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# Guilty pleas in an inquisitorial setting – An empirical study of France

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*Anglo-American guilty pleas have inspired criminal justice reformers in many inquisitorially-based systems in recent years, in response to caseload pressures. In France, two different procedures based on the defendant's confession have been introduced in 1999 and 2004 respectively: an out-of-court disposal (the composition pénale) and a prosecution pathway (the comparution sur reconnaissance préalable de culpabilité).*

*Basing its analysis upon direct observations and interviews with French public prosecutors, this paper examines the impact of these procedures on the French criminal justice system and its actors. Rather than a move from an inquisitorial to a more adversarial system, data collected for this study show a bureaucratisation of the French criminal justice process. The role of public prosecutors is changing from that of judicial officers to caseload managers who have delegated part of their workload to less qualified staff for efficiency purposes.*

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## INTRODUCTION

The opportunity for defendants to admit their guilt before a judge and thereby avoid the need for a trial is a familiar feature in criminal justice systems founded on the adversarial tradition, such as England and Wales. By contrast, systems derived from the inquisitorial model, such as France, have not historically attached such weight to a defendant's admission. Adversarial and inquisitorial models of criminal procedure<sup>1</sup> encompass two different procedural cultures: the inquisitorial culture conceives the criminal justice process as a neutral investigation conducted by impartial state officials in order to determine the truth, whereas the adversarial system characterises criminal procedure as the adjudication of a dispute between two parties (the prosecution and the defence) by a judge acting as a passive umpire. Guilty pleas fit more naturally within the adversarial model given the principle of party autonomy in defining the scope and terms of the dispute. The recognition by the defence that the prosecution is correct removes the need for each party to present evidence in support of or against a finding of guilt before the judge.<sup>2</sup> Conversely, an admission of guilt by the defendant can be an important element in the decision of the judge in the inquisitorial model, but it might not provide a complete version of the truth, which is only to be determined by the judge.

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<sup>1</sup> These categories are not conceived as describing existing systems of criminal justice, but represent useful ideal-types which explain fundamental differences between common law and civil law criminal procedure traditions.

<sup>2</sup> However, the testing of the evidence at trial is at the very heart of the adversarial system. Yet, with guilty pleas, 'there is no requirement on the prosecution to prove its case by the introduction of admissible and persuasive evidence; there are no restrictions on what might count as "evidence"; no witnesses are produced to give evidence (indeed, none may be available); there is no independent tribunal of fact; there is no settled procedure under which it should operate (or none that judges and practitioners seem able to follow); and there is no public trial or other independent decision-making tribunal.' M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (2014) 25.

Negotiations over pleas between defence and prosecution are even more alien to the inquisitorial ideal-type. Two forms of plea bargaining can be found in England and Wales: charge bargaining or fact bargaining. Charge bargaining typically consists of the defendant agreeing to plead guilty to a less serious offence than the prosecution originally proceeded upon. Alternatively, when the defendant faces several charges, an agreement to plead guilty to one or some of them can result in the discontinuance of others. Fact bargaining does not involve a change in the charge faced by the defendant, but an agreement between the prosecution and the defence on a factual basis acceptable by both sides. For instance, a defendant might agree to plead guilty to assault on the basis that she slapped the victim, but did not punch her as asserted in the original prosecution version of events. This can have an impact on the perceived seriousness of the offence and thus on sentencing. Whereas such negotiation is natural in the dispute model of an adversarial system where the parties can shape the remit of the passive decision-maker, it is unacceptable in principle in an inquisitorial system where the truth cannot be bargained with or compromised. Nevertheless, reforms in the last two decades have introduced new procedures based on an admission by the suspect/defendant in criminal justice systems rooted in the inquisitorial tradition.

In France, the *composition pénale* was introduced in 1999, although the Act only came into force in 2001.<sup>3</sup> Nicknamed ‘plea bargaining *à la française*’,<sup>4</sup> it allows the public prosecutor to impose a sanction (such as a fine, but not imprisonment) on a person who admits the commission of an offence, which must then be validated by a judge. Contrary

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<sup>3</sup> Loi no 99-515 of 23 June 1999, *renforçant l'efficacité de la procédure pénale*, codified at articles 41-2 and 41-3 of the Code of Criminal Procedure (*Code de procédure pénale* – CPP).

<sup>4</sup> J. Pradel, ‘Une Consécration Du “Plea Bargaining” à La Française’ (1999) *Recueil Dalloz* 379.

to guilty pleas in England and Wales or the US, the *composition pénale* is defined as an alternative to prosecution according to article 40-1 of the Code of Criminal Procedure (*Code de procédure pénale* – CPP) and does not result in a formal conviction. However, it will form part of the offender’s criminal record once accepted and complied with. A formal guilty plea procedure called the *comparution sur reconnaissance préalable de culpabilité* (CRPC – procedure on prior recognition of guilt) was introduced in 2004.<sup>5</sup> Following an admission by the defendant, the public prosecutor can offer a sentence of up to one year in prison which, if accepted, must again be validated by a judge.

These new French procedures have been presented as a legal transplant from the Anglo-American practice of plea bargaining,<sup>6</sup> although several scholars have underlined important differences.<sup>7</sup> Similar concerns have been discussed in both French and Anglo-American procedures involving an admission by the defendant, in particular the central role given to public prosecutors in place of judges and the professed objective of efficiency leading to the bureaucratisation of the criminal justice process.<sup>8</sup> In France,

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<sup>5</sup> Loi no 2004-204 of 9 March 2004, *portant adaptation de la justice aux évolutions de la criminalité*, codified at articles 495-7 to 495-16 CPP.

<sup>6</sup> F. Desprez, ‘La Comparution Sur Reconnaissance Préalable de Culpabilité: 18 Mois d’application à Montpellier (1er Octobre 2004 – 1er Avril 2006)’ (2006) *Archives de politique criminelle* 109; J.-P. Céré and P. Remillieux, ‘De La Composition Pénale à La Comparution Sur Reconnaissance Préalable de Culpabilité: Le "plaider Coupable" à La Française’ (2003) *AJ Pénal* 45; F. Molins, ‘Plaidoyer Pour Le "plaider Coupable": Des Vertus d’une Peine Négociée’ (2003) *AJ Pénal* 61.

When it presented the bill introducing the CRPC in French law, the government clearly stated that it was ‘inspired by Anglo-Saxon guilty plea procedures’: Bill no. 784, *portant adaptation de la justice aux évolutions de la criminalité*, registered before the *Assemblée Nationale* on 9 April 2003 <<http://www.assemblee-nationale.fr/12/projets/pl0784.asp>> accessed 15 July 2015.

<sup>7</sup> M. Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’ (2004) 45 *Harvard International Law J.* 1; Pradel, op. cit., n. 4.

<sup>8</sup> C. Viennot, *Le Procès Pénal Accéléré: Étude Des Transformations Du Jugement Pénal* (2012); J. Hodgson, ‘Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice’ in *The prosecutor in transnational perspective*, eds E. Luna and M. Wade (2012); V. Perrocheau, ‘La Composition Pénale et La Comparution Sur Reconnaissance de Culpabilité: Quelles Limites à l’omnipotence Du Parquet?’ (2010) 1 *Droit et Société* 55; C. Saas, ‘De La Composition Pénale Au Plaider-Coupable: Le Pouvoir de Sanction Du Procureur’ (2004) *Revue de science criminelle* 827; G. E. Lynch, ‘Our Administrative System of Criminal Justice’ (1998) 66 *Fordham Law Rev.* 2117.

several empirical studies offer an interesting insight into the implementation of the *composition pénale* in practice.<sup>9</sup> However, these early studies do not allow enough perspective to observe the long-term transformations of the criminal justice system as it took some time for the *composition pénale* to be fully adopted by professionals.<sup>10</sup>

There have been few empirical studies of the implementation of the CRPC procedure. It is not clear which methodology was followed by Desprez in his study of the implementation of the CRPC in three court centres.<sup>11</sup> Viennot's study of accelerated procedures in French criminal justice is based partly on empirical data collected during periods of direct observations and through interviews, although the number of interviews and the time spent observing the work of practitioners are not known.<sup>12</sup> She found that accelerated procedures in French criminal justice were characterised both by a transformation of the figure of the judge – with a delegation of judicial functions to several legal actors, including public prosecutors – along with a transformation of the act of judging – with limited possibilities for debates on legal issues. In 2013, a wide-ranging empirical study highlighted the pressures on resources that weigh on *procureurs'* procedural choices.<sup>13</sup> However, there have been few comparative studies of these procedures. Luna and Wade<sup>14</sup> and their contributors have shown how prosecutorial powers have been increased in many criminal justice systems in order to

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<sup>9</sup> P. Milburn et al., 'Controverses et Compromis Dans La Mise En Place de La Composition Pénale' (2005) *Archives de politique criminelle* 151; J. Danet and S. Grunvald, 'Brèves Remarques Tirées d'une Première Évaluation de La Composition Pénale' (2004) *AJ Pénal* 196.

<sup>10</sup> 1,511 *compositions pénales* in 2001, 6,755 in 2002 and 14,788 in 2003, but progressively increasing and remaining broadly stable at over 70,000 from 2009 according to official figures.

<sup>11</sup> F. Desprez, 'L'application de La Comparution Sur Reconnaissance Préalable de Culpabilité à Nîmes et Béziers. Au Regard Du Principe de Judicialité' (2007) *Archives de politique criminelle* 145; Desprez, *op. cit.*, n. 6.

<sup>12</sup> Viennot, *op. cit.*, n. 8.

<sup>13</sup> J. Danet (ed), *La réponse pénale dix ans de traitement des délits* (2013).

