by the French authorities of helping to organise the bombing of a synagogue in Djerba, Tunisia, killing 21 people. When the German authorities indicated that they lacked sufficient evidence to arrest him, the Saudi authorities deporting Ganczarski placed him on a flight via Paris, where he was arrested – the French claiming jurisdiction because French nationals were among the casualties in the Tunisia attack. Craig Whitlock, 'French push limits in fight on terrorism' *Washington Post Foreign Service*, 02 November 2004.

[59] The *parquet* exercises an important function in shaping the initial enquiry, but the policy of opening an *information* early on in many terrorism cases can result in the *juge d'instruction* taking an overly broad view of the case and investigating beyond her remit.

terrorism.[60] The response to these attacks centred on the establishment of co-ordinated and centralised anti-terrorist policies, units of operation and investigations. A specialist group of *juges d'instruction* was established in Paris (there are now seven such *juges*), working alongside a dedicated section of the Paris *parquet*, now also numbering seven. Representatives from all of these are in daily contact and a co-ordinated policy is articulated through the Ministry of Justice. Technically this process of centralisation creates a system of concurrent competence, but in practice, if a prosecutor believes that a crime committed in her jurisdiction relates to terrorism she will refer the matter to the specialist corps of prosecutors and *juges d'instruction* in Paris. Information about cases is relayed to the Minister of Justice through the hierarchy of the *parquet* across the country, allowing Paris to pick up cases that they consider to be terrorist-related, where the local *parquet* has not referred it on.

(iv) Turning intelligence into evidence: intelligence officers in criminal investigations

As described in section two of this report, the investigation by the *juge d'instruction* involves delegation of virtually all investigative work to the police. This would generally have been the terrorist branch of the judicial police, but faced with a wave of Basque and Corsican separatist terrorist attacks in the 1990s, the division was unable to respond to the needs of the *magistrats*, as its resources were stretched to the limit. The *juges d'instruction* therefore seized this opportunity to turn directly to the domestic intelligence agency, the DST (*Direction de la Surveillance du Territoire*), making full use of the fact that DST officers can also be placed under the authority of a *magistrat* when working as judicial police in a criminal investigation.[61] In this way, the judiciary gained direct access to intelligence officers who had until that point been under the jealously guarded authority of the interior minister. The DST work very closely with the counter-terrorist *magistrats* and there is a high degree of trust on both sides. Just as the police in ordinary investigations will initiate the opening of an *information*, so too the DST will go directly to the *procureur* or *juge d'instruction* if they feel that they have intelligence that justifies a judicial enquiry. If an *information* is opened, the intelligence gathered is part of what is termed an administrative investigation and so is not admissible as evidence, but it will form the basis on which judicial investigations will be carried out – searches, wire taps, interrogations, seizure of financial records etc. Switching hats, as it were, acting in their capacity as judicial police, officers of the DST are then able to transform intelligence into evidence through the vehicle of the judicial investigation – what a number of *magistrats* described as a process of 'judicialisation'.[62]

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[60] The political response of creating an ad hoc cell within the Presidential palace to deal with terrorist issues was less successful. It was resented by the police and intelligence services and so did nothing to promote the trust and coordination required. Finally, it received much negative publicity after it was found to be have planted evidence in order to arrest a group of suspected Irish terrorists.

[61] See the description of the administrative and judicial police function in section one.

[62] It was also suggested to us that this made the DST more responsible, as they could not blame another brigade or service if things went wrong.

This would be extremely problematic within our own criminal procedure, where the defence's ability to test out the prosecution case is fundamental. A recent study looking at whether an adapted version of this approach (known as a pre-trial sift procedure)[63] might work in England and Wales concluded that it would not. The study drew particular attention to the difficulty in expecting the jury to assess facts when they had no knowledge of the source of these 'facts'; the inability of even special advocates to cross-examine witnesses in order to probe the reliability of their evidence (a problem further exacerbated when the intelligence comes from outside Britain); and so the 'reliability gap' between intelligence and evidence. The study concluded that none of the intelligence material under consideration would have survived the pre-trial sift procedure as it was inherently incapable of being probed properly. Agents could have a range of motives for providing intelligence and even well-established agents could have been misled, or have intended to mislead, or both. In France, there is a very different legal culture. It is more accustomed to accepting evidence produced by a judge pre-trial, without looking behind it. The strengthened role of the defence during *instruction* is designed to allow the defence to engage with the construction of the case and to a limited extent, to test the evidence as it emerges. But as described in section two and demonstrated in the Outreau case the defence has little or no impact on the pre-trial process, in contrast to the police and *procureur* who are seen to dominate even cases investigated by the *juge d'instruction*.

