MUCH ADO ABOUT JUSTICE: REFORMING CRIMINAL PROCEDURE IN FRANCE

Memorial Lecture for Joelle Godard by Nicole Questiaux, The University of Edinburgh, 22 October 2010

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Justice, in particular criminal justice , would seem to be one of the most established functions in society. Its rules and organization go away back to a distant past , before democracy itself. To our modern eyes however, it is intricately built into democracy, as one of our essential safeguard to our liberties and as a central component of the system of checks and balance we assume necessary to control abuses of power .

As lawyers , we are vested in this tradition . As lawyers who have an interest in comparative law , we have for decades come to recognize the same objectives could be attained by very different organizations of the judicial system. To make things overly simple , the countries relying on common law had habeas corpus, France did not, but we French lawyers would incessantly refer to the constitutional principle that individual freedoms were under the protection of the judicial authority. France has a juge d'instruction, a judge for the investigation ; it is the job of this magistrate to investigate the facts of the case, criminal procedure is therefore held to be inquisitorial. This was not the case in England or Scotland who relied on an accusatorial exchange to establish the facts of the case.

I suppose the Franco British lawyers association have heard many learned speeches on this theme and I know that Joelle Godard, whom we honor, today was fascinated by these differences ,and spent a lot of time and energy trying to make them as clear as possible in each national context .She would have been one of the first to react to the new developments which have suddenly appeared in France .

Criminal procedure has suddenly come to the limelight, as an acute political issue. Of course as you know, in old European countries like France ,and also Britain, the idea that reform is the key to our adaptation to a changed and hostile world and the alternative solutions to reform makes politics and brings new governments into office. So it happened in France ,in favor of a rightwing government. But not many expected among the in majority rather conservative legal professions that this would bring such a turmoil .

Before coming to the point, I shall try to give you some background . And I shall as a preliminary explain from where I stand as a witness to these events .

As some of you know, I am not a specialist In fact, professionally I am not a practitioner of penal law or criminal procedure My career was that of a judge of administration ,in the Conseil d'Etat. I do know what it means to hold the balance of justice in individual cases , to establish the facts in a given case and to claim, if necessary with sufficient vigor, my independence . But it was not for me to send someone to prison As I have been however involved all my life in activities concerning human rights, I am at the present time and have been for some years a member of our National Commission for Human Rights. This is a body of some sixty persons of experience in the field, who is entitled to give opinions on issues arising from government action or otherwise which might prejudice human rights. Well ,from this observation post , and as laymen as far as the administration and practice of

criminal justice is concerned , we have recently concluded that what is going on in the proposals to reform criminal procedure in France is a concern for human rights

This is why I suggested this subject for a lecture to honor Joelle's memory. She would have been sensitive to the novelty of the situation. Suddenly , justice is divested of its robes. The judges and with all the professions who concur to justice are held to account in the glare of a confused public debate. The government who appeared to have initiated the controversy by a consultation on proposed reforms and a President who had bluntly proposed to suppress the juge d'instruction –the judge for investigation which is the traditional pillar of the French system- seem to hold back their hand .

How did this come to be ?

A series of factors are discernable, and I would like to make the point that they show trends which may not all be particular to the French scene. It could mean that the whole concept of justice in our changing societies is under scrutiny .

Our contemporaries attitude to criminality is changing. It has become one of the great anxieties of our time , an insecurity against which every citizen demands protection , as is required in many other fields by what the French describe as a principle of precaution. This has a profound influence on the exercise of justice. The victims claim comes to the fore, repression becomes more severe , Judges are made accountable for the results of their decisions ,they are required to be more heavy handed and the prisons fill up .This tendency appears simultaneously in different countries and is fuelled by comparisons with what is done elsewhere. In this context, if and when there is a miscarriage of justice , it can not be ignored. What could have been discreetly buried comes out, with a vengeance

And this is what happened with a long drawn and messy trial in the north of France concerning an alleged pedophilic ring. At Outreau, a small dreary borough nobody had heard about , a whole collectivity of families was incriminated in the mistreatment of children by one of what the press likes to call le petit juge , a juge d'instruction who was in the first years of such responsibilities in that rather obscure posting. He was overwhelmed with the job , incriminated a large number of persons, some more or less educated , his action broke their lives and that of some of the children and, to sum the situation up, made a mess of it. We know this because in the end most of his decisions were upturned in appeal and because ,which was without precedent, a multipartisan parliamentary enquiry was held in face of the ensuing scandal .