<sup>14</sup> E. Luna and M. Wade (eds), *The Prosecutor in Transnational Perspective* (2012).

process cases more efficiently, including through the implementation of admission-based procedures.<sup>15</sup> Indeed, the incursion of efficiency and managerialism in criminal justice appears to be one of the converging factors for European criminal justice systems.<sup>16</sup>

This article aims to fill this gap by providing a comparative and empirical study of the impact of the procedures based on the admission of the offender in France on public prosecutions. The study draws on data collected during fieldwork conducted in 2013 in France and England and Wales. I observed the work of French public prosecutors (*procureurs*) in a medium-sized court centre (around 30,000 cases processed by *procureurs* each year) for a total of two months. I spent time with *procureurs* supervising police investigations over the phone and deciding whether to prosecute cases or not. I also observed how cases were disposed of, whether at trial or through alternatives to prosecution. In particular, I observed a total of 103 cases dealt with by four different prosecutors through CRPC and 18 cases of *compositions pénales* processed outside of court by two *délégués du procureur*. I also carried out interviews with eight of the nine *procureurs* working at the court centre (from the highest ranking official to the most junior level: *Procureur de la République*, *procureurs adjoints*, *vice-procureurs* and *substituts*),<sup>17</sup> as well as one trainee *procureur* coming towards the end of her training period. Although primarily centred on French criminal procedure, the analysis also

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<sup>15</sup> See also J.-M. Jehle and M. Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (2006).

<sup>16</sup> A. Binet-Grosclaude, *L'avant-procès pénal: étude comparée Angleterre-France* (2011); J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.

<sup>17</sup> At the local level, each prosecution service office is headed by a *Procureur de la République* who manages a team of more junior *procureurs* who can have different ranks, depending on the size of the office: i.e. large court centres (such as Paris) can be staffed by many *procureurs* (over 100 in Paris) divided in teams headed by *procureurs adjoints* and/or *vice-procureurs*; the smallest court centres only consist of the *Procureur de la République* and one or two *substituts*.

makes comparisons with the practice of guilty pleas and plea bargaining in England and Wales, based on four months of observational fieldwork carried out at a Crown Prosecution Service (CPS) office in 2012 and 31 interviews with CPS staff.

French public prosecutors are part of the same professional body as judges, and not public service lawyers as in England and Wales. At the heart of the criminal justice process Yet, *procureurs* have become administrators of the criminal justice system, with efficiency becoming a central objective in their decisions. This new role is in tension with that of impartial adjudicator, which partly justified the transfer of judicial functions from judges to *procureurs* in admission-based procedures such as the *composition pénale* and the CRPC. In this paper I argue that, although *procureurs* still sometimes attempt to behave according to their professional ethos of *magistrats* by tailoring their decision to the specificities of cases and by checking the veracity of the defendant's admission, the pressures of processing cases as quickly and efficiently as possible are often overwhelming. This has resulted in the bureaucratisation of prosecutorial decision-making through the use of standardised tables and the delegation of a large part of *procureurs'* caseload to less qualified staff. A shift towards a more adversarial legal culture is prevented by the weakness of defence lawyers for historical and cultural reasons. Instead, the inquisitorial culture of *procureurs* is changing due to increasing managerial expectations, threatening to transform the criminal justice system into an administrative system of justice where both guilt and sentence are determined by public servants with no legal qualifications according to standardised tables or, potentially, by computer systems.



Inquisitorial roots explain the central role played today by public prosecutors in French criminal procedure. The *juge d'instruction* (investigative judge) is usually presented as the paradigmatic example of the neutral judicial officer collecting inculpatory as well as exculpatory evidence, yet she oversees a tiny proportion of cases in practice.<sup>18</sup> Most cases are investigated by the police under the supervision of another judicial officer, the *procureur*. Along with trial judges and *juges d'instruction*, *procureurs* belong to the *magistrature*, the French career-trained judiciary. As such, they can and do switch between roles throughout their career. Unlike judges, however, *procureurs* are part of a hierarchical organisation with the Minister of Justice, a member of the government, at the top of the pyramid.<sup>19</sup>

By contrast with public prosecutors in England and Wales, *procureurs* are not understood as representing the narrow interests of the prosecution side, but are supposed to represent the wider public interest as *magistrats*. *Procureurs* must ensure that all lines of enquiry are explored by the police, including those potentially exculpating the suspect, and should protect the rights of the accused. However, in practice, *procureurs* often favour a crime-control orientation to the public interest when

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<sup>18</sup> Calculated as a percentage of cases proceeded with by public prosecutors (i.e. this includes prosecutions, alternatives to prosecution and *compositions pénales*) 16,946 cases out of 1,367,166 were sent to the *juge d'instruction* (around 1.24%) in 2016. Ministère de la Justice, 'Les Chiffres Clefs de la Justice 2017'. The recent Loi no 2016-731 of 3 June 2016 will further impact the distribution of cases between *procureur* and *juge d'instruction*.

<sup>19</sup> This link between the public prosecution service and politicians has long been controversial: for a recent summary of the debate, see J. Hodgson and L. Soubise, 'Prosecution in France' (2016) *Oxford Handbooks Online* <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-124>>.

supervising police investigations.<sup>20</sup> Trust is central in the relationship between *procureurs* and police investigators, with supervision usually being limited to a retrospective, bureaucratic review of the investigative file, rather than a close monitoring of police actions.<sup>21</sup>

The judicial status of *procureurs* under French law has been called into question, following recent decisions by the European Court of Human Rights (ECtHR)<sup>22</sup> which found that they do not meet the guarantees of independence required from a ‘judicial officer’ under article 5 para. 1 of the European Convention on Human Rights.<sup>23</sup> The idea that *procureurs* and judges should not be part of the same body is today gaining momentum as a majority of defence lawyers, but also of judges, wish for a split of the *magistrature*.<sup>24</sup> *Procureurs* are for the most part opposed to this, fearing an ‘Anglo-Saxon’ drift, where prosecutors would be reduced to the role of public accusers. The *procureurs* I interviewed largely shared this vision, feeling that their status of *magistrat* was essential to defend their position.

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<sup>20</sup> J. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (2005); J. Hodgson, ‘Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations’ (2002) 29 *J. of Law and Society* 227.

<sup>21</sup> Hodgson, *op. cit.* (2005), n. 20; C. Mouhanna, *Polices judiciaires et magistrats: une affaire de confiance* (2001).

<sup>22</sup> *Medvedyev And Others v France* (2010) 51 EHRR 39, para 124; *Moulin v France* App no 37104/06 (ECtHR, 20 November 2010), para 59.

<sup>23</sup> A. Giudicelli, ‘Le Ministère Public n’est Pas Une Autorité Judiciaire Au Sens de La Convention de Sauvegarde Des Droits de l’homme: Quelles Conséquences Sur Le Contrôle de La Garde à Vue?’ (2011) *Revue de science criminelle* 142; J.-P. Jean, ‘Le Ministère Public Français Au Regard Des Justices Pénales d’Europe’ (2011) *AJ Pénal* 106; W. Mastor, ‘Le Ministère Public Est-Il Une Autorité Judiciaire?’ (2011) *Nouveaux cahiers du Conseil constitutionnel* 231; J. Pradel, ‘Quel(s) Magistrat(s) Pour Contrôler et Prolonger La Garde à Vue? Vers Une Convergence Entre La Cour de Strasbourg et La Chambre Criminelle de La Cour de Cassation’ (2011) *Recueil Dalloz* 338; D. Roets, ‘Le Manque d’indépendance Du Ministère Public Français à l’égard de l’exécutif et Des Parties: Un Obstacle à l’exercice de Certaines Fonctions’ (2011) *Revue de science criminelle* 208; J. Hodgson, ‘The French Prosecutor in Question’ (2010) 67 *Washington and Lee Law Rev.* 1361; F. Sudre, ‘Le Glas Du Parquet’ (2010) *La Semaine Juridique* 2277; J.-P. Marguénaud, ‘Tempête Sur Le Parquet’ (2009) *Revue de science criminelle* 176; J.-F. Renucci, ‘Un Séisme Judiciaire: Pour La Cour Européenne Des Droits de l’homme, Les Magistrats Du Parquet Ne Sont Pas Une Autorité Judiciaire’ (2009) *Recueil Dalloz* 600.

<sup>24</sup> P. Milburn et al., *Les Procureurs, Entre Vocation Judiciaire et Fonctions Politiques* (2010).

Despite all this, the image of the *procureur* as protector of the public interest and *magistrat* still gives them great prestige in French legal culture. Recently, it has also justified the transfer of powers from the judge to the *procureur* to cope with the justice system's overload. *Procureurs* not only decide whether to prosecute a case or not, but also which procedural pathway to send the case on. They can decide to engage alternatives to prosecution, such as warnings (*rappels à la loi*), mediation,<sup>25</sup> voluntary reparation/compensation, rehabilitation schemes, but also *compositions pénales*. Even when *procureurs* do decide to prosecute the suspect, they can choose from several procedures: speedy 'on-file' procedure (*ordonnance pénale*),<sup>26</sup> CRPC, speedy trial (*comparution immédiate*),<sup>27</sup> trial before the *tribunal correctionnel*<sup>28</sup> or formal investigation by a judge (*instruction*).

The judicial status of *procureurs* as *magistrats* has also been put forward to justify their intrusion in the adjudication function in admission-based procedures: 'Without any doubt, the *procureur de la République* has important powers at his disposal since he has got the initiative of this procedure and determines the sentence that he will propose. But let's not forget that the *procureur* is a *magistrat*, a natural defender of liberties just

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<sup>25</sup> *Loi* no. 93-2 of 4 January 1993 introduces mediation as an alternative to prosecution. See J.-P. Allinne, *Gouverner le crime: les politiques criminelles françaises de la révolution au XXI<sup>e</sup> siècle. Tome 2, Le temps des doutes, 1920-2004* (2004) 132-145.