(v) The high level of trust between the judiciary and intelligence service

This specialist group of *magistrats* works very closely with the police and intelligence services and has developed extremely high levels of expertise relating to the organisation and operation of different types of terrorist groups. It is they, rather than the politicians, who have become the public face of counter-terrorism. *Juge d'instruction* Jean-Louis Bruguière, undoubtedly the most infamous of this specialist corps, describes the 'synergy' between the different actors working during the different procedural phases – police, intelligence, *parquet* and *instruction* – and the permanent dialogue between *procureur* and *juge d'instruction*. The relationship between intelligence officers and *magistrats* (especially the *juges d'instruction*) is characterised by extremely high levels of trust, even greater than exists in police-*magistrat* dealings in ordinary investigations, given the very sensitive nature of the material involved. Terrorist investigations will be conducted by the *juge d'instruction* and so it is with her (rather than the *parquet*) that intelligence officers from divisions such as the DST will have the most sustained contact and the most developed relationships of trust. Contact between them is not limited to the

[63] This would provide for a closed pre-trial hearing in which sensitive material would be examined with a view to producing a statement of open evidence and conclusions from the closed material. A special advocate would represent the defendant. At trial, the defence could challenge the statement, but would have no right to go behind it to examine the material upon which it was based. The jury would be told of the process that had led to the production of the statement and would be able to consider it as they would a witness statement.

duration of the judicial investigation. The knowledge and trust that they share means that discussions take place and advice is sought prior to and beyond the official enquiry in a way that suggests the collapsing of the traditional divisions between the procedural phases of administrative and judicial enquiry. Working in teams, information is shared between *magistrats* and investigations often result from evidence gleaned in earlier cases.

The high level of trust that exists between the DST and the *magistrats* working alongside them would not be possible in the context of an ordinary jurisdiction where police and *magistrats* come and go. Movement between regions is one of the principal ways of obtaining promotion for *magistrats*, so many will not stay in the same place for more than five years. In contrast, the specialist counter-terrorism corps is made up of a small number of dedicated *magistrats* who have worked in Paris for ten or fifteen years – the two most prominent being Jean-Louis Bruguière and Jean-François Ricard. This stability has been possible by ensuring that the *juges d'instruction* are promoted without having to move elsewhere. Between them, this group of *magistrats* has built up a body of expertise over two decades, a knowledge and understanding of terrorist organisations, networks and modes of operation, as well as individual specialisms in the workings of particular types of terrorist networks whether it be the Basque separatists or the Islamist movement. The objective of this intense working method is to track the evolution of terrorist organisation and activity in order to be able to anticipate and to dismantle it, however it manifests itself. The nature of terrorist investigations is very different from most non-terrorist cases. They are extremely complex, tracking networks across the globe and most take several years to complete. Again, it is only through the existence of a stable and experienced team of judicial investigators that such enquiries are possible.

This trust and cooperation is regarded as the strength of the system, enabling intelligence gathering and judicial enquiry to work together in ways that are of mutual benefit. It also represents a potential weakness. There is a danger that the functional independence of the *parquet* and the *juge d'instruction* (seen to be so dangerously lacking in the Outreau affair) [64] is eroded and that administrative and judicial powers overlap unduly, undermining the safeguards and systems of accountability underpinning each. A number of recent cases, described below, suggest that the judiciary may place undue reliance on intelligence during the pre-trial phase, intelligence that fails to produce credible evidence that can be relied upon at trial. Another limitation of this organisation and strategy is that its effectiveness rests upon only a small number of people. For the same reason, there can often be long delays in investigations, especially where they require international co-operation and the translation of material.

