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Chief Public Prosecutor[1]: a Strengthened Professional Identity

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On August 27 2007, a vice-prosecutor in Nancy made submissions at a criminal court hearing that were implicitly critical of the August 10, 2007 Act that provided for minimum sentences against repeat offenders. Those submissions caused him to be summoned by the Ministry of Justice, while his superiors (the chief prosecutor and the Appellate court chief prosecutor) and colleagues, including the inter-union association and the *Conférence des procureurs*, organised his defence. The present study does not address this incident, but it does shed some light on the affair, as well as on current debates around public prosecutors. The incident does indeed seem to epitomize the tensions specific to this profession, which has undergone considerable change over the last two decades. Until the '80s, the work of the Public Prosecution Office was mostly to decide whether a criminal case should be prosecuted or dismissed, and then to make submissions at the hearing, in accordance with the Napoleonic conception of the function.

In addition to these traditional tasks, public prosecutors had their competence gradually expanded with respect to prosecution, to the judicial aspects of urban safety policies, and to criminal investigation. The present research, based on the sociology of professions and the sociology of justice, analyses the specificity of the prosecutors' position within the magistracy and the justice system, with special consideration to the range of their activities, by examining the prerogatives and capacities to act imparted by their function. It points to the stakes, as well as the impact of that evolution on their professional identity. More specifically, we will discuss the main lines of modernisation of the profession of public prosecutor, with emphasis on the identity strains among its members, which seem to be leading them to reassert their professional independence.

Conducting Public Prosecution and its Collateral Effects

The job of public prosecutors is to implement the criminal justice policy set by the administration, while adjusting it to the specific context of their local jurisdiction. Their role thereby, as holder of the public prosecution, has grown in importance with the expansion of diversion, the so called the « third track »[6] (victim-offender mediation and restoration) and with the establishment of alternative modes of prosecution (guilty pleas, known as CRPC – *comparution sur reconnais-*

Methodology

This article is the outcome of a research funded by the *Mission de recherche « Droit & Justice »*, a governmental agency that is subsidising research on law and justice, in the framework of an invitation to tender about the profession of public prosecutor. It was conducted by a team primarily composed of sociologists (Philip Milburn, Patricia Bénec'h-Le Roux) and judges (Denis Salas, Xavier Lameyre), in collaboration with the CESDIP, the « *Printemps* » Research Centre (University Versailles-Saint-Quentin) and the *École Nationale de la Magistrature*, the national magistrates' training school)[2].

The research focused on Chief public prosecutors and therefore did not cover deputy, or first-deputy prosecutors. The information was provided by in-depth interviews with 25 prosecutors active in 2003, chosen to represent the variety of professional situations depending on size of the areas of jurisdiction, seniority and hierarchical position. In particular, the sample includes 4 women and 7 men nearing retirement, and who therefore viewed the profession in retrospect. The group was selected to respect the proportional representation of the 181 active public prosecutors. Moreover, the selection of *tribunaux de grande instance*[3] from various Appellate courts enhanced the comparative dimension of the study. The final phase of the investigation consisted in interviews conducted with other key actors in this sphere, including an Appellate court public prosecutor, a lawyer, a member of the *Conseil Supérieur de la Magistrature*[4], and a member of the *Conférence des procureurs*[5]. Three other focuses were: a statistical study of the careers of public prosecutors, a clinical approach to their practices and a comparison of their status in five European countries: Germany, Belgium, Spain, Italy and the Netherlands.

[1] The Public prosecutor (*procureur*), sometimes called « prosecutor » here for brevity, is a magistrate representing the government in the prosecution of cases. The functions of the *procureur* also include the general monitoring of the activity of the court in both criminal and civil cases.

[2] A doctoral student, Brice Champetier, a jurist, Maria Cardoso and an anthropologist, Christiane Besnier, also contributed to the study.

[3] A bottom level court.

[4] The disciplinary body of the magistracy, which also has a say for the magistrates' advancement.

[5] An association, the first of its kind, created and supported by chief public prosecutors themselves to defend the interests of their profession.