<sup>26</sup> The *ordonnance pénale* is a procedure without a public hearing. Judges make their decision purely on the basis of the prosecution papers. Since there is no public debate on guilt, the defendant can oppose the decision within thirty days and demand a trial. However, such oppositions seem rare in practice: see F. Zocchetto, 'Juger Vite, Juger Mieux ? Les Procédures Rapides de Traitement Des Affaires Pénales, Etat Des Lieux' (Sénat 2005) Rapport d'information 17.

<sup>27</sup> The expedited *comparution immédiate* procedure is available in offences with a maximum sentence of between two and ten years imprisonment, where the *procureur* considers the case ready for trial (Art. 395 CPP). The procedure is designed to rapidly process cases, tried within hours of the police custody period. See L. Mucchielli and E. Raquet, 'Les Comparutions Immédiates Au TGI de Nice, Ou La Prison Comme Unique Réponse à Une Délinquance de Misère' (2014) *Revue de science criminelle* 207.

<sup>28</sup> The *tribunal correctionnel* is normally composed of three professional judges – although some offences can be tried by a single judge – and tries mid-ranking offences such as burglary, theft, assaults, etc.

like judges (...).<sup>29</sup> In theory, their professional culture and ideology of acting in the public interest means that they do not believe it appropriate to leave all protection of the interests of the accused to defence lawyers. It should prevent *procureurs* from behaving in a purely adversarial manner. Yet *procureurs* often conflate the public interest and a crime control oriented agenda in their supervision of police investigations.<sup>30</sup> Do *procureurs* behave differently in admission-based procedures where they are placed in a more judicial role? Of equal importance is the impact of these procedures on the behaviour of defence lawyers, given the adversarial origins of the procedures. According to my own observations, *procureurs* are torn between their judicial role and the pressures to administer criminal casework efficiently. Rather than a shift towards a more adversarial system, I observed a bureaucratisation of the French criminal justice system.

#### THE *PROCUREUR*, FROM JUDICIAL OFFICER TO CASELOAD MANAGER

In a pure adversarial model, the decision to plead guilty rests with the defence. The defendant can decide to abandon her right to trial by admitting that she has committed the offence she is accused of. In practice, however, defendants in common law systems are pressured into pleading guilty by public prosecutors or, more generally, by the criminal justice system as a whole<sup>31</sup> or even by their own defence lawyers,<sup>32</sup> for efficiency

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<sup>29</sup> J. Pradel, 'Défense Du Plaidoyer de Culpabilité. À Propos Du Projet de Loi Sur Les Évolutions de La Criminalité' (2004) *La Semaine Juridique* 169.

<sup>30</sup> Hodgson, *French Criminal Justice* (n 20); Mouhanna (n 21).

<sup>31</sup> For instance, defendants who plead guilty are rewarded by a sentencing discount in England and Wales.

<sup>32</sup> M. McConville et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994); D. Newman, *Legal Aid Lawyers and the Quest for Justice* (2013).

purposes.<sup>33</sup> Unlike in adversarial systems, the decision to dispose of a case through a guilty plea procedure in France resides mainly in the hands of *procureurs* and there is no bargaining on charges, in keeping with the system's inquisitorial roots. However, the introduction of multiple procedural pathways has led to the bureaucratisation of prosecutorial decisions, with expectations on *procureurs* to manage the courts' caseload efficiently.

### 1. The absence of plea bargaining

In my own fieldwork, prosecutors usually asked the police whether the suspect had made a confession in interview and relied on their assessment of the admission when deciding to summon a defendant for a CRPC hearing or for a *composition pénale*. I did not observe *procureurs* check the circumstances in which suspects had made such admissions, whether they had admitted all elements of the offence nor whether a defence might have been suggested. *Procureurs* generally make their decision over the phone, with no access to transcripts of police interviews. They are therefore completely reliant on police officers to assess the reality and reliability of the admission at this stage.<sup>34</sup> Yet, pressures on suspects to confess at the police station have been well documented.<sup>35</sup> Although there is no suggestion that they have been amplified since the

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<sup>33</sup> J. Baldwin and M. McConville, *Negotiated Justice: Pressures to Plead Guilty* (1977); McConville et al., op. cit., n. 32; Lynch, op. cit., n. 8; A. Sanders et al, *Criminal Justice* (2010, 4<sup>th</sup> edn.); S. Bibas, *The Machinery of Criminal Justice* (2012); McConville and Marsh, op. cit., n. 2.

<sup>34</sup> These findings chime with those of earlier empirical research which showed the relationship of trust existing between *procureurs* and police investigators, which leads to an absence of close monitoring of police actions: B. Bastard and C. Mouhanna, *Une justice dans l'urgence: le traitement en temps réel des affaires pénales* (2007); Hodgson, op. cit. (2005), n. 20; Hodgson, op. cit. (2002), n. 20; Mouhanna, op. cit., n. 21.

<sup>35</sup> J. Hodgson, 'The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice' (2001) 41 *British Journal of Criminology* 342; Mouhanna, op. cit., n. 21; Hodgson, op. cit. (2005), n. 20.

introduction of admission-based procedures, the risk that confessions at the police station have been coerced still exists.<sup>36</sup>

According to article 495-7 CPP, the defence can request the use of the CRPC, but the decision in all cases I observed was taken by the *procureur* following her discussion with the police. *Procureurs* sometimes decided to ignore an allegation and charge only the offence that the suspect admitted, in order to proceed to a CRPC, but this decision was made solely by the *procureur*, with no attempt at charge bargaining from the defence. For example, in case F-101,<sup>37</sup> a suspect had been arrested following an altercation in a car park where she was alleged to have used pepper spray against the victim and to have damaged her car. As the suspect admitted the assault, but not the criminal damage, the *procureur* decided to summon her to a CRPC only for the assault and not to charge her with criminal damage.

In England and Wales plea bargaining often took place at the initiative of the defence lawyer, whereas I never observed French defence lawyers negotiating the charges faced by their clients with the *procureur* in two months of fieldwork. Several factors can account for this: defence lawyers gained greater access to police investigations only recently and tend to consider the defence role as a more passive and restricted role than their Anglo-Welsh counterparts;<sup>38</sup> moreover, lawyers advising suspects at the police

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<sup>36</sup> The opposite might actually be true since defence lawyers have been permitted to attend police interviews from 2011: see J. Blackstock et al., *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (2014). Prior to that, they were only able to offer a 30-minute consultation to suspects: see Hodgson, *op. cit.* (2005), n. 20; J. Hodgson, 'Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process?' (2002) 6 *The International J. of Evidence & Proof* 1.

<sup>37</sup> Interview participants and cases are coded by the letters EW (for England and Wales) or F (for France) and a number (i.e. EW-126).

<sup>38</sup> S. Field and A. West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process' (2003) 14 *Criminal Law Forum* 261; Hodgson, *op. cit.* (2002), n. 36.

station are unlikely to continue representing them at court.<sup>39</sup> This prevents them from playing a more proactive role prior to trial, such as making representations to the *procureur* in favour of a specific procedural path. Recent reforms<sup>40</sup> extended the right to access to a defence lawyer and expressly opened the possibility to make representations about the chosen procedural path in cases where the suspect is handed over to the *procureur* after police custody.<sup>41</sup> Arguably, these reforms could prompt lawyers to play a more pro-active role in influencing the procedural path chosen by the *procureur*.<sup>42</sup> However, such handing-over to the *procureur* after police custody only takes place where the *procureur* is considering the opening of an *instruction* or a *comparution immédiate*. In the vast majority of cases, defendants are given summons to a later court date by the police, with no opportunity for defence lawyers to make representations to the *procureur*.

There have been concerns about privatisation of the criminal justice system through admission-based procedures, given the greater role afforded to private parties in theory.<sup>43</sup> However, my findings show that the decision to process a case through *composition pénale* or CRPC remains firmly in the hands of *procureurs*. As such, the new

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<sup>39</sup> C. Saas, 'Droits de La Défense et Alternatives Aux Poursuites: Des (r)Apports Réciproques Au Soutien d'une Politique Criminelle Pragmatique' (2015) 1 *Archives de politique criminelle* 69; Blackstock et al., op. cit., n. 36, pp. 332–335; Y. Msika, 'Plaider Coupable et Rôle de l'avocat à Pontoise et Ailleurs' (2005) *AJ Pénal* 445. It should be noted that police station advice is often undertaken by accredited advisors, rather than fully qualified lawyers in England and Wales. Therefore, it is likely that the person representing the defendant in court will not have assisted them at the police station. However, the case will be handled within the same firm and the lawyer at court should have access to all the information gathered at the police station, whereas in France the case might be handled by a different firm altogether.

<sup>40</sup> Loi no. 2014-535 of 27 May 2014 *portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil, du 22 mai 2012, relative au droit à l'information dans le cadre des procédures pénales*; Loi no. 2016-731 of 3 June 2016 *renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*.

<sup>41</sup> Art. 393 CPP.

<sup>42</sup> See Saas, op. cit., n. 39, p. 76.

<sup>43</sup> Desprez, op. cit., n. 6, p. 109; see, more generally, X. Pin, 'La Privatisation Du Procès Pénal' (2002) *Revue de science criminelle* 245.

procedures reflect the inquisitorial roots of the French criminal procedure where a judicial officer is entrusted with making impartial decisions, rather than giving a greater role to defence lawyers. Moreover, the procedure reflects the objective concept of truth in inquisitorially based systems and the collateral reluctance to bargain with it.<sup>44</sup>

As *procureurs* alone decide to use admission-based procedures, I will examine the criteria guiding their decisions in the next sections. Admission-based procedures were introduced in the French criminal justice process in order to speed up the disposal of cases. Yet, the use of CRPC and the *composition pénale* remains relatively limited, by comparison with guilty pleas in England and Wales. Systemic pressures on public prosecutors are different in each jurisdiction and this leads to different perceptions of the adequacy of guilty plea disposals. However, the objective of efficiency is paramount in both jurisdictions.