[64] The enquiry into the Outreau affair was critical of the *procureur* and *juge d'instruction* making identical recommendations re who should face trial and on what charges. In fact, it was clear that the JI had literally cut and pasted the recommendations of the *procureur*, failing to exercise any independent judgment. In terrorism cases too, we were also told that there is rarely any disagreement on this matter.

b. Functional independence and the reliability of intelligence-led evidence

The gravity of terrorist related offences means that they will be investigated through the more lengthy *instruction* procedure, rather than under the supervision of the *procureur*. However, the *parquet* plays an important part both before and after the *instruction*. Where the case concerns a '*flagrant*' or recently committed offence (eg somebody has planted a bomb in a building), the police may detain and question any suspect for up to six days[65], under the supervision of the *procureur*. This will precede the opening of the *information*. Given the absence of safeguards such as tape recording or the presence of lawyers during this procedure and the limited nature of *procureur* supervision (the *procureur* is not present during the suspect's interrogation and her 'supervision' of the detention period will take the form of reviewing the interview summaries – of which ten pages represents five or six hours of interviews) it is significant that the police have unrestricted access to the suspect for four days – extending to six in exceptional circumstances. Confession evidence is of central importance and once made during GAV, admissions are almost impossible to displace during the judicial enquiry. Yet, as the Guantánamo case discussed below suggests, GAV interrogations may be underpinned by intelligence, the credibility of which has never been judicially tested, producing 'evidence' which is itself of dubious credibility. Where the offence is not '*flagrant*' the police may have carried out months of investigation overseen by the *procureur* before there is sufficient credible evidence to open an *information*,[66] again, often preceded by police interrogation. Once the case passes to the *juge d'instruction*, she remains in close dialogue with the *parquet*. These close working relationships are considered to be a strength of the procedure (assisted by the common training and movement between functions) and those we spoke to felt that their functional relationship with colleagues did not mean that they would necessarily be of the same mind. Yet, at the same time, all parties emphasised to us the high level of discussion and agreement that characterised their relationships and working practices. The lessons from Outreau, where the danger of undermining the functional independence between roles, especially judicial roles, was demonstrated so powerfully, cannot simply be excluded as irrelevant in counter-terrorism cases.

The media and human rights organisations have also been critical of the very close relationship between *magistrats* and the domestic intelligence agency, and of the centralised judicial apparatus.[67] The structure of the judicial enquiry is based upon the

[65] The extension from four to six days has not yet been used.

[66] Many such investigations will, of course, not be successful in generating sufficient evidence to open an *information*.

[67] There is also concern in some quarters at obvious political leanings of some judges. In a pre-recorded television interview in 2005, the interior minister Nicolas Sarkozy justified his proposed anti-terrorist legislation with reference to the arrests made that very day (ie five days later when the programme was to be broadcast). On the day the interview was broadcast, *juge Bruguière* contacted the media to cover the arrest of nine people on terrorist charges, designed (it is alleged) to coincide with Sarkozy's interview

dispassionate investigation of a case by a judicial officer. Her professional status and ideology set her apart from the police and from the defence lawyer and to a lesser extent, the *procureur*. It is in this way that the interests of the accused are protected. Yet, in counter-terrorism cases, the explicit policy is that police, *procureurs* and *juges d'instruction* should all work together – sharing information, formulating policy and determining whether to instigate intelligence investigations or a judicial enquiry. Whilst this undoubtedly nurtures a shared expertise and trust, it also risks undermining the independence of the *juge d'instruction*'s role if her perspective becomes that of the intelligence services. Given the level of trust that necessarily underpins their working relationship and the fact that the *juge d'instruction* will receive information from the DST that will never be 'judicialised', this unity of perspective cannot be ruled out. At its worst, this runs the risk of the vehicle of the judicial enquiry simply empowering and legitimating what are essentially police and intelligence driven investigations. This distorts the balance of power in the pre-trial phase and fails to guarantee sufficiently the reliability and credibility of evidence. This is already a danger in non-terrorist cases where working relationships are less enmeshed, as seen in the Outreau affair and subsequent reform proposals. My earlier research (described above) as well as miscarriages of justice such as the case of Patrick Dils, demonstrate the way in which the *parquet* or the police perspective can come to dominate the case and the difficulties in displacing this during the *instruction*. There is an even greater concern in terrorist investigations given the very small number of people exercising control over the production and evaluation of large amounts of information (much of it intelligence based), with very little outside control. This has been the criticism in recent cases where the evidence was weak and the dossier was held together by assumptions and suppositions, rather than any concrete proof. The 1999 FIDH (Federation of International Human Rights Leagues) Report into the application of counter-terrorism laws in France noted in particular:

> …the formulaic character of the interviews; the apparent and uncritical reliance on information provided by intelligence and police sources; the reluctance to take seriously evidence and explanations put forward by the defence and to accede to their requests to take action; the use of prejudicial but often unsubstantiated assertions and asides in the dossiers; and the mechanically negative responses to applications to bail. (1999:31-2)

How is the reliability of this intelligence evidence to be tested? *Magistrats* recognise that they are unable to determine the reliability of intelligence as they do not know the name of the informant, nor are they able to look behind the information. They rely upon professional trust,[68] subsequent evidence obtained and claims that it would not be in the interests of officers to provide unreliable information. In theory, the defence has the right to challenge the intelligence through claims that it is not confirmed in the judicial

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and so to bolster support for his reform. All none suspects were released without charge shortly afterwards.

[68] Trust acts as the cement of the French criminal justice process, holding everything together and filling the gaps in legal accountability.

enquiry.[69] The DST can be questioned, but they are not required to answer. The defence may challenge the truth of the statement of evidence provided by the DST, but this is difficult when they have no information about who produced the intelligence or why. The only possibility is to provide an alternative account that challenges that provided in the statement of evidence. Thus, the defence cannot challenge the inherent reliability of the statement by, for example, claiming that it was made by somebody who bears a grudge against them, or that the conversation immediately preceding that led in evidence alters the context and meaning of the words said. It is a higher threshold of proof to demonstrate that the evidence is false, than to demonstrate that it is unreliable. Effectively, the inclusion of intelligence information in the dossier is an endorsement of its reliability by the *juge d'instruction*. This is, of course, the very question that we are battling with in England and Wales – how can evidence be introduced at trial if the defence has no means of testing it? The recent pre-trial sift study recommendations were alert to the dangers of reliance upon intelligence and the need to subject it to robust scrutiny before according it the degree of probity required in a court of law.

The *Chambre d'Instruction* provides some accountability but it reviews only the procedural legality of the *instruction*, the detention of those under investigation and the sufficiency of charges for the accused to be sent to trial; it does not delve into issues of fact or of strategy. Just as there is a small specialised corps of *procureurs* and *juges d'instruction*, so too there are three judges in the *Chambre d'Instruction* who deal with all terrorism cases.[70] Concerned to ensure the proper application of the law, these judges must base their ruling on what is contained within the dossier. As with other forms of oversight and supervision, this review is a paper one. The dossier is examined at a single point, allowing for a static analysis of the case rather than any wider interrogation of the process. This can make it difficult to identify errors in appreciation and the interpretation of information, as the reviewer will see only the end product. It is exceptional that they would rule against the *juge d'instruction*, whether the challenge concerns detention, procedure or the decision to send a person to trial. And where a ruling has been made in the *Chambre d'Instruction* the same issue cannot be raised again at trial. This has led to accusations of judicial corporatism, a common outlook fuelled further by the common and emotive goal of the 'war' or 'fight' against terrorism. Defence requests were repeatedly refused in the Guantánamo Bay case discussed below, because the defence could (of course) not provide objective evidence to support their claim that they had been questioned by French intelligence officers whilst being held in detention. These requests for further information do not look so unreasonable now that they have been made by the trial court.

Two recent cases point to the dangers of investing so much power within a single small group that is subject to relatively little control. In February 2006, Vincent Andriuzzi and

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[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.

[70] Although they will also deal with other cases, these are the only judges to deal with terrorism cases. Judges in the *Chambre d'Instruction* are not entirely apart from their investigating colleagues and they will go to visit them in their offices.