[6] Presently representing 50% of penal responses.

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sance préalable de culpabilité – or else compounding fines). This broader range of case dispatching options has granted them increased power in shaping penal tracks. Furthermore, this alternative management of offences has enabled them to develop a degree of independence, especially in respect to judges, their counterparts from the bench. In addition, the March 9, 2004 Act (known as the Perben 2[7] Act) « for the tuning of Justice to crime trends », which made all offences liable to a compounding fine, now practically grants them a quasi-power of jurisdiction.

Another reason for the introduction of these new arrangements was to relieve congestion in penal courts and to facilitate more fluid case handling. Real-time treatment (TTR) and victim-offender mediation, for example, were first experimented by public prosecutors before being validated by the ministry or receiving legal endorsement: both turned prosecutors into holders of a new form of justice, both closer to the public and more diligent. Mavericks, these public prosecutors thus triggered a process of modernisation of public prosecution and of criminal justice, and contributed to in-depth change in the operation of the criminal justice system, now forced to conform to the present day pressure towards a performance culture, borrowed from the logic of the business world (with its indicators, objectives and evaluation), a trend reinforced by the LOLF[8] budgetary reform. The objective set by their hierarchy and by ministerial instructions is primarily a systematic response to every offence, with the objective to promote what was hoped to be an efficient, productive and visible judicial service.

Naturally, this makes more drastic managerial demands on the two heads of court, the president and the public prosecutor. More specifically, the operation of the new arrangements requires greater cooperation between the two heads, and has furthered the development of a court specific justice policy, involving preliminary discussion on the broad lines of public prosecution so as to adjust the public prosecutor's prosecution policy to the court's material capacity for conducting trials. The spread of this managerial culture also implies interfering in the investigating judge's work through stricter control of the time spent on each case. In the last analysis, however, managerialism also tends to reduce the prosecutors' own power to decide upon prosecution, although this is the core of their charge, so that dismissals based on pure expediency are now rare. Indeed, while the range of penal response options has widened, prosecutors are subjected to stricter guidelines issued by Chief prosecutors at the Appellate Courts level. Ultimately, prosecutors enjoy diminishing leeway in their decision-making, so that the scope of their judicial action is narrowing. Budget constraints may also weigh on the prosecution policy and on police investigation procedures, by confining the use of overly expensive investigation measures (such as phone taps, information requests to banks, biological testing) to some special cases. They may also affect penal policy, and more specifically the choice between procedural options such as the decision to give a case summary trial or send it for victim-offender mediation. They may weigh, as well, on the modes of sentence-serving, especially on recourse to alternatives, based on the comparative cost of citizens' groups and public prosecutors' delegate, for instance.

Controlled Collegiality

According to interviewed prosecutors, the modernisation of public prosecution and the demands for judicial efficiency lead them to renovate their work and managerial techniques, be it with regard to judges and clerks or with criminal investigation police, as will be seen in the next section. Heads of the Public Prosecution Offices are now more approachable, making professional relations much like those a head of a firm entertains with his partners. Those relations tend to be less rigidly conventional, with greater reliance on pragmatic, functional contacts. Where yesterday's prosecutors handed their decisions down in an authoritarian, unilateral manner, those interviewed in 2006 said they put them up for discussion so that they may be made through individual and/or collective consultations. That is what is behind the notion of the « team », to which interviewees refer when talking about the internal organization of the Public Prosecution Office. As opposed to the traditional image of the public prosecution as a purely hierarchical system run solely on the basis of respect for authority, prosecutors are now anxious to show the modern side of their team management. Team work, as a management technique, then means that everyone takes part in decisions, with collective discussion of those in meetings. The public prosecutor explains his reasons to his colleagues, so as to convince them and win their consent. From this perspective, his authority, to be fully wielded, must draw its legitimacy from confrontation, with the team's trust in and respect for its chief at stake. Based more on interpersonal relations and consensus, the authority of the chief of a modern Public prosecution office is shaped in day-to-day contacts, through collaborative management of a team.