So it came to be that for a few weeks the public could sit and watch on television a real live discussion on the mismanagement of justice. Each magistrate in the line of those responsible for the trial had to explain how he had done his share of the disaster ,while those who had been called before the courts could loudly voice their complaints. The members of Parliament, whatever their obedience, gave a remarkable show of understanding and came to the unanimous conclusion reform was necessary. However they felt the core of the problem had been the crucial function of the solitary juge d'instruction. They suggested that, for the future and at least for difficult cases, investigation should be carried out by a college of judges. And this unprecedented enquiry was successful enough to be rapidly implemented in law. Under the suggestion of the government , parliament voted for a collegiate system. Of course , this required some profound reorganization of the ways and means invested in the administration of justice and as sometimes happens in France , these measures were not yet in force when the political outlook changed with the election of Nicolas

Sarkozy.

We shall come back to these questions in an instant. What is important is that the judicial system, the courts themselves had been openly criticized, made accountable.

And simultaneously another factor was for very different reasons working to weaken their authority. The international commitments of France to European law and in particular to the European Convention on Human Rights were progressively taking effect in individual cases, in two manners .As the treaty has to be implemented as law and even, in the French interpretation ,takes precedence on national law, it was progressively being taken into account by the national courts; also, I must remind you that France had only ratified the protocol allowing individual citizens to go to the European court in the eighties, and ,with the necessary delay, some matters were now being argued in front of the European Court of Human Rights. And the decisions of the European court did not always uphold the traditions of the French criminal procedure. Independence of the courts and fairness in the prosecution were no more held for granted and became matters for discussion , eventually unexpected issues for reform If things were to move , this would have to be under international supervision .

So much for the background. The institution of justice was destabilized and its traditional authority shaken. This did not however necessarily lead to the proposals which are now in front of us and which I propose to discuss.

In what is described as a political mandate for reform , the government, in fact the President himself has now included an overall revision of the code of penal procedure. It covers a wide field of questions some very technical. But over all, it has initiated a wide spread political turmoil , bringing the organization of criminal justice to the limelight in a manner the legal professions are not accustomed to .

Before I move on into the account of these events, I must take a preliminary stand. We are going to discuss sensitive subjects, testing, some say threatening civil liberties in France. But France is an old and sophisticated society, entrenched in the philosophy of human rights. Much as many of us may become annoyed with some aspects of reform ,there is a profound consensus in my country on the liberal principles which govern the matter. So much so that the new proposed code starts off with an elegantly worded preliminary on the fundamental principles of penal procedure They are familiar, because France is already committed by Its Constitution, by its reference to Human rights international declaration or conventions to the very same obligations. They had been rather elegantly and convincingly summed up in a report due, in 2002, to Professeur Mireille Delmas-Marty, one of our leading authorities on penal law . The government's proposal refers to this consensus on principle . And so we are reminded in this draft that penal procedure should be equitable and impartial, that it functions in a contradictory manner and must preserve fairness between the parties, that all users of justice are equal before the law, that the judiciary authorities dealing with prosecution must remain separate from those who are responsible for the judgment, that any accused person is presumed innocent ,and that individual liberty, the right to defense and the rights of the victims are guaranteed. In an overwhelming majority, the French citizens whether they are or not involved in the administration of justice, whether they work in the police, are magistrates or express themselves in the political field bow to these principles . And we are here at a level where we could probably not discern any serious difference between France and the rules applying in the UK or Scotland.

But of course criminal procedure may not function only by reference to principle. It always has been and remains in the proposals before us a maze of detailed prescriptions, all the more so because the proper application of the code is enforced by the theory of nullity. Out of them emerge two highly sensitive subjects , on which I shall focus my remarks : the practice of garde à vue –police custody at the preliminary stage before incrimination- and the fate of the juge d'instruction – the judge of the investigation .