## **2. The search for efficiency**

In 2016, proceedings were brought against almost 1.46 million individuals in the criminal courts in England and Wales.<sup>45</sup> Meanwhile, French criminal courts handed down 1.09 million decisions at first instance.<sup>46</sup> Processing such a high number of cases through criminal courts requires time and resources. In England and Wales, guilty plea procedures are seen as necessary to manage heavy courts' caseloads. Similarly, the CRPC

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<sup>44</sup> See Langer, *op. cit.*, n. 7, pp. 10–11; A. Garapon, 'French Legal Culture and the Shock of "Globalization"' (1995) 4 *Social & Legal Studies* 493.

<sup>45</sup> Ministry of Justice, 'Criminal Justice System statistics quarterly: December 2016' (Ministry of Justice 2016) 14, available at <<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2016>> accessed 16 January 2018.

<sup>46</sup> Ministère de la Justice, 'Les Chiffres Clefs de la Justice 2017' (Ministère de la Justice 2017) 15 <[http://www.justice.gouv.fr/art\\_pix/stat\\_Chiffres%20Cl%E9s%202017.pdf](http://www.justice.gouv.fr/art_pix/stat_Chiffres%20Cl%E9s%202017.pdf)> accessed 16 January 2018.



was presented as a solution to French courts' overburdened caseload at the time of its introduction by Parliament.<sup>47</sup>

In France, *procureurs* have been at the forefront of the drive for efficiency in the criminal justice system, especially from 2001 onwards. The 2001 *Loi organique relative aux lois de finances* (LOLF) reformed the architecture of the state budget, in order to improve efficacy (by obtaining results in accordance with set objectives) and efficiency (by obtaining the best results from available resources).<sup>48</sup> It introduced a new target for *procureurs* – the 'criminal response rate' – which measures the number of 'prosecutable cases' against the number of cases prosecuted at court or closed through alternatives to prosecution. Resulting from concerns over numerous dismissals by public prosecutors in the 1990s,<sup>49</sup> the statistic is published by the Ministry of Justice to promote the efficiency of the *ministère public*<sup>50</sup> and has been increasing constantly since its creation in 1998.<sup>51</sup> Alternatives to prosecution and accelerated procedures are used to provide a

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<sup>47</sup> Rapport No 856 of J.-L. Warsmann for the National Assembly (available at <[http://www.assemblee-nationale.fr/12/rapports/ro856-t1-3.asp#P873\\_226599](http://www.assemblee-nationale.fr/12/rapports/ro856-t1-3.asp#P873_226599)> accessed 19 December 2017).

<sup>48</sup> C. Vigour and A. Hastings-Marchadier, 'L'économie budgétaire de la justice pénale' in *La réponse pénale. Dix ans de traitement des délits*, ed. J. Danet, (2013); C. Mouhanna and F. Vesentini, 'Indicators or Incentives? Some Thoughts on the Use of the Penal Response Rate for Measuring the Activity of Public Prosecutors' Offices in France (1999–2010)' in *Modernisation of the Criminal Justice Chain and the Judicial System. New Insights on Trust, Cooperation and Human Capital*, eds. A. Hondeghem et al. (2016).

<sup>49</sup> At the time, *procureurs* discontinued around eighty per cent of cases sent to them for a decision see, for instance, B. Aubusson de Cavarlay et al., 'L'abandon Des Poursuites Par Le Parquet' (1990) III *Questions pénales*; L. Simmat-Durand, 'Le Parquet et l'opportunité Des Poursuites' (1994) VII *Questions pénales*. It should be noted, however, that over half of those dismissals were, in fact, unresolved, i.e. no suspect had been found.

<sup>50</sup> The French public prosecution service is called '*ministère public*'. The word '*parquet*' is also used as a collective term for *procureurs*.

<sup>51</sup> In 2016, 86 per cent of prosecutable cases were given a 'response' Ministère de la Justice, 'Les Chiffres-Clés de La Justice 2017' (Ministère de la Justice 2017) <[http://www.justice.gouv.fr/art\\_pix/stat\\_Chiffres%20Cl%E9s%202017.pdf](http://www.justice.gouv.fr/art_pix/stat_Chiffres%20Cl%E9s%202017.pdf)> accessed 1 February 2018., compared with only 64.9 per cent in 1998 Ministère de la Justice, 'Les Chiffres Clés de La Justice 1999' (Ministère de la Justice 1999) <<http://www.justice.gouv.fr/budget-et-statistiques-10054/chiffres-cles-de-la-justice-10303/les-chiffres-clefs-1999-11865.html>> accessed 10 May 2016.

systematic institutional response to offences, without increasing courts' caseloads. The aim is to process the maximum number of cases with minimal resources.<sup>52</sup>

### 3. The proportion of guilty pleas

In England and Wales in 2016/17, over 78 per cent of defendants prosecuted by the CPS at the magistrates' court and over 70 per cent at the Crown Court pleaded guilty.<sup>53</sup> This means that the vast majority of criminal cases did not involve the presentation and cross-examination of evidence by each party. As explained by a CPS lawyer I interviewed, guilty pleas are 'very much part of the DNA of the system' (Interview respondent EW25). In France, growing pressures to improve efficiency significantly affect *procureurs'* decision-making. Yet, far from becoming the preferred way to dispose of criminal cases in France, the CRPC represents 6.4 per cent of 'prosecutable' cases<sup>54</sup> and the *composition pénale* just over 5 per cent of cases in 2016.<sup>55</sup> This difference can be explained by several factors, which include a stricter legal framework for guilty pleas in France than in England and Wales and the relative novelty of the French procedures compared to guilty pleas in England and Wales. Importantly, legal actors in each jurisdiction are also subject to different systemic pressures.

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<sup>52</sup> V. Gautron, 'L'impact des préoccupations managériales sur l'administration locale de la justice pénale française' (2014) *Champ pénal* <<http://champpenal.revues.org/8715>> accessed 29 July 2014.

<sup>53</sup> Crown Prosecution Service, 'Annual Report and Accounts 2016-2017 (for the Period April 2016 - March 2017)' (2017) HC115 63-65 <[https://www.cps.gov.uk/sites/default/files/documents/publications/annual\\_report\\_2016\\_17.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/annual_report_2016_17.pdf)> accessed 5 February 2018.

<sup>54</sup> In official figures published by the French Ministry of Justice, 'prosecutable cases' are cases where sufficient evidence exists against an identified suspect and there are no legal obstacles to prosecution.

<sup>55</sup> Ministère de la Justice, 'Les Chiffres Clés de La Justice 2017' (Ministère de la Justice 2017) <[http://www.justice.gouv.fr/art\\_pix/stat\\_Chiffres%20Cl%E9s%202017.pdf](http://www.justice.gouv.fr/art_pix/stat_Chiffres%20Cl%E9s%202017.pdf)> accessed 1 August 2017. French researchers have underlined significant local variations in the use of these procedures, see, in particular, V. Gautron, 'Different Methods, Same Results as French Criminal Courts Try to Meet Contradictory Policy Demands' in *Modernisation of the Criminal Justice Chain and the Judicial System. New Insights on Trust, Cooperation and Human Capital*, eds. A. Hondégem et al. (2016).

(a) Strict legal criteria

Whilst guilty pleas are available for all criminal offences in England and Wales, the CRPC and the *composition pénale* are strictly framed by legislation. The *composition pénale* is applicable to minor and mid-ranking offences with a maximum penalty of five years imprisonment. The CRPC was originally limited to offences with a maximum penalty of five years or under, but was extended in 2011 to offences punished by up to ten years, except certain offences such as serious assaults. The resort to these measures is also influenced by the punishment likely to be imposed on the defendant. The *composition pénale* does not allow prosecutors to impose any imprisonment. The CRPC allows the public prosecutor to offer a sentence to a defendant who admits the offence, but the proposed sentence cannot be more than one year in prison or half the maximum penalty. Finally, the CRPC procedure can only apply to adults and not juveniles, who do not have capacity to contract in French law.<sup>56</sup> Initially, the *composition pénale* was not available to juveniles either, but this was amended by a 2007 Act.<sup>57</sup>

(b) Different systemic pressures on legal actors

In England and Wales, prosecutors' incentives to negotiate and obtain a guilty plea are particularly high. Trials are particularly resource-intensive: involving hours of preparation by investigators and lawyers on each side and the presence of several witnesses (as well as a lay jury at the Crown Court),<sup>58</sup> they represent the opportunity for the parties to test their opposing accounts. Their outcomes are difficult to predict due

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<sup>56</sup> This reluctance to make guilty plea procedures available to minors suggests that the guilty plea is not understood simply as evidence of guilt in French admission-based procedures, but more fundamentally as a waiver of the right to trial, which implies the existence of a negotiated settlement between the prosecution and the defence and therefore full capacity to consent to the other party's conditions.

<sup>57</sup> Loi 2007-297 of 5 March 2007

<sup>58</sup> Although a trial at the magistrates' court is substantially cheaper than a trial by jury, it is still more expensive than a disposal by guilty plea.

to the high number of unknowns. CPS prosecutors I observed often commented that it was best to accept a plea to a lower charge, as it was ‘not worth going to trial’. Importantly, the pressures on the defence to plead guilty are significant, with a guaranteed sentence discount, the possibility of lowering the charge and the uncertainty of the trial outcome.