Nonetheless, in a pendulum movement, prosecutors cannot conceivably act without the normative framework set by the head of the Public Prosecution Office. The office's internal hierarchy and the specific authority of public prosecutors are threads recurrently running beneath the surface of the interviews. Organizationally speaking, there is no room for emancipation: their autonomy as magistrates is conceived only under the control of their chief prosecutor. For instance, some prosecutors presently allow members of their team to work directly with deputy Appellate Court prosecutors, provided, however, that they be informed of and have authorized the content thereof. Renamed « *collective cooperation in constructing the work of justice and in implementing decision-making* » by one chief public prosecutor, hierarchical control persists, since it is out of the question to consent any leeway or to hand over a portion of one's power. Moreover, the public prosecutor, and he or she alone, within the team is the ultimate arbiter and makes the final decision. This makes the function a solitary one, in spite of a well-built chain of command and the structurally supportive role of deputies. Hierarchical authority remains present in the background, then, vigilant, intervening in case of dysfunction, in particular. It is in fact conceived as a protection in hazardous situations and as the transmission belt through which public prosecution operates: necessary in decision-making to unfreeze a situation and get moving, to make sure rules are respected, to face up to the outside world.

« Close-up » Management of Criminal Investigation Police and Quality Control

Relations between public prosecutors and criminal investigation police have also changed. The Perben 2 Act reinforced the role of supervisor of criminal investigation specifically conferred on public prosecutors. They have power over the preliminary investigation (phone tapping, house searches), which encroaches on the territory of examining judges, and over the procedure of summons to court by a criminal investigation police officer (*OPJ,* for *Officier de police judiciaire*). Furthermore, as guarantors of civil liberties, according to article 66 of the Constitution, they are in charge of monitoring police custody. With real-time treatment (*TTR,* for *Traitement en temps réel*) however, rapid investigation procedures are soaring, increasing the risk of procedural errors due to time shortage and to the difficulty step back from the pressure. This makes control over the duration of the investigation, the quality of legal paperwork and more generally the police's investigative work particularly important for crafting a good case for the prosecution, and taking it all the way to the hearing with an irreproachable procedure, barring which there is the risk of discharge based on a procedural error, and loss of face in the eyes of sitting judges and lawyers. Public prosecutors are the guarantors of the legal validity of the penal procedure, which vouches for their professionalism. Another stake, intrinsically tied to this regulatory function in court, is their ability to uphold the image of a Public prosecution and a Justice department delivering a high-quality public service and in the last analysis, to establish the Justice's authority as such.

A major change is now visible: there is constant contact between those who « bring in » cases, « suppliers » of offenders and those who handle them, between where the action occurs and where decisions are made, between field work and

[7] From the name of the Minister of Justice who promoted the bill (2 because this was the second bill he pushed for on criminal issues).

[8] For *Loi organique relative à la loi de finance*, a Constitutional bylaw on budget acts, applied to the Ministry of Justice from 2006 on.

management[9]. This trend has repercussions in the way people work: communication between policing agencies and the public prosecution is now systematic, through on-call judges and TTR (with early intervention in the police's criminal investigation) and through management of criminal investigators, oscillating between control (with evaluation and sanctions) and reassurance. It is further reinforced by police and gendarmerie work based on frequent meetings, and in the smaller courts, on shared field work. Actually, the new proximity between the public prosecution and investigators facilitates exchanges between people with different professional cultures (justice and police) and also corresponds to the goal of more efficient criminal investigation work, through tighter control over the investigation, while authority draws more of its legitimacy from field work. The statements made by public prosecutors in the course of our study certainly tend more to reflect their conception of their supervisory function rather than a definitely more complex and fluctuating reality. Earlier studies have shown relationship between the police and the prosecution to be based on necessary mutual trust, but also on the OPJs' strategies for circumventing the undesirable effects of the prosecutor's control[10]. Others have also shown that with the accelerated processing of procedures, prosecutors find it increasingly difficult to exert strict control over police activities when they are on phone duty[11]. Conversely, however, some courts now have an investigations bureau in which the most important cases are processed, and where investigations are under close supervision by the public prosecution.