To explain why these matters are so sensitive and reform in this field involves issues of civil liberties , I must remind you ,maybe in a rather sketchy description of the essential characteristics of criminal procedure In France. If one is to follow the chain of events which can bring a person suspected of an offense to trial, the first steps involve the police. The person is called to account of his or hers action, interrogated, eventually if this appears necessary to the investigation detained by the police for a limited period. The police is at this stage, fully responsible, but supervised by the judiciary authorities But the acting authority at this early stage is the Procureur, a member of the Parquet; he is given notice as soon as a person is detained, after a short time limit and is called to authorize specifically any further measures from the police.

The parquet will become the essential actor at the next stage, when the decision is envisaged to incriminate the person. The Parquet is then in its normal function as prosecutor, and it is for the parquet to decide whether there is no cause to go further , or whether the case can move into the hands of a juge d'instruction. This is a member of the judiciary, a magistrate of equivalent standing and prerogatives than all the other magistrates sitting in court. But the juge d'instruction will not judge the case , he will achieve and close the investigation ,acting as we say à charge et à décharge, with the sole objective to establish the facts of the case. In this activity, he can be challenged in appeal before a superior court of investigation. It is very important to specify here that while this is normal procedure , the Parquet has the possibility when the case appears simple enough to short circuit the phase of instruction and go straight to court.

Counsel so far has only been allowed a brief appearance during garde à vue , at this preliminary stage no access to the files nor assistance in interrogation .Of course legal help becomes essential in the hearings in front of the juge d'instruction, as it can develop ultimately before the court.

As safeguards for civil liberties, the system relies on a precise codification of the succession of acts each of the authorities concerned is allowed to do , such as for instance the delays or the definition of the outside persons notified or allowed to support the suspect. It also applies the principle that any risky stage is under the supervision of, as prescribed by article 66 of our Constitution , the judiciary .To achieve this , it is necessary to admit that the Parquet is part of the judiciary.

This is why, at this initial stage of our story, we must well understand how the Parquet stands in the general organization. Members of the Parquet are fully fledged magistrates, like all the others. They have come from the same recruitment and may indifferently move from one function to the other during their career. The independence of the judges is a fundamental principle in French law and all the magistrates claim the status it confers. But the contents of this status differs when the magistrate is appointed in court ,or when he is called to function in the Parquet. In the first case , he can not be removed from his post without his consent and his career is supervised by an independent and prestigious Conseil de la magistrature , the opinion of which is binding for the executive in decisions affecting promotion and discipline. As a magistrate in the Parquet , he prosecutes under the authority of the executive, the minister of justice , who can deliver general directives concerning penal policy and according to a varying practice may also make suggestions in individual cases. The

Parquet prosecutes in the name of the state. Members of the parquet while protected in their career have not so far obtained that in this function they enjoy the protection vested in the constitution which is due to their colleagues sitting in court and can themselves enjoy when they move to such positions.

In the chain of events which leads from a person being suspected to the moment he is either brought to trial or released without charge, the weak links for civil liberties are principally the moment , in the preliminary investigation, when detention by the police is possible, or when action is taken by different authorities involving now the judiciary to establish, in all fairness, the facts of the case

This is why we shall focus ,in the proposed reform, on those two subjects : garde à vue or preliminary custody by the police, and the suggested demise of the juge d'instruction.

I GARDE A VUE

In France, as elsewhere a person suspected of an act that may incriminate him penally may be held by the police and interrogated, before actually being prosecuted. We describe this situation as garde à vue ,and the duration, conditions and mode of supervision are among one of the most sensitive issues for human rights in a modern democracy. All the more at a time when the French public discovered that the practice was far more frequent than had been realized. In fact the media have begun to relay the experiences of would be offenders from a middle class who had never imagined having to remove shoes or even a brassiere to conform to the rules in such a situation. Some 800000 people seem to have been held in such fashion; this is to be explained in two manners, the increasing severity of the penal code itself, which has multiplied the situations eventually leading to a prison sentence ; now garde à vue may only be prescribed if there is such an eventuality ; and the second even more effective cause is the generalized clampdown on traffic offenses.