In France, although both procedures were designed to accelerate the disposal of criminal cases, it still takes around five months on average to dispose of cases through the CRPC procedure and almost a year through *composition pénale* after the *procureur*’s choice of a specific pathway.<sup>59</sup> One *procureur* (FR6) confided that she was not convinced by the efficiency gains: ‘There is the *procureur* in one room and the judge in another, working on the same files. If they were in the same room, it would be the same as a normal hearing.’ This comment reflects the abbreviated form of trials in the *tribunal correctionnel* where mid-ranking offences are judged.

By contrast to England and Wales, there are fewer risks involved for public prosecutors to go to trial in France and trials take up far fewer resources. In England and Wales, the prosecution file is perceived as a partial account that must be confronted by the defence version for the truth to emerge; in France, the dossier is seen as the result of a more neutral investigation supervised by an impartial judicial officer. It is therefore much more difficult for the defence to contest the file’s content. Trials at the *tribunal*

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<sup>59</sup> V. Carrasco and L. Viard-Guillot, ‘Les Durées de Traitement Des Affaires Pénales Par La Justice’ (2015) *Infostat* 134 <[http://www.justice.gouv.fr/art\\_pix/stat\\_Infostat%20134%20odef.pdf](http://www.justice.gouv.fr/art_pix/stat_Infostat%20134%20odef.pdf)> accessed 4 July 2015.

*correctionnel* are often short (from as little as fifteen minutes to a couple of hours, depending on complexity) as witnesses are rarely called to testify in court.<sup>60</sup>

In England and Wales, efficiency concerns have led to growing numbers of guilty pleas and, in recent years, pressures on defendants to plead guilty as early as possible. In France, in reaction to the multiplication of simplified and accelerated procedures at their disposal, *procureurs'* decision-making process has become increasingly standardised, by contrast with their discourse of individualisation of prosecutorial decisions to the particularities of the case and of the suspect.

(c) Standardisation vs individualisation

*Procureurs* have been given a wide range of options to process cases which could mean a response tailored to the offence seriousness and the suspect's personality. Previous convictions, a stable life demonstrated through a permanent job and a family, a remorseful attitude, and so on, are all factors put forward as influential in their decisions. In my fieldwork, I observed *procureurs* using the procedural options at their disposal following a grading scale.<sup>61</sup> The most minor offences were diverted to alternatives to prosecution, in a progressive range going from warnings, restorative measures and up to *composition pénale*. Cases commonly resolved through *composition pénale* included shoplifting, minor public order offences and cannabis possession. More serious offences were prosecuted through, in ascending order, *ordonnance pénale*,

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<sup>60</sup> See J. Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in *The trial on trial Vol.2 Judgment and calling to account*, eds Antony Duff et al. (2006). Different traditions preside over the most serious cases tried at a *cour d'assises*, where witnesses are usually called to testify before a jury composed of *magistrats* and lay jurors.

<sup>61</sup> J. Pradel, 'Vers Un "Aggiornamento" Des Réponses de La Procédure Pénale à La Criminalité; Apports de La Loi N° 2004-204 Du 9 Mars 2004 Dite Perben II. Première Partie' (2004) *La Semaine Juridique* 821; Danet, op. cit., n. 13; A. Lenoir and V. Gautron, 'Les Pratiques Des Parquets Face à l'injonction Politique de Réduire Le Taux de Classement sans Suite' (2014) 3 *Droit et Société* 591.

CRPC, traditional *correctionnel* hearing and *comparution immédiate*. The CRPC procedure was typically used for drink driving or driving without a licence, but also domestic violence (minor assault and harassment), minor frauds and thefts. The defendants in CRPC usually had previous convictions. However, this ‘adaptation’ of the decision to the individual case comes up against the reality of limited resources and a heavy caseload. In practice, decisions are often made quickly, following standardised decision-making tables.<sup>62</sup>

This standardisation of prosecutorial decision-making has been observed following the introduction of *Traitement en Temps Réel* (TTR) in the early 2000s. The TTR unit is staffed by *procureurs* who answer phone calls from police officers reporting orally on their investigations. *Procureurs* can ask questions and order further investigations. In straightforward cases, they indicate the charge to be brought and the court date, and the police issue the official summons to appear. The supervision of police investigations therefore often takes place over the phone and typically leads to a quick decision by the *procureur*, leaving little time for in-depth reflection.<sup>63</sup> [In cases of \*comparution immédiate\*, trial and sentence can take place within hours of the prosecutor’s decision.](#)

Bastard and Mouhanna show that the pressure to provide an immediate prosecutorial decision whilst on the phone with the police results in standardisation with the definition of grading scales within *parquets* to provide a quasi-automatic decision for mass offences.<sup>64</sup>

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<sup>62</sup> S. Grunvald, ‘Les choix et schémas d’orientation’ in *La réponse pénale dix ans de traitement des délits*, ed. J. Danet, (2013) 109–110; Lenoir and Gautron (n 67).

<sup>63</sup> Bastard and Mouhanna, *op. cit.*, n. 34.

<sup>64</sup> *ibid.*

Going even further in the rationalisation of the process, permanent directives are an instrument of local prosecution policy shaping the *parquet's* case treatment structure. Local *parquets'* heads can issue directives to the police, so that police officers can determine certain case outcomes without contacting the *parquet*. In the area I observed, the *Procureur de la République* had issued directives for shoplifting, drink driving and cannabis possession. These directives standardise the response to mass offences based on comprehensive grading scales relating to, for example, blood alcohol level, drug quantity, or stolen goods' value<sup>65</sup> without any scope for greater individualisation.<sup>66</sup> These 'permanent directives' are used by *parquets* to control their workload by partially delegating out-of-court disposals to the police. Under this scheme in the area I observed, files were sent directly by the police to a *Maison de la justice et du droit* (MJD – House of Justice)<sup>67</sup> without contacting the *parquet*.

#### 4. The judges' input in earlier phases

The quasi-sentencing power given to the *procureur* in the *composition pénale* and the CRPC procedures has been the subject of debates in France. In 1995, the *Conseil constitutionnel* struck out the *injonction pénale*, a predecessor of the *composition pénale*, considering that a criminal sanction could not be imposed by a public

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<sup>65</sup> For example, for a theft under €30 in value with a first-time offender who admits the offence and who lives within the area, a simple warning by the police officer is deemed sufficient. For a theft between €80-120, the table distinguishes further: if the offender returned the stolen goods or eventually paid for them, the file goes for a *composition pénale*; if the offender did not return the goods or they were damaged and were not reimbursed, an *ordonnance pénale* is necessary, in a gradation of the seriousness of the response.

<sup>66</sup> See, for similar observations, G. Roussel et al., 'La Coordination Entre Forces de Police et Justice Dans Le Traitement Des Délits' in *La réponse pénale. Dix ans de traitement des délits*, ed. J. Danet (2013).

<sup>67</sup> Co-funded by local councils and the Ministry of Justice, Houses of Justice (MJD) were created to improve access to justice by offering legal services at the heart of the community. MJD organise the provision of pro-bono legal advice by lawyers, as well as mediation (civil and victim/offender) and other out-of-court disposals. See A. Crawford, 'Justice De Proximité - The Growth of "Houses of Justice" and Victim/Offender Mediation in France: A Very Unfrench Legal Response?' (2000) 9 *Social & Legal Studies* 29. In many instances, *procureurs* recruited assistants, called *délégués du procureur*, to handle out-of-court disposals at the MJD (see below).

prosecutor, but required the intervention of a judge, that is a member of the sitting judiciary independent from the executive.<sup>68</sup> A *composition pénale* or a CRPC must therefore be validated by a judge, but this verification has been described as ‘quick’, ‘succinct’ or even ‘artificial’, underlining that the judge can only accept or reject the sanction proposed by the prosecutor and that a deeper check would go against rapidity objectives for which the measures were first introduced.<sup>69</sup>

[Procureurs and judges work in court buildings and have many opportunities to speak to each other as colleagues, for example when meeting at the coffee machine. These conversations might include general matters of prosecution and sentencing policy.](#) However, as judges’ [agreement-consent](#) is required for smooth caseload management, public prosecutors have [also](#) negotiated [formal](#) agreements with judges ~~in advance~~ to avoid their decisions being rejected at the validation stage and thus ensure the procedures’ success. These agreements define the type of offences and the appropriate level of sanction for these procedures. Their level of detail varies, with some court centres adopting comprehensive decision-making tables.<sup>70</sup> Judges have thus regained some of the powers they lost in the validation phase.<sup>71</sup> However, the definition in advance of cases in which these procedures apply necessarily leads to further standardisation of prosecutorial decision-making.

Although in principle *procureurs* should make their decision according to case specific characteristics and the offender, their decision-making is increasingly standardised and

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<sup>68</sup> *Conseil constitutionnel*, Decision No. 95-360 DC 2 February 1995, <<http://www.conseil-constitutionnel.fr/decision/1995/95360dc.htm>> accessed 24 March 2014.

<sup>69</sup> Perrocheau, *op. cit.*, n. 8; Saas, *op. cit.*, n. 8.

<sup>70</sup> Grunvald, *op. cit.*, n. 62; Danet and Grunvald, *op. cit.*, n. 9; J.-D. Régnauld, ‘Composition Pénale: L’exemple Du Tribunal de Cambrai’ (2003) *AJ Pénal* 55.

<sup>71</sup> Perrocheau, *op. cit.*, n. 8.



automated, due to a drive for efficiency in criminal justice. Far from reinforcing their role as judicial officers, the multiplication of prosecution pathways has pushed *procureurs* to embrace a more administrative role, that of caseload managers. This move away from individualisation facilitates the delegation of some decisions from public prosecutors to police officers, instructed to follow set decision tables. The next section examines how cases are handled once the decision to use a 'guilty plea' procedure has been made.