From Hierarchy to the Ethic of Loyalty

The Public prosecution is indivisible, meaning that the decision of a public prosecutor, whatever his rank, is binding for the Prosecution as a whole. The ideal Public prosecutor's office, then, for all the prosecutors we met, is first and foremost « a team ». The reality may differ somewhat, particularly since no member, irrespective of function or rank, is ever co-opted: offices are the fruit of the official musical chairs played with appointments and transfers. But the Public prosecutor's office is predicated on, and its work structured by, this postulate of indivisibility: to be public prosecutor therefore implies working collectively, in solidarity. It requires a « team spirit », running through the centralized organization of work, in which hierarchy represents a chain of command regulating professional relations. The latter involves professional values and particularly strong habits of obedience, historically anchored in the profession. Article 5 of the December 22, 1958 Ordinance on the status of the magistracy states that public prosecutors are placed under the direction and control of their hierarchical superiors and under the authority of the Minister of Justice (*Garde des Sceaux*). Within a structure of this type, hierarchy means functional dependence and is grounded in mutual trust and loyalty among prosecutors. These qualities are all the more necessary since specialisation and delegation of tasks have become the rule within the Public prosecution. So public prosecutors are accountable to their superior for their action: writing or making verbal reports to one's superior is an essential part of their professional culture. It means sharing information and problems, a necessity both for the internal functioning of the public prosecution team and for contacts with outside partners. In that sense, reporting to the hierarchy is the requisite for a united public prosecution, capable of action. It represents both the function and the work ethic of public prosecutors. The point is not so much transparency as the need to inform one's superiors of any event susceptible of engaging the responsibility of the judicial and political powers up to the highest level, and toward citizens at large. This is where the prosecutor's true commitment and professional identity really lie: loyalty and commitment to the parent administration, of course, but more broadly, toward the public: the image of the justice system is at stake here as well.

Heads of prosecution offices are therefore strongly encouraged to send information upward, from the field to the ministry. In particular, they must systematically inform the Appellate court public prosecution office of any « delicate » cases, which are, broadly, of four types: serious criminal cases, cases that threaten public order or involve individuals with a critical social or professional status (such as police officers, lawyers, judges), those which the Chief public prosecutor is susceptible of discovering by reading the telexes sent by police services and those susceptible of appearing in the mass media. Requests for memos on those cases are frequent and imperative. Moreover, public prosecutors are required to account for their action in two main areas: first, organisational issues (planning of hearings, workforce problems) and secondly, management of public prosecution, expressed in performance scorecards showing performance (number of cases examined and communicated to the prosecutor's office for dispatching, harmonization of public prosecution according the Appellate court's guidelines, banning orders for violent husbands, anti-Semitic acts, and so on).

As a rule, prosecutors note a rising number of requests from the Appellate court public prosecution office and the Ministry for reports of all sorts, in addition to their weighty annual penal policy report. Now, in small and medium-sized public prosecution offices the time spent writing those reports means less time spent in judicial work. Secondly, they note an inflation in official instructions, and some point out their close tie to the headlines. For instance, the urban violence in November 2005 produced strong encouragement to prosecute and to respond rapidly to that kind of offending. Some comment ironically on the very content of those instructions: « *to say we should prosecute someone who sets fire to a car when we manage to arrest the person and identify him as the offender, that's no news for the Public prosecution office* ». Despite acceptance of the burden of those reports, instructions and general directives, the remark shows this public prosecutor's stance to be more professional than institutional. For it is true that the prosecutor's ethic of loyalty to the parent administration does not obliterate autonomy of action: although accountable, he or she has no obligation to demand an authorization for action. This, so to speak, is the sign of the public prosecutor's independence, and therefore of the strength of that position.