The government's plan to review the entire code of criminal procedure did not necessarily include this preliminary stage of garde à vue. But the proposals met with an unexpected interest from the public and set a series of political dilemnas for their authors .

The Minister of justice believed the only issue was to update rules which had at any rate been strengthened during the last decade .Conditions for garde à vue were set as follows The power to place a person in garde à vue was the responsibility of the police ,but specifically was to be exercised by an officier de police judiciaire This means a special entitlement delivered to some officers under the control of the judiciary .

Could fall under such powers any person susceptible to give information on the facts eventually leading to an incrimination or on the objects or documents related to such a case. Can then be retained, for a period not exceeding twenty four hours a person against whom there might be plausible reasons to suspect they have committed an offence . The Procureur de la Republique , who is a magistrate from the Parquet is immediately notified .The police may then keep a person in custody for another twenty four hours , but must be authorized to do so by the Procureur. At the end of this period, the person is either released without charge, or officially charged by the Parquet , and the prosecution then follows the set rule in front of the judiciary.

Conditions for garde à vue allow for some precautions. The person is immediately informed of the

charges , and is eventually allowed an interpreter . He or she may ask for the presence of a lawyer who is allowed thirty minutes in presence of the detainee, but has no access to the file or documents and may not assist in interrogation . The same is true in the case of prolongation. However this very short delay, twenty four hours does not apply to a series of grave incriminations , where counsel may not be admitted before forty eight or even seventy two hours .

Now there has always been an underlying controversy about these conditions, and the delicate balance required between the necessities of the investigation and the rights of the person . But for the government , in other matters so intent on reform, there was no urgency here. At least, there would have been no cause for concern , if there hadn't been a form of mobilization of the European Court of Human rights on the subject. Not that the French government had at the time been censored specifically, but some decisions had come rather close. In particular, the Court had ruled that interrogation carried out in the absence of counsel and without his assistance should not be held valid as proof(Selduk 27 november2008, 13 october 2009) This was fuelling a rising disquiet in the legal profession about the very strict constriction of the role of counsel in these situations When this running complaint from the lawyers dissatisfied with the possibilities offered to them the need to be present when called at any time of day or night ,but the impossibility to provide much more than moral support –met with the disquiet in the public about the frequency of garde à vue , the whole proposal was turned on its head and the minister had to contemplate some more liberal adjustment than had been at anytime envisaged.

The argument in favor of a radical, and more liberal change in legislation are well summed up in an opinion made public before the summer by our National Advisory Commission on Human Rights, a body which comprises the representatives of our major NGO's active in the field, who sit with other personalities who are known for their experience or express the different philosophical and religious outlooks recognized in French society. For this body, there was much cause for concern in the existing situation and in the perspectives tabled for its reform.

The difficulty starts from the fact that garde à vue was initially promoted as a legal framework for some necessary forms of preliminary detention. It is to be preferred to any informal system by which the police calls a person for interrogation without any set conditions. And so we can immediately note that human rights champions are up at arms against the suggestion coming from police quarters and taken up in the proposals ,that a person could voluntarily accept to be held for interrogation without the rules of garde à vue being enforced .

Every body then accepts there has to be a legal regime.

But should it become systematic? Should it become a form of physical punishment? Should it leave the person alone and practically undefended in the face of his interrogators ?

The Commission severely criticized the ever extending practice of garde à vue This was due to criteria that were originally too imprecise ,or when related to the nature of a possible incrimination, were bound to follow the tendency to multiply situations involving penal incrimination and particularly those opening up the eventuality of a prison sentence and all the proposals for a better definition came to rely on the police officer's ability to qualify the suspected acts as a penal matter. So the first complaint related to qualification of the situations requiring garde à vue .