#### GUILTY PLEA PROCEDURES AND OCCUPATIONAL CULTURES

Guilty plea procedures were criticised for going against fundamental principles of French criminal procedure. The move was perceived as participating in a wider privatisation movement of the criminal justice process<sup>72</sup> in allowing the parties to shape the judicial debate. As we have seen, this concern has not come true in practice, with *procureurs* remaining firmly in charge of the decision to use an admission-based procedure and the absence of any charge bargaining in practice. It was also argued that it transformed the role of *procureurs*, although two opposing transformations were identified: the *procureur* came to replace the judge<sup>73</sup> or there were risks that *procureurs* would behave more like a party to the proceedings, instead of a neutral judicial officer.<sup>74</sup> It is therefore interesting to see how *procureurs* behave in practice.

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<sup>72</sup> Pin, op. cit., n. 43; Desprez, op. cit., n. 6.

<sup>73</sup> Hodgson, op. cit., n. 8, p. 127; Saas, op. cit., n. 8.

<sup>74</sup> See Desprez, op. cit., n. 6, p. 113: 'The procureur represents society and must demand the application of the law, he should not negotiate.'

## 1. The procureur's ambivalent role in the CRPC

The *procureur* must check the veracity of the admission when they meet the defendant before offering a sentence in the CRPC procedure. This verification by the *procureur* was not simply perfunctory in the cases I observed. Thus, in case F-26 where the defendant was charged with drink driving, the *procureur* (FRI) asked the defendant whether he admitted the offence, but the defendant declared that, although he had indeed been drinking, he was at home and not in his car when the police arrested him. Despite the willingness of the defence lawyer to negotiate on sentence, the *procureur* refused to carry on with the CRPC procedure and sent the case to trial:

***Procureur:*** So, you don't admit drink driving then.

***Defence lawyer:*** well, it depends what sentence you're offering.

***Procureur:*** No, no. The law says that the person has to admit the offence first, before a sentence is offered. If they don't admit it, we don't go any further.

Making sure that the defendant admits the offence she is charged with is in line with the behaviour expected from judicial officers who must ensure that defence rights are respected, rather than leave it fully to the defence lawyer. The contrast could not be starker with England and Wales where I never observed CPS representatives expressing any doubt over the admission or carrying out such checks. There is simply no opportunity for public prosecutors to meet with represented defendants in the normal course of proceedings in this jurisdiction.<sup>75</sup> In an adversarial system, it is the defence lawyer's role to ensure that the defendant's rights are respected which includes making sure that the admission is not made under pressure. This underlines the significance of

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<sup>75</sup> It should be noted that the Solicitors Code of Conduct (IB 11.4) prohibits solicitors (including those working for the CPS) to communicate with another party who has instructed a lawyer. A similar rule is in place for barristers.

McConville et al's findings that defence lawyers in England and Wales, working on the assumption that their clients are probably guilty, actually often pressurised them to plead guilty.<sup>76</sup>

The *procureur's* decision to apply the CRPC procedure is not irrevocable and *procureurs* can decide to abandon it if they later realise that the abbreviated procedure is not appropriate to handle the case, as a full hearing is necessary. For instance, in case F-28, a defendant was charged with assault with a weapon against his employer. However, the *procureur* (FRI) noticed that the assault took place in the context of a highly difficult relationship between the defendant and the victim of the assault. The defendant reported to the *procureur* that he had been harassed and sexually assaulted by his employer, causing his reaction. The *procureur* told him that he did not think the case could be handled properly in a CRPC and advised the defence lawyer to request a psychological report for her client as the case was sent to trial.<sup>77</sup>

In other respects however, *procureurs* are far less attentive to defendants' rights, favouring quick case disposal instead. Thus, they issue two summonses to the accused for the same day: one for the CRPC and one for a trial. This means that if the CRPC is not successful, the case can still be disposed of swiftly. The practice was ruled as illegal by France's highest courts,<sup>78</sup> but was supported by Parliament through a change in the legislation in 2009.<sup>79</sup> In my own fieldwork, CRPC cases were dealt with from 9am one

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<sup>76</sup> McConville et al., op. cit., n. 32, ch 6 and 10; see also Newman, op. cit., n. 32.

<sup>77</sup> At this stage, court proceedings were already formally open. As such, it was not within the *procureur's* powers to order a psychological expertise himself. The court was sole permitted to order it. As the *procureur* might not have been the same person prosecuting at trial, this probably explains why the *procureur* advised the defence to request the expertise.

<sup>78</sup> CE, 11 May 2005 and CE, 26 April 2006; Cass. crim., 4 October 2006, no. 05-87.435, Bull. crim. 2006, no. 244.

<sup>79</sup> Loi 2009-526 of 12 May 2009.

day of the week and unsuccessful CRPC cases were sent for trial at 11am on the same day.<sup>80</sup> This organisation has important consequences on the behaviour of public prosecutors in practice.

Whilst representation by a defence lawyer is mandatory for the CRPC, defendants can waive their right to a lawyer in the traditional trial. The cost of the lawyer is borne by defendants unless they qualify for legal aid. Defendants who cannot or do not want to pay for a lawyer are thus excluded from the CRPC. *Procureurs* did not perceive this to be an issue and simply sent unrepresented defendants to trial, as can be seen in the following examples.

Two defendants were charged with handling stolen goods. They applied for legal aid, but did not qualify and they did not want to pay for a lawyer.

***Procureur*** (FR4): Not a problem, I'll just ask you to sign to say that you don't accept the CRPC. [case F-139]

In another case, the defendant was charged with driving unlicensed and refused to have a lawyer. The *procureur* (FR4) did not try to explain why a lawyer might help, simply saying: 'Okay, you'll be tried at 11am'. [case F-140]

I also observed, on several occasions, pressure being exerted by prosecutors to convince defendants to forgo the CRPC procedure and accept being tried without a lawyer.

In case [F-282], the *procureur* (FR8) met three unrepresented defendants in separate cases. He asked: 'Do you want to be tried at 11am without a lawyer?' Two of the defendants said that they did not have enough resources for a lawyer. The *procureur* did not tell them that they could be eligible for legal aid. They agreed to be tried at 11am. One of them came back a few minutes later saying that he had spoken to the duty lawyer who had told him that he could have legal aid because he was on benefit.

**Defendant:** I know your time is precious, so I don't want to bother you.

***Procureur*:** No, no, you have a right to a lawyer, it's not about what bothers me, so we can give you another date to come back for a CRPC.

**Defendant:** Will it change anything to the sentence I get?

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<sup>80</sup> The case had to be adjourned to another date if the offence was only triable by three judges.

**Procureur:** No, it's the same.

This comment is in contradiction with the spirit of the procedure which should mean lower sentences in the CRPC than in the ordinary procedure in order to entice defendants to accept the *procureur's* offer.<sup>81</sup> Unsurprisingly, it was effective in persuading the defendant that he had nothing to lose by going to trial (even without a lawyer):

**Defendant:** Ok, I'll be tried at 11am today then.

**Procureur:** Are you sure?

**Defendant:** Yes, then it's over.

The last defendant seemed unsure what to do. The *procureur* left the room to see the other two defendants out. In his absence, the defendant asked the clerk if she thought he should take a lawyer. She replied that she could not advise him.

**Defendant** (thinking out loud): If I'm tried today, then it'll all be over with.

The clerk confirmed this. I knew that, as an observer, I should not have intervened, but I could not help myself and I told him that it might be best for him to get a lawyer. He was told to come back at a later date. The *procureur* came back and the clerk explained that the defendant was hesitating.

**Procureur:** He should just have accepted to be tried at 11am.

**Clerk:** Well, I did my best.

The *procureur's* actions were evidently not in keeping with the image of a neutral *magistrat*, acting in the public interest and protecting defence rights, but were more consistent with an adversarial mindset. The prospect of disposing of these cases as quickly as possible, rather than having to process them at a later date, probably played a central role in her actions.

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<sup>81</sup> See below for an analysis of sentencing in the CRPC.

## 2. Negotiating the sentence: the weaknesses of defence lawyers exposed

The legislation regulating the CRPC does not refer to negotiations and the ministerial circular accompanying the 2004 Act clearly excludes it.<sup>82</sup> Although he insists that the law provides for a ‘plea without bargaining’, Pradel<sup>83</sup> admits that this might be tempting for legal actors in practice. As explained above, there is no bargaining on charges taking place between the prosecution and the defence. Instead, some negotiations take place on sentence,<sup>84</sup> in stark contrast with England and Wales where sentencing remains firmly in the hands of judges.<sup>85</sup> Typically, the *procureur* first proposed a sentence before the defence lawyer mitigated for their client. A discussion on the sentence would then result, not simply between the *procureur* and the defence lawyer, but often with the active participation of the defendant as illustrated by the following case of drink driving:

The *procureur* (FRI) offered a suspended prison sentence of one month, a €100 fine and the suspension of the driving licence for 12 months. The defence lawyer asked to reduce the length of the licence suspension. The *procureur* announced that it would mean increasing the fine in exchange. He proposed a 9-month suspension and a €1,000 fine. The defendant said that he was happy to pay more in order to reduce the suspension, because he had never taken his children on holiday and had planned to take them this summer. The *procureur* made the following final offer: 2-month suspended prison sentence, €1,500 fine and a suspension of the driving licence for six months. It was accepted by the defendant. [case F-35]

The transparency of the French procedure contrasts widely with my observations in England and Wales. In England and Wales, discussions usually took place between the CPS representative and the defence lawyer in the courtroom, shortly before the case was heard, but in the absence of the defendant. French defendants have full knowledge of

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<sup>82</sup> Circular of 2 September 2004, *Présentation des dispositions de la loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité relatives à la procédure de comparution sur reconnaissance préalable de culpabilité* (NOR: JUSDo430176C).