From Independence to Professional Ethics

According to the prosecutors interviewed, the hierarchical nature of relations within the Prosecution is not contested by its members. Nonetheless, some suggested that submission to hierarchy may not always be self-evident for the most independent-minded of their colleagues. Our study shows the professional identity of public prosecutors to be defined by constant tension between an ethic of independence and of responsibility shared with sitting judges, and an ethic of submissiveness and loyalty to their hierarchy and to the Ministry. This tension has crystallized, actually, around the debate over the magistracy as a collective body: having their legal status separated from that of judges of the bench would lead, they felt, to a « civil-servant » or « prefect-like »[12] conception of their function. Moreover, they are increasingly wary of being defined as mere instruments of the current power and turned into « judicial prefects ». Indeed, new provisions assign prosecutors a role in public bodies intended to define safety and crime prevention policies at various local levels, such as the *département* or the municipality: *Conseils départementaux de prévention de la délinquance*, *Conseils Communaux de Prévention de la délinquance*, *Conseils Locaux de Sécurité*), and local groups for handling crime (*Groupe locaux de traitement de la délinquance*). Their participation in these local safety schemes takes them out of the courthouse, then, to take part in public life, working with prefects and elected officials, a proximity that would have been unthinkable twenty years

[9] « *In those days it was the criminal investigation police officer who made the decisions on cases, and then reported them by phone to the public prosecutor, sometimes with the idea of not disturbing him unless necessary. We weren't always notified of police custody, can you imagine that? I worked as first deputy prosecutor at the Bordeaux court, and was on call for* (…) *6 to 8 months without having a phone in my home, and* (…) *that was supposed to be a workable set-up* » (Public prosecutor in a large court).

[10] MOUHANNA Ch., 2001, *Polices judiciaires et magistrats. Une affaire de confiance*, Paris, La Documentation Française.

[11] BASTARD B., MOUHANNA Ch., 2007, *Une justice dans l'urgence. Le traitement en temps réel des affaires pénales*, Paris, Presses Universitaires de France.

[12] A French *Préfet* is a high-ranking civil servant who represents the State at the level of the *département* (a basic administrative division of the territory) or the region. Besides a range of administrative duties, the role of the *Préfet* is to ensure that government decisions are carried out properly at local level.

ago. Some public prosecutors may have been tempted by working with prefects, inasmuch as it evoked the possibility of new resources, and therefore of presently lacking means of action such as court clerks and funds. However, while these public policy bodies provide an opportunity to present their penal policy and the judicial logic to other actors, they are also places where the authority of the public prosecution and the justice system are publicly represented[13], a stage on which identities tend to be confronted. When faced with a prefect, that unquestionably legitimate direct representative of the State, the chief prosecutor necessarily perceives his difference with that very powerful personage: through proclaimed membership in the magistracy, he is freed of any dependency on the political powers. Whence their strong reaction when the letterhead of a letter from the Prefecture sets the Public prosecution office on the same level as other administrative agencies and state services: what is at stake in their punctilious defence of formal etiquette is the independence of the prosecutors' profession and of their function, with respect to other actors in the administration.

Other elements of various sorts are also indicative of this defence of the profession's autonomy. In reporting delicate cases to their parent administration for instance, some public prosecutors occasionally choose not to do so, to avoid doing unnecessary work for which the resources are not always available (monitoring proceedings, victim support, and so on). They make a « bet », they « skip it », so to speak, appraising the risks of having the cases become publicized and therefore come to the ears of the Appellate court Public prosecutor. Their control over information gives them a slim but really existent leeway to manage their degree of independence with respect to their superiors. Some practical autonomy in their professional practice actually counterbalances their functional hierarchical submission, particularly since this autonomy derives its strength from the modernization of their profession.