The French practice had been severely criticized by national or international organs supervising human rights , whether they may be our independent authority controlling detention

circumstances , or the body which so far controls the complaints against the police. The European committee for prevention of torture had been particularly outspoken and this is why human rights seem to boil down to hygiene, over systematic bodily searches, spectacles, dentures, shoelaces and even brassieres, all objects or matters which are constitutive to human dignity.

But mostly the system fell short when it came to the conditions of the assistance of a lawyer. Now here the European court of Human Rights is adamant: according to article 6 of the convention, assistance must be provided from the moment a person is detained and the incriminating elements may not be compiled without the active presence of a lawyer (CEDH Dayanan contre Turquie 13 october 2009 and Adamkiewicz contre Pologne 2 mars 2010) In fact, things are moving so rapidly that just a week ago, in the Brusco case on october 14th, the Court came up with the clearest of condemnations yet : counsel is to be available from the first moment of detention and during interrogation ; and the detainee is to be informed of his right to remain silent . Now it is not possible whether under the present system or under the suggested changes for the lawyer to accede to the files or to assist his client during interrogation.

And of course one must bear in mind that the magistrate who is called upon to supervise all this belongs to the Parquet, alias the prosecution, and is not a member of the judiciary appointed to the courts .

Some or all these criticisms were vociferously voiced in legal circles and did mobilize a growing concern among the organs representative of the defense lawyers.

So we moved into a ponderous program of consultations .Of course few bodies consulted, except the police , wanted to come up as supporters of garde à vue. And the lawyers organizations realized the time had come for a full bodied pressure to increase the presence and specially the function of counsel during garde à vue .

So far nobody quite knows what the government would have made of the situation unwillingly created by the proposed reform. When all of a sudden, we came up with one of these legal happenings , which can make history . Our country has recently revised its constitution ,and provided for the first time a form of judicial control of the conformity of existing law to the constitution . This works through a question set before the Constitutional council by one of the High courts, Cour de Cassation or Conseil d'Etat when having to apply the law to a given case. There have been so far very few cases, but many lawyers dealing with criminal cases were waiting in ambush to question the existing legal status of garde à vue. And so the Constitutional Council has given its answer ,in one of the very first decisions using its powers to control existing law, on july 30th,2010.

Existing legislation was challenged on several grounds .

First reference was made to the constitutional principle, embodied in article 66, that the judiciary is the guardian of individual freedom . This could mean that the police was out of its jurisdiction when enforcing a measure implying detention. This argument went on to say that the Procureur ,called upon to control the reasons for detention was not a fully fledged member of the judiciary ,and that anyway ,he could not exercise proper control without actually seeing the person.

Anyway, the argument went on , the constraints involved in garde à vue by far exceeded what could be reasonably required for the needs of the investigation .

Thirdly ,material conditions of detention in this way were not compatible with human dignity

And last , that the defenders 'rights were not properly taken into account, in so that it was not required to remind him he was entitled to keep silent , and that the lawyer's assistance ,as provided was but a sham and delivered under unequal circumstances.

Before answering, the Council had to define its method ,and in particular whether or not it would be held by precedent in what was a completely new scope for its supervision of the law as decided in Parliament. As I have said , criminal procedure is not a new field of law , and in particular the above mentioned rules for garde à vue had come under the scrutiny of the Council in the recent years, as the Council had been called upon to examine preventively the constitutionality of new laws reforming or adjusting the system. The new procedure , allowing the Conseil to review existing law could not ignore the previous decisions which could, in its preventive role, have validated the criticized prescriptions. And so did the Conseil rule as a preliminary stand for its future decisions . But the Conseil went on to allow that this could not apply if there had been a notable change in circumstances. And here we read , not without surprise and some admiration , that such a change in circumstances is in the case noted by the Council .

Yes , the conditions for garde à vue had been declared valid in 1993. Yes , since then guarantees had even been reinforced .But some recent changes in the general regime of criminal procedure and specially in the practice of the authorities had led to a much more frequent use of these powers and upset the delicate balance between obligations and rights that is constitutive to this issue involving civil liberties.