<sup>83</sup> Pradel, *op. cit.*, n. 61.

<sup>84</sup> See, for instance, Msika, *op. cit.*, n. 39.

<sup>85</sup> However, a sentencing discount applies to guilty pleas, depending on the timeliness of such plea.

the discussions that take place between the prosecutor and their lawyer. This contrasts with England and Wales where defence lawyers sometimes cooperate with public prosecutors to ensure that defendants plead guilty.<sup>86</sup> Such cooperation appears impossible in the French system.

The presence of the defendant in the discussion between the prosecution and the defence, however, underlines the weakness of defence lawyers in French criminal procedure. Whilst in England and Wales public prosecutors must go through the defence lawyer for plea bargaining, French *procureurs* can speak directly to the defendant, bypassing defence lawyers, relegated to the role of advisers, rather than representatives. This is in line with the diminished role expected from defence lawyers in the French system, in comparison with their counterparts in adversarial systems. During the pre-trial phase, French defence lawyers are thus merely perceived as ‘auxiliaries’ to the *magistrat*, rather than primary actors, with defence lawyers who attempt to intervene during their client’s interrogations being usually given short shrift, both at the police station<sup>87</sup> and before the *juge d’instruction*.<sup>88</sup> There is a real risk of defence lawyers being used to legitimise the procedure without them having real powers to affect the outcome.

The fairness of such ‘negotiations’ can be questioned given the inherent imbalance between the parties. In England and Wales, the Code for Crown Prosecutors regulates the behaviour of Crown Prosecutors in charging and subsequent plea bargaining. In particular, it clearly prohibits public prosecutors from overcharging in order to

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<sup>86</sup> McConville et al., op. cit., n. 32, p. 194 refer to the ‘sweetener’ agreed by defence lawyers with prosecutors to ensure their client pleaded guilty; see also Newman, op. cit., n. 32, pp. 116–117.

<sup>87</sup> Blackstock et al., op. cit., n. 36, pp. 398–408.

<sup>88</sup> Field and West, op. cit., n. 38; Hodgson, op. cit. (2005), n. 20, pp. 124–128.

encourage a defendant to plead guilty to a less serious charge (para. 6.3). By comparison, in France, the circular presenting the new procedure expressly rejects the idea of any negotiation taking place between the *procureur* and the defence which means that the practice remains wholly unregulated. In my own fieldwork, I witnessed *procureurs* offering higher sentences than they believed to be fair as a starting point to the discussion with the defence. Thus, one *procureur* (FR1) told me that he purposefully asked for a high sentence in case F-32 to be able to negotiate it down, as he knew the defence lawyer was good. Another *procureur* (FR8) systematically factored negotiating room in his first offer to the defence, as became apparent in the following case of driving under the influence of cannabis:

The *procureur* started by offering the defendant a hundred fine days at €6: this meant that he had to pay €600 or spend a hundred days in prison.

**Defence lawyer:** Okay, no problem!

**Procureur** (puzzled): Err... well, I'm offering 100 fine days at €5 actually.

[The *procureur* then realises that he forgot to add an 8-month suspension of the defendant's driving licence.]

**Defence lawyer:** I did think that you were being lenient!

[After some negotiating, a 7-month suspension is agreed. The defendant leaves the room.]

**Procureur** [to the defence lawyer]: Don't tell me you agree [with my offer], there's an automatic 25 per cent reduction [on the sentence originally offered]! [case F-274]

Although the above interaction only took place because of the *procureur's* mistake, it reveals his habitual practice of offering a high sentence at the start of the negotiation. It should be noted, however, that the *procureur* did not settle for the most severe sentence, despite the ready acceptance by the defence lawyer, but instead spontaneously offered to lower the sentence, a behaviour more in line with his professional status of impartial judicial officer.



In theory, the CRPC procedure should lead to a lower sentence for the defendant than a traditional trial. However, the comparison of sentencing outcomes for the two procedures is fraught with difficulties as there is no guarantee that cases closed through CRPC or traditional trial are comparable. Looking at cases originally meant to be dealt with in CRPC, but eventually sent for a traditional trial, Ministry of Justice statisticians found that a quarter of defendants were sentenced to non-suspended imprisonment terms.<sup>89</sup> This proportion is only 8 per cent for CRPC, suggesting greater severity for defendants opting for traditional trial. It is difficult to analyse whether this greater severity represents a form of ‘trial penalty’, where defendants would be punished for their voluntary decision to contest the charges against them or simply the result of their inability to secure the services of a defence lawyer and therefore of having mitigating factors presented on their behalf.

A crucial part of the role of the defence lawyer is to advise her client whether to accept the sentence proposed by the public prosecutor.<sup>90</sup> In the absence of any formal sentencing guidelines, defence lawyers must rely on their own experience and knowledge of the local sentencing culture to determine whether the offered sentence is advantageous to their client. As explained, there often are agreements in place between *procureurs* and judges on sentencing in the CRPC procedure. Moreover, as the case will be tried on the same day if the defendant refuses the sentence offered by the *procureur* and opts for a traditional trial, the same judge will either validate the sentence (in the

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<sup>89</sup> R. Houllé and G. Vaney, ‘La comparution sur reconnaissance préalable de culpabilité, une procédure pénale de plus en plus utilisée’ (2017) *Infostat* 157 <[http://www.justice.gouv.fr/art\\_pix/stat\\_Infostat\\_157.pdf](http://www.justice.gouv.fr/art_pix/stat_Infostat_157.pdf)> accessed 12 January 2018.

<sup>90</sup> Saas, *op. cit.*, n. 39, p. 77 argues that the introduction of those new speedy procedures could transform the role of defence lawyers.

CRPC procedure) or impose a sentence following sentencing recommendations by the same *procureur* (in the traditional trial). It would therefore be a risky (or simply pointless) strategy for a defence lawyer to advise her client to refuse the sentence offered by the *procureur*.

The empirical data I collected shows that the pressures to administer criminal casework efficiently can prevent *procureurs* from performing the judicial role expected from them in the CRPC procedure. Moreover, the historical and cultural weaknesses of defence lawyers do not permit them to provide a meaningful adversarial counterweight to the might of *procureurs*. Remarkably, *procureurs* play a much diminished role in *composition pénale* in practice, as they have delegated their role to less qualified staff. The judicial status of the *procureur* is therefore not perceived as necessary to deal with *compositions pénales*, where a *procureur's* representative is seen as sufficient.

### **3. The absence of procureurs or defence lawyers in the composition pénale**

*Procureurs* started recruiting *délégués* in the 1990s when alternatives to prosecution started developing. *Délégués du procureur* handle minor offences (public order offences, shoplifting, traffic offences, minor drug use, and so on). They administer some warnings, as well as *compositions* and *ordonnances pénales*. They can deal with a high proportion of *procureurs'* caseloads: in 2016, alternatives to prosecution together with *ordonnances pénales* represented over 54 per cent of decisions taken by *parquets*.<sup>91</sup>

No minimum qualification is required to become *délégué du procureur*. The website for the Ministry of Justice lists incredibly varied occupations as potentially leading to the function of *délégué du procureur*, such as retired police officers or *magistrats*, but also

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<sup>91</sup> Ministère de la Justice, 'Les Chiffres Clés de La Justice 2017', op. cit., n. 59.

social workers, nurses, students, engineers or farmers.<sup>92</sup> Aubert observed that *délégués* were generally public service retirees (often former police officers/gendarmes or *magistrats*), recruited through recommendations, rather than through a formal recruitment process.<sup>93</sup> The two *délégués* I observed during my own fieldwork were retired gendarmes who had volunteered to become *délégués* ‘to keep in contact with people’ and top up their pension. They were offered no training before starting in their new role and only attended a 3-day training session a few years after they started at the regional court of appeal with two days dedicated to practical simulations and one day to theory.

In the area I observed, *délégués* had limited discretion as they had to follow standard grading scales defined by the *parquet* to decide which punishment should be administered (fine, community work, and so on) for cases automatically sent by the police under permanent directives. The *parquet* defined strict formulae to calculate fines, based on the defendant’s income bracket and, for instance, the quantity of cannabis found. *Délégués* also received cases from the police endorsed with specific instructions from *procureurs* with regards to the type of measure and the level of sentence to be administered, such as a fine between €200 and €400 for example. Such standardised sentencing does not at first sight require any legal skill and could be printed out from a computer. However, given that cases are usually sent directly from the police station to the *délégués* without proper oversight by a *procureur* (see below),

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<sup>92</sup> See <<http://www.metiers.justice.gouv.fr/la-justice-hors-de-la-fonction-publique-12684/delegue-du-procureur-de-la-republique-26860.html>> accessed 5 February 2018.

<sup>93</sup> L. Aubert, ‘Systématisation Pénale et Alternatives Aux Poursuites En France : Une Politique Pénale En Trompe-l’œil’ (2010) 1 *Droit et Société* 17; L. Aubert, ‘Appréhension Systématique Des Phénomènes de Délinquance et Troisième Voie: Les Dilemmes d’un Parquet Divisé’ (2009) VI *Champ pénal* <<http://champpenal.revues.org/7613>> accessed 17 April 2012.

*délégués du procureur* have an important role in ensuring that the legal requirements of the procedure are met, in particular when an admission is required. Importantly, they are also supposed to explain the procedure and the sentence to defendants. My observations show that this did not happen in practice.

Each meeting between *délégués* and defendants lasted between 10 and 15 minutes. The *délégués* therefore did not have time to discuss the case in much detail and were not interested in hearing the defendant's account.<sup>94</sup> Although *compositions pénales* require the admission of the offence by the suspect, *délégués* rarely checked the reality of the admission and even ignored suggestions that the defendant might deny the offence or part of it. For example, in case F-187, the defendant was alleged to have insulted a bus driver. The *délégué* started the meeting by summarising the case:

**Délégué:** On [date], you had an argument with a bus driver and you gave her the finger when you left the bus.

**Defendant:** Yes, that's true.

**Délégué:** Then on [later date], you were on the bus with the same driver and you had a difficult conversation with her.