Furthermore, the public prosecutor is required to comply with written instructions, but is nonetheless allowed to express his or her personal opinions. Indeed, « *The pen is servile, but speech is free* », as the saying goes, formalized by article 33 of the Code of Criminal Procedure stipulating that the public prosecutor speaks freely at hearings[14]. His independence remains complete, in this respect. Even if public prosecution is subject to greater restrictions, as shown at the beginning of the present article, this independence remains one of the prosecutor's defining prerogatives, evidenced in decisions on the expediency of prosecution. Orders or special instructions to dismiss specific cases, issued by the parent administration (the general prosecution office or the ministry), have now been prohibited by law. Public prosecutors are of course obliged to comply with instructions on prosecution, but that does not prevent them from making their dissent with their superiors known, or from expressing reserves, at the least, depending on their ability to resist, their degree of independence and the quality of their work in court (a well-presented dossier and proper justification of their recommendation for dispatching of the case are expected). The textbook case of the Nancy affair, mentioned in our introduction, illustrates the way the identity of public prosecutors is tied to an ethic of independence. In addition, taking the opportunity of the (traditional) submissions at court hearings to deliver a message – primarily of a professional nature here – indicates a reversion to the intrinsic definition of their role: judicial work within the precinct of the court. Last, the shield put up by the superiors of that vice-prosecutor to defend him against political authority is indicative of a true collective professional commitment. Another, similar indication is the creation, in 2007 (in preparation since 2005) of the *Conférence national des procureurs de la République*, created to represent the profession and to dialogue with the Ministry of justice on specific professional issues. From a sociological standpoint, this collective marks the decision of members of the profession to take responsibility for it, and attests to their organizational capability and to their autonomy[15]. Behind this position, what is at issue is their legitimacy, and through it, the place assigned to law in a democratic state with a hybrid public prosecution (as in Belgium and the Netherlands). The position of public prosecutors is certainly ambiguous and under stress, by definition: they are independent as magistrates (with an ethic of responsibility and professionalism), but within a restrictive hierarchical structure (with an ethic of loyalty and obedience). But within this justice model, they are interfaces between users of the justice system, civil society and the executive, acting as guardians of the democratic machinery, which is perhaps what makes their job so difficult, but also confers its social prestige.

Conclusion

The extension of the areas in which public prosecutors intervene has increased the skills required to do the job. Their judicial professional culture is now tainted with managerial, policing, administrative and political cultures (political in the original sense of participation in the administration of public life). The profession of public prosecutor is not quite the same, then, depending on the size of the court. In small courts it deals mainly with court proceedings, while in the large ones it is essentially administrative and managerial. The decision to pay more attention to some fields of action at the expense of others reveals their personal view of the profession and of the justice system and partakes of a redefinition of their professional identity. Through a mirror effect, that identity is enhanced by their new proximity with actors and spheres of action (criminal investigation police officers, prefects, elected officials, associations) they did not approach as closely in their work 30 years ago, and which introduce them to different professional logics and contribute to the renewal of their profession. At the same time, these outside relations have encroached on their specific sphere of action, which is the court and thereby challenged their professional identity. However, the reorganization of their environment, the reduction of their former margins of freedom via some hierarchical and managerial constraints, the present context of strain between the judicial and executive branches of power, seem to have revealed a previously dormant collective identity among public prosecutors, who had previously been too busy with the modernisation of the public prosecution and the justice system. Through these transformations in their job, over and beyond their institutional function, public prosecutors find a new professional dimension in their expertise, now relying on collective norms and values specific to their profession. An ethic of independence regulates their work within the court and outside it.

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[13] The role of representing the court and the justice system is also visible in the public prosecutors' monopoly of communication with the media.

[14] The public prosecutor is bound to make written submissions in conformity with the instructions given under the conditions set out in articles 36, 37 and 44. It is free to make such oral submissions as it believes to be in the interest of justice.

[15] According to Everett Hugues, « *an occupation consists, in part, of a successful claim of some people to* licence *to carry out certain activities which others may not* (…). *Those who have such licence will* (…) *also claim a* mandate *to define what is proper conduct of others towards the matter concerned with their work* » (*Men and their Work*, 1958, Greenwood Press (1981), 78). In other words, « *Professional groups … are interactive processes leading members of a same work activity to self-organise, defend their autonomy and their territory and protect themselves against competition* ». Dubar C., Tripier P., 1998, *Sociologie des professions*, Paris, Armand Colin, 96.