And there , what had sofar been considered rather condescendingly as the thesis of the naïve do-gooders suddenly attains the status of constitutional law. The Council takes into account the fact that more and more people are incriminated without there being opened a criminal procedure stricto sensu, and on the basis of the facts reported to the procureur by the police in the course of garde à vue ; this is the case in some 97% of the affairs judged in correctionnelle .Garde à vue had become the preferred way to draw up a case.

The Council goes on to note , diplomatically but rather unkindly, that an officier de police judiciaire is not the qualified officer that he used to be. Because of the necessities of overwork, the capacity to ordain garde à vue has widened to include the more lowly members of the police forces, and the number of those entitled had more than doubled since the Council's decision in 1993.

Garde à vue had become common practice, concerning 790000 persons in 2009. It was time to reopen the discussion . And the constitutional judge goes on to do so, in the characteristic balancing tone that the French commentators are familiar with .

The Council proceeds first to do away with the argument based on human dignity: it has not been the legislators remit to provide for the material conditions of garde à vue, and the law may not come under criticism because of the way it is applied by the administration .

But we now come to the core of the matter The law must conciliate the necessity to prevent criminal activities and identify perpetrators of such acts and the enjoyment of the liberties inscribed in the Constitution , among which individual freedom as protected by the judiciary and the right to be properly defended. Garde à vue is not unconstitutional as such, on the contrary it is a necessity , but it must be accompanied by the appropriate guarantees .

Guarantees were deemed sufficient as far as the intervention of the judiciary was provided for at an early stage in the procedure .To come to this conclusion, the Conseil had to anticipate on a very serious matter which will crop up again about the other proposed reforms. It did state that the magistrates sitting in court and the magistrates charged with the prosecution were both part of the judiciary . This meant that the control of the prosecuting magistrate during the first 24 or 48 hours, if properly exercised by an authority who could always require to see the detainee, was acceptable . And the responsibility would automatically pass on to a fully fledged magistrate after the expiration of these very short delays .

However , the Conseil was not happy with the situation during the garde à vue. The person held can be interrogated without counsel's support , and this whatever the circumstances of the case , without consideration of any particular problems relating to the conservation of proof or the protection of third parties; the person is not even alerted to the fact he is entitled to remain silent

And so the Conseil concluded that taking into account the change in perspective the procedure had become unbalanced and did not anymore conform to the constitution .

A few weeks later, the Constitutional Council confirmed it really meant business.In another case involving the traditional powers of retention used by the custom authorities, an age long practice based in law ,the Council ruled that the impossibility for the detained person to accede immediately to legal help was contrary to his constitutional rights .

There will be much rejoicing in the human rights circles.But for the persons actually detained or susceptible to be so , they will come to understand a victory in constitutional matters is not like winning your case in any ordinary court. The Conseil stepping carefully in the field of these new powers has shown itself to be very creative. The decision concludes that it is not up to the Conseil to provide the properly balances statutory draft that will conform to its ruling, but for parliament .And it quietly decides that the public authorities shall need a year to sort out the matter and come up with a proper reform, meanwhile the unconstitutionality of existing law on garde à vue shall be of no effect on individual cases .

We now in France hold our breath , as the message from the executive has radically changed. Our minister of justice is caught between the pincers of the Constitutional Council and the European Court of Human Rights . The govrenment's goal is now to radically reduce, hopefully halve the number of persons held in garde à vue .A new draft comes up with a much more precise definition of the situations allowing this form of detention, new openings for defense .Counsel for defense may be present at the start of the interrogation and accede to the documents drawn up by the police. The defendant will be reminded he is under no obligation to answer, and a written sum-up by the lawyer will accompany the proceedings .a Number of practical precautions are provided for, to ensure the dignity of the person detained.

Will this satisfy the constitutional requirements? In spite of all these manifestations of goodwill, the proposals, at their present stage , still reveal a number of astute ways of slipping out of the new constraints. One is to proclaim a person may voluntarily accept interrogation, and none of the new rules may then apply. Another is to proclaim none of these precautions apply to the exceptional prolonged situations of garde à vue provided for in the serious incriminations of terrorism and such matters .And every here and there ,loopholes are provided for the administration to refuse , for some superior reason, and under the supervision of the Parquet, the new guarantees provided for by the

law .