Jean Castel were successful in their appeal against conviction for instigating the assassination in 1998 of the Corsican prefect, Claude Erignac. The working methods of the *Division Nationale Anti-Terroriste* (DNAT), and therefore by implication the extent to which the *instruction* offers sufficient scrutiny of this, were criticised by the president of the court. He censured police practices, including the latitude taken with criminal procedure. He also noted the weakness of some of the evidence presented by the prosecution which contained too much supposition and very little proof. The former head of the DNAT admitted in his testimony that there was no actual formal evidence against the two men.[71]

A further blow to the counter-terrorism unit was struck when the judge hearing the case against the six French men held in Guantánamo adjourned the trial until May 2007 in order that additional investigations could be carried out. This case strikes at the heart of the relationship between intelligence and credible evidence. Two of the men alleged that officers of the DST and the DGSE (the *Direction Générale de la Sécurité Extérieure,* a Ministry of Defence division that provides intelligence information gathered outside France) had visited and questioned them at Guantánamo and that this information formed part of the prosecution case. At the time, they had not known that they were intelligence officers, only that they were part of a French delegation. The defendants made repeated requests for copies of the audio-visual recordings made and the notes taken, alleging that these interrogations were unlawful, as the detention itself was unlawful. The courts refused these requests on the ground that there was no proof that the visits had taken place. As noted above, in reviewing the instruction process, the courts can only take account of the dossier and cannot enquire into the process by which evidence is obtained and developed. The defence were unable to provide objective evidence to support their claim, and so it was not upheld. A confidential document from the Ministry of Foreign Affairs dated 1st April 2002, was then published on 5th July 2006 and appended to the case dossier the same day. It reported that a joint DST and DGSE visit had taken place between 26 and 31 March 2002, and stated that it had gone well. The defence criticised the circulation of this secret information between justice and state authorities, both of whom concealed what was in effect, illegal evidence. This, argued the defence, made the current trial unfair. The *procureur* did not deny the arbitrary nature of the men's detention, but denied any knowledge of the diplomatic document. The only questions for the trial court, she argued, were whether these men were dangerous and why they became involved with Al Quaeda.

The trial judge has now ruled that the legal basis on which DST officers intervened when they made visits to Guantánamo to meet the defendants, is insufficiently clear. Mirroring

[71] Investigations into malpractice on the part of DNAT officers during this enquiry are being carried out by the police inspection service. Allegations of torture being used by DNAT against Islamist suspects held in Paris and Lyon in 1995 were made by five anonymous police officers in a book published by three journalists from Le Point magazine. These allegations of assaults and torture by electric shock were found to be untrue, though the official report said that security forces may have slapped suspects violently.

the very requests denied the defence by all three authorities – the *juge d'instruction*, the *chambre d'instruction* and the *cour de cassation* – the court has required the two officers present at Guantánamo to clarify the basis of their interventions and to provide full explanations of the reality and content of the interrogations, as well as the conditions in which the records were made. The ministry diplomat is also required to inform the court of the source of his information and how he was able to verify his account. For her part, the *procureur* explained that these visits were only for intelligence rather than evidence gathering. Yet, once on French soil, it is clear that this intelligence is what motivated the case against the men. They were held in police detention and asked merely to confirm what they had already told officers in Guantánamo. The serious concern is that the *juges d'instruction* in the case accepted intelligence provided by the Americans, some of which may have been obtained under torture.

c. Protecting freedoms and providing security: the French approach

More generally, there is criticism of the way in which the balance is struck in counter-terrorism investigations, between the freedom of the citizen and the need to gather intelligence. The treatment of suspects held in police custody has been condemned repeatedly by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and in this the counter-terrorism police have been marked out for particular criticism. The actions of the counter-terrorism *juges d'instruction*, and in particular of Jean-Louis Bruguière, have been seen as heavy-handed. Throughout the 1990s there were several high profile 'sweeps' in which tens of people were arrested, detained and questioned, with most then released. In May 1998, 53 people were arrested in France as part of a Europe-wide operation aimed at dismantling dissident networks planning terrorist attacks during the world cup. In fact, most were released within 48 hours. Also in 1998,138 people were tried in the gymnasium of Fleury-Mérogis prison, converted into a courtroom for the occasion. None were convicted of terrorist acts; 87 were convicted of *association de malfaiteurs* (39 receiving sentences of two years or less, the maximum penalty being 10 years) and 51 were acquitted and released, some having spent three years in prison during the investigation. Far from the show trial of a foiled terrorist attack, the case was something of a fiasco, suggesting that the *magistrats* had been misled over the strength of the intelligence that led to the investigation and prosecutions. The threshold of evidence required to make such arrests appears low and there is no oversight or control to challenge this.