**Defendant:** No, that's not true.

[In interview at the police station, the defendant admitted the first incident, but not the second one.]

**Délégué:** I'm not here to speak about the facts; you admitted [the offence]. I'm just here to offer you a *composition pénale*. You can accept my offer or refuse it. If you refuse, you'll be tried at court. (...)

[The defendant accepted the *composition pénale*.]

Case F-200 concerned a defendant accused of stealing a computer mouse from a shop. He struggled to express himself in French and the conversation was therefore quite difficult.

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<sup>94</sup> For similar findings, see Milburn et al., op. cit., n. 9.

**Délégué:** Okay, do you accept the *composition pénale* then?

**Defendant:** Well, I don't have a choice; I want to sort it out.

**Délégué:** Yes, you do have a choice! If you think you're not in the wrong, you shouldn't accept. You did steal this mouse, didn't you?

**Defendant** [it is difficult to understand him]: No, I didn't steal it, a young guy took it. He's a youth; I'm an adult, so I take responsibility.

**Délégué:** Well, in this case, it would be handling stolen goods (...)

[Speaking to the researcher] He's telling me that he's taken the mouse out of the shop to help another guy, but that's handling. I think it's punished more severely than theft, so there's no point for him to go to court!

[The *délégué* checks the criminal code and finds that handling stolen goods is indeed punished more severely than theft]

[To the defendant] If you go to court to contest the theft, they'll convict you for handling and it's punished more severely. So, do you accept?

**Defendant:** I don't have a choice anyway.

**Délégué:** Okay, so you accept.

Although the *délégués* always presented the offer as a lenient gesture from the *procureur* and emphasised that the choice rested with the defendant, they clearly had no interest in the case going to court. In fact, they exercised pressure to obtain the cooperation of the defendant, often presenting the maximum punishment as the sentence defendants exposed themselves to if they chose to go to court.<sup>95</sup> This is in stark contrast with the behaviour of *procureurs* during CRPC hearings. Whilst the *procureurs*' ideology appears to incite them to check the veracity of the defendant's admission and to refer the case to a full trial if it seems in the interest of the defendant, the *délégués du procureur* I observed did not share the same professional ethos. As former police officers or gendarmes, they unconsciously reverted back to old habits of police station interrogations when talking to suspects.

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<sup>95</sup> Aubert also notes that *délégués* used the defendants' lack of knowledge of their status and powers to their advantage: L. Aubert, 'L'activité des délégués du procureur en France: de l'intention à la réalité des pratiques' (2008) 32 *Déviance et Société* 473, 479.

[The defendant was arrested and found to be in possession of 0.15g of cannabis]

**Délégué:** For this, the *procureur* could have sent you to court.

**Defendant:** It was the first time I was caught.

**Délégué:** Even for a first time, you could have been sent to court.

**Defendant:** I don't know anything about courts or police.

**Délégué:** Well, I will tell you [he opens the criminal code and reads the relevant article out loud]. In front of the court, you could have had up to one year in prison and a €3,750 fine. However, the *procureur* decided to offer you an alternative to prosecution. If you accept it, you will need to pay a €120 fine. You can refuse it, but then you will be sent to court.

**Defendant:** No, no, I accept. [case F-196]

Despite the *délégués'* lack of judicial status and the summary nature of the procedure before them, limited safeguards are in place to protect defendants' rights. Defendants can choose to be represented by a lawyer, but I never witnessed such a case over my two-day long observations, although one *délégué* told me that it happened more frequently. He claimed that they did not need a lawyer given the pettiness of the offence and the lightness of the sanction. However, although *compositions pénales* are not formally equivalent to convictions, they are nonetheless recorded on a defendant's criminal record and will be taken into account in the event of future offending. Furthermore, the interactions between *délégués* and defendants and the pressures put on the latter to accept the sentence are reminiscent of police station encounters where the presence of the defence lawyer is necessary to conform with the right to a fair trial defined at article 6 of the European Convention on Human Rights. An important factor explaining the absence of defence lawyers for *compositions pénales* is the low legal aid fee, a mere €46. Bureau<sup>96</sup> also notes that the limited discretion afforded to *délégués* renders any sentence mitigation by a lawyer meaningless.

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<sup>96</sup> A. Bureau, 'Etat Des Lieux d'un Dispositif Procédural Atypique: La Composition Pénale' (2005) I *Archives de politique criminelle* 125.

*Délégués du procureur* in the area I observed operated outside of court, in a *Maison de la Justice et du Droit* (MJD).<sup>97</sup> Cases were therefore not processed in open court which means that they were not open to public scrutiny. Furthermore, they were subjected to very few checks by *procureurs* and judges. Cases that fell under permanent directives were sent directly from the police to the MJD without being checked by the *parquet* first or even without the *parquet* being aware of their existence. A *procureur* could decide to use *composition pénale* even if the offence fell outside of permanent directives, but they relied on the police oral report to make their decision and the file was again sent directly from the police to the MJD. Following the first meeting with the defendant, *délégués* sent the files to the *parquet* along with the offer they made to the defendant. A *procureur* should review them and send them to the judge for validation. However, with over 2,000 *ordonnance* or *composition pénale* every year in the court centre I observed, the review by the *procureur* cannot amount to more than a cursory check.

The requirement for a judge to validate the *composition pénale* was introduced following a ruling of unconstitutionality by the *Conseil constitutionnel* who considered that some of the measures that could be offered by the prosecutor were restrictive of individual freedom. As such, they could not be pronounced solely by the authority in charge of prosecution, even with the agreement of the defendant. They require the decision of a judge.<sup>98</sup> In practice, however, this control of the judge amounts to little more than rubber-stamping.<sup>99</sup> Importantly, whilst in the CRPC the judge will meet the

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<sup>97</sup> As they are funded at the local level, MJD are not present across the whole territory. Bureau notes that in some regions *délégués* operate within courts: A. Bureau, op. cit., n. 97, p. 133.

<sup>98</sup> *Conseil constitutionnel*, Decision 95-360 DC, 2 February 1995, para. 6.

<sup>99</sup> B. Pereira, 'Justice Négociée: Efficacité Répressive et Droits de La Défense?' (2005) *Recueil Dalloz* 2041; Saas, op. cit., n. 8.

defendant to double check the reality of the admission and to validate the agreed sentence, in the *composition pénale* the judge will make her decision purely on the file prepared by the police and on the decision added by the *délégué du procureur*, without a hearing.

The clerk administering the MJD in my own fieldwork estimated that judges refused to validate the decision of the *parquet* in about 5 per cent of cases. She added: ‘they always explain why they refuse and I speak to the *parquet* about it who will speak to them as well. At the moment, we might have a few more refusals than normal because the judge is new, so it always takes a bit of time to get used to the way they work.’ This hinted to a form of agreement between the *procureur* and the judge to secure the cooperation of the latter ahead of these alternative or accelerated procedures being carried out.<sup>100</sup>

## CONCLUSION

*Procureurs* can rightly be described as the most powerful officials in the French criminal justice system as their powers have steadily increased. In particular, they have been given substantial prerogatives in admission-based procedures, deciding which cases can be processed through a *composition pénale* or a CRPC and what sanction should be imposed against the offender. This paper interrogates the impact on public prosecutors and their decision-making process of the introduction of these theoretically adversarial transplants in French criminal procedure, using the Anglo-Welsh criminal justice system as a point of comparison. It is based on data collected through the direct observation of the work of public prosecutors for several months, complemented by

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<sup>100</sup> See above discussion and Danet, *op. cit.*, n. 13; Saas, *op. cit.*, n. 8.



interviews. A larger scale empirical research project would be necessary to determine whether or not data collected in this study are representative of the reality in all French *parquets*, rather than specific to the local site observed. However, the chosen methodology enabled me to observe the internal working of a *parquet* and to show which constraints apply to prosecutorial decisions in practice. Whilst studies have underlined important local variations in the use of these procedures, qualitative data they collected are confirmed by my own findings.

Rather than a move from an inquisitorial to a more adversarial system, the data collected for this study show a bureaucratisation of the French criminal justice process. Similarly to England and Wales, judges play an increasingly reduced role in the disposal of criminal cases. They have been replaced by public prosecutors who, in theory, also have a judicial status and professional ethos in France. In practice, however, pressures to process more cases, quicker, and with fewer resources, have further eroded the judicial outlook of *procureurs*. The transfer of adjudicative powers from judges to public prosecutors has taken place in response to growing pressures on the criminal justice system to process cases efficiently. Although the judicial professional culture of *procureurs* prevents them from behaving in a purely adversarial manner –they do not pursue convictions at all cost nor the most severe sanction –, the competing expectation that the French public prosecution service should manage the courts’ caseload efficiently appears to have had profound effects on the occupational culture of *procureurs*.

The political decision that public prosecutors ensure a systematic response to all criminal offences has put excessive demands on the criminal justice system and the

introduction of procedures borrowed from other jurisdictions, such as admission-based procedures, have failed to stem the flow of cases. Instead, prosecutorial decisions are increasingly made according to standardised decision-making tables, part of the prosecution workload is delegated to less qualified staff and minor cases are being processed as quickly as possible into a one-size-fits-all system. This evolution is taking place in the absence of meaningful defence safeguards with defence lawyers being unable to offer a credible counterweight to *procureurs* for historical and cultural reasons. Moreover, the delegation to less qualified staff of the *composition pénale* means the complete absence of the guarantees theoretically offered by the judicial status of the *procureur* in any event.