Just as I was concluding my story ,only a day ago ,our Cour de Cassation has now joined the chase : it has ruled that proper implementation of article 6 of the Convention requires complete assistance from counsel, even in those situations where exceptional reasons allow for prolonged detention . This means the proposed draft under discussion must be again amended …

II- END OF THE "JUGE D'INSTRUCTION?

The subject of reform may get out of hand, as shown in the case of garde à vue, but this was nothing compared to the furore and frustration created at least in the circle of the legal professions by N. Sarkozy's announcement the government intended to do away with the juge d'instruction.

As I mentioned at the beginning , this comes as an aftermath of the deplorable Outreau affair where the juge d'instruction did retrospectively appear to have not been up to the mark. But the parliamentary inquiry that followed and not only was by partisan, but animated by very vocal leaders of the present majority did not conclude to such a radical issue. Nobody quite knows why the President of the Republic in person chose the occasion of a speech in front of the highest authorities of the judiciary to announce that a key bolt of the French criminal procedure was to be changed .

A very vivid debate is now under way , and the arguments on both sides are well furbished .As we will see in an instant , its outcome is more and more uncertain But more important than all, it has created a backlash on other essential aspects of the French system and opened up wide fields for doubt which could affect the public's confidence in criminal justice.

In fact, the place of the juge d'instruction in the line of events which lead from the perpetration of illegal acts to their identification, their incrimination proper and the appearance of the accused before a judge Is not a new subject.

It has been with us since the institution of the juge d'instruction, and this explains why the French solution in its present form is not strictly inquisitorial, but has picked up quite a few characteristics of the accusatorial system and can be somehow qualified as hybrid. Since 1808, the two essential stages were the law of 1897, which opens the instruction proceedings to the persons counsel, and the reform of the procedural code in 1858, which states that the juge d'instruction is independent from the Parquet,alias the prosecutor .

As it stands nowadays , the system can be criticized from opposing standpoints, as has been well set out in successive learned official reports, the most interesting of which at the present stage dates from 2002 and is known as the DelmasMarty report, according to its author who is probably the most respected authority in the university on the subject of penal law.

Why ,already in 2002, did her Commission argue for a change in the system ? I can only come back to her description. A man, more often nowadays a woman, apparently solitary; the juge d'instruction In fact , a person caught up in a net of complex relations ,with the police, the prosecutor , the interested parties and, in spite of the rule of secrecy covering proceedings at this stage ,often hounded by the press.

He comes under criticism for the most contradictory reasons. He has too much power, because he

can incriminate and detain, and not enough, because he depends on the prosecutor or the victim to take up a case and on the police to build it up. But more fundamentally , this has come to questioning the fact that a same authority can simultaneously assume the function of the investigator and the function to administer justice.

What has appeared all the more striking is that evolution reinforces the contradiction. As over the time , the juge d'instruction becomes more and more called upon to exercise a real judicial role, simultaneously the police and the prosecution have seemed to enlarge their powers .This boils down to the fact more and more cases under different flagrant or jumpline procedures tend to go directly from prosecutor to the court, skipping the instruction phase entirely .

Confusion in the tasks of the different authorities only highlights all the more what many critics are now seeing as an incompatibility in principle between investigation and judicial powers .They question the fact that the judge who must be a referee independent and appearing as such has been involved with the investigative task of formulating and verifying hypothesizes on culpability. One feels here the strong influence of the European court of human rights ,who makes a strong case for the appearance of impartiality and independence and is not satisfied with the magistrates idea of how they are to assume this obligation .

Under this severe attack based on principle ,our beleaguered juge d'instruction is told that anyway materially he is not able to sufficiently cover all the aspects of his task and in fact uses and abuses of the delegations to ,who can it be but the police ,while contradictory audiences in the presence of counsel are held with unseemly alacrity .