One French official told Shapiro and Suzan (2003:85) that past failures demonstrated to the *magistrats* "the necessity of maintaining a constant operational surveillance over Islamic groups in order to prevent their development on French territory." In this way there is both a political and judicial strategy aimed at preventing people from radicalising and joining what are perceived to be extremist groups. This approach is supported by the very broad definitions of what can amount to terrorism (the *association des malfaiteurs* offence), providing the *magistrat* with the power to act well before any terrorist acts have been committed or are even in preparation, targeting instead the networks of people who they believe may be working towards this end. This enables *magistrats* to interrogate large numbers of people in order to corroborate data and to maintain information on the

operation of networks. Critics point to the risk of arbitrary law enforcement as offences aimed at prevention rather than simply suppression mean that the *magistrat* is able to determine that a lawful act is unlawful because of the alleged context in which it takes place – ie the context of intent to commit (unspecified acts of) terrorism. The offence of *association de malfaiteurs* is used widely. It is committed when a group or agreement is formed with a view to the preparation of one of several crimes, including terrorism. A person need only be a member of the group or a party to the agreement. There is no need to prove an intention to commit a specific crime – the existence of preparatory acts is sufficient. It should also be noted that those detained during the *instruction* process are under investigation only – the decision to prosecute will be made at the end of the enquiry – but they may be held for several years.

What is striking when reviewing the literature and official publications in this area is the emphasis on policy, method and the politics of repression, with an almost total absence of discussion around the ways in which due process protections are assured and the credibility of evidence guaranteed. There is no equivalent of Lord Carlisle's reviews of counter-terrorism legislation or the detailed and regular scrutiny of the Joint Committee on Human Rights. Defence rights are generally viewed with some cynicism. Despite the very distant nature of judicial supervision and the absence of tape recording or other safeguards relating to the reliability of interrogation evidence, the presence of lawyers in the GAV is strongly resisted. It is seen generally as favouring the accused over the victim and the interest in conducting an effective enquiry. In relation to the present study, one judge told us that he thought it would have a 'sterilising' effect upon the enquiry. Some claimed that the suspect would remain silent once she had received legal advice; others noted that the suspect's choice to answer questions in terrorism cases was exercised independently of any legal advice. Tape recording is also strongly opposed by the police who regard it as demonstrating a lack of trust in their conduct of criminal investigations. Some *magistrats* suggested to us that lawyers were increasingly arguing their case at trial rather than during the *instruction*. They characterised this more adversarial approach as an act of sabotage, placing the defendant's acquittal above all else. This may represent the beginnings of an interesting shift in culture and given the difficulties in challenging issues pre-trial, one that is perhaps understandable.

Some of the same concerns have been raised in the UK in relation to the use of extended pre-charge detention, given that "the criminal law has not traditionally been a preventive tool in the UK".[72] Detention for the purposes of disruption or prevention is not permitted under Art 5(1) ECHR, but the Home Affairs Committee has reported that this is in fact its primary use and has suggested that preventive detention should be included as a statutory ground for detention. The Joint Committee on Human Rights points out that this would require a derogation form Art 5(1), something they do not believe to be necessary, especially given the availability of the broader offence of acts preparatory to terrorism. In line with its recommendation to use the ordinary criminal law rather than special procedures that are not susceptible to review, the Joint Committee argues that the police should use these detention powers only for the purpose of investigation with a view to

[72] Joint Committee on Human Rights (2006:9).

prosecution. Furthermore, given that the charge threshold is that it must be based on evidence admissible at trial (rather than requiring a realistic prospect of conviction) the Joint Committee also considers 28 days a sufficient period of detention.