When the case for suppression was made by Delmas Marty's commission in 2002, it greatly distressed the profession itself as the juge d'instruction , more often young and dedicated are greatly attached to this function. And their cause was championed by a dissenting opinion in the report ,which emanated from one of the eminences of the judiciary. From him came the idea that reform should support and not condemn the juge d'instruction , and it would be much preferable to build up a collegiate court for instruction and to simultaneously reinforce the rights of the defendant.

But above all, this brought into the discussion the counterargument which is still unanswered and is still with us as we mull over President Sarkozy's intentions .

This is what I mean by the back lash. If the judge loses all his powers of investigation and is replaced by a magistrate only there to supervise the procedure , the prosecutor assumes these powers and has full control of the investigation. But he remains prosecutor, and he has to carry the accusation to its proper conclusion. How then can he direct his enquiries a charge et à décharge , meaning to balance incrimination and defense and bring about an unbiased description of the facts ?The promoters of the idea immediately answer easily enough , if we simultaneously increase the capacities of counsel and give the defense sufficient say in the investigation ,production of expert advice ,entitlement to ask for further elements or provide them.

But this does not clinch the argument. It opens up new and unlimited perspectives On the one hand the legal profession is not at all ready to furnish the time and organize the costs of a system where investigation has so far been entirely financed on public funds. The bar is not prepared for this long drawn and complicated investment , and the public is not at all ready to pay for it. It could only come about in France accompanied by a real surge in legal aid , which our country has never

contemplated and is not much in accordance with the present budget restrictions.

But secondly and even more seriously , this reform would be inseparable from a more profound revolution affecting the status of the Parquet. Now this is the central matter put forth by our Human Rights Commission in its opinion made public just before the summer . It reflects the point of view of a large sector of the legal profession, academics or practitioners. It stated its argument as follows:

If the juge d'instruction disappears from the field, his function then is taken up by the prosecution. Magistrates from the Parquet are called upon to conduct the inquiry, of course with as before the help of the police But this means that the same authority will conclude the inquiry and decide or not to prosecute. One form of confusion is substituted to another. And magistrates from the Parquet are under the authority of the minister of justice ,as such a member of the executive. Both from the point of view of their personal status and their attitude facing individual cases , they are in an ambiguous situation. They do belong to the same body as the magistrates sitting in court ,and can move during their career from one function to another. But while they serve at the Parquet, they can ad libitum be removed from their post and do not enjoy the same protection from the Conseil supérieur de la magistrature than their colleagues . And dealing with individual cases ,they are under instructions from the minister, the understanding being that this means in conformity with a general penal policy or in conformity with the official stand on a particular case. Different ministers have in succession held each point of view, and the prosecuting magistrate is held to such instructions, if they are given ,and may only fall back on his oral explanations in court to express his eventual disagreement This explains how embarrassing the position of the European court of justice has appeared to be ,when it was stated in Medyedev and others 29 march 2010 "The magistrate must present requisite guarantees of his independence from the executive and the parties , which means he may not ultimately act against the person concerned in a criminal procedure ,as it is the case for the "ministère public".

This ominous and long awaited judgment from the European court has given the public some difficulties in interpretation. The case was complex ,as the sailors arrested under the suspicion of trafficking drugs on the cargo Winner in Brest were detained on board and only brought before a judge in Brest 13 days later. The Court gave them satisfaction on the fact that the rules of their detention were not clearly stated , and went on to discuss the argument that they had not been immediately brought before an independent magistrate. The Court decided that there were exceptional circumstances making it impossible materially to bring them sooner before a magistrate, but rather nastily reminded the parties that to be qualified as a magistrate ,an authority must show guarantees of independence from the executive and the parties, and that this excludes that he can eventually act later on against the plaintiff, in the procedure ,as it is the case for the prosecutor.

The government took this as a form of reprieve , but knew as well as anybody that the Court does not go along with the idea the prosecutor is a magistrate, and in European circles most specialists agree with the remarks of a very interesting report before the parliamentary assembly of the Council of Europe, on" Abuses in the penal system due to political reasons". The German rapporteur of this document, Sabine Leuthesser Schnarrenbergher, writes "In France, the balance between ferociously independent judges, prosecutors held to