There can be no doubt that the wide powers of investigation and surveillance available to *magistrats* and police result in the production of valuable information in the investigation, prosecution and prevention of terrorism in France. What, of course, is less clear is the price paid by citizens in terms of surrendering their privacy and even their liberty. The surveillance, detention and questioning of individuals is an infringement of individual freedom which, even in cases as grave as suspected terrorism, can only be justified when based on good grounds. The extent to which individuals are subjected to speculative enquiry or effective targeting is unknown. There may be a high conviction rate of those brought to trial, but there are hundreds more detained and released after days, months and even years in custody whilst investigations are ongoing. [73] It is difficult therefore, to make any judgment about the effectiveness of investigative work. Shapiro and Suzan (2003:88) suggest that "[t]he French public is accustomed to and willing to tolerate a police bureaucracy that would certainly be viewed as invasive in the US, even taking into account the change in attitudes after the 9/11 attacks" and that "there seems to be a consensus that the freedom to walk the street or to take the subway without fear of bombs lies at the base of all other civil liberties." This consensus is not always apparent in political debate in which the protection of the right to either *sûreté* or *sécurité* is variously invoked in support of legislative change. Inspired by the right of *habeas corpus*, the right to *sûreté* concerns the freedom from arbitrary arrest or detention and is established in the 1789 *déclaration des droits de l'homme et du citoyen*. The right to *sécurité* is what is described by Shapiro and Suzan and is a more contemporary theme, firmly established in the legislation of 21 January 1995 (and then redefined in the statute of 15 November 2001), as a condition of the exercise of freedoms and the reduction of inequality. The reduction of inequality has now been dropped and the first article of the legislation passed on 18 March 2003 now declares the right of *sécurité* as a fundamental right and one of the conditions for the exercise of individual and collective freedoms.[74]

This balancing or contrasting of liberty with security is a common feature of current political discourse – the notion that more of one means less of the other. This is used to justify exceptional measures, the curtailing of freedoms and the attenuation of due process safeguards. The Joint Committee on Human Rights (2006:13) rejects this approach: "We reiterate the importance of not seeing liberty and security as being in an inverse relationship with each other…We agree with the view expressed by the European Commission for Democracy through Law (the Venice Commission) that 'State security and fundamental rights are not competitive values: they are each other's precondition.'"

[73] One journalist reports that *Juge* Bruguière has ordered the arrest of over 500 people on suspicion of conspiracy in relation to terrorism. Craig Whitlock, 'French push limits in fight on terrorism' *Washington Post Foreign Service*, 02 November 2004.
[74] Lazerges (2003:645-6). See (Gleizal) 2001 for discussion of the politics of *la sécurité*.

d. Concluding comments

The judicial role in France is very different from that in the UK. Rooted in an inquisitorial procedure, it is part of the pre-trial investigation as well as the trial. Whilst our own judiciary have become increasingly implicated in the management of cases prior to hearing, this remains linked to the trial process and not to the preparation of the case by the parties. To descend into the pre-trial proper would be to move away from the independent function of arbiter and into the domain of the adversarial parties in the case. In France, this is not considered problematic as the investigation is characterised in more neutral terms as a search for the truth in which prosecutor, suspect and victim may participate. In practice however, as described above and noted by the recent report of the Joint Committee on Human Rights (2006:3), the investigating judge procedure "is more prosecutorial than judicial and therefore would not sit easily with our traditions of judicial independence." This fundamental difference in how the investigation and trial are understood is of significance in considering reform. Investigations in England and Wales are neither carried out nor supervised by judges, but by the police without accountability to either the CPS or the judiciary. This separation is considered an important guarantee of the independence of each, allowing effective scrutiny. If there is a shift in these roles, care must be taken not to upset this balance. If the CPS or judiciary become involved in the police enquiry their ability to effect subsequent independent review may be questioned. The current approach of closer CPS involvement during the investigation of terrorist offences appears to provide the necessary guidance in terms of legal and evidentiary requirements, without making claims that such co-operation is oversight of a nature that would justify further attenuation of defence rights. It is the characterisation of the investigation in France as a judicial enquiry and the resulting negative consequences for the defence that would pose the greatest problems within an adversarial procedure, and all the more so given the strong ties between JI and *procureur*. In short, the presence of some form of judicial oversight of an investigation carried out by the police and intelligence services, cannot serve as an alibi for proper defence and due process protections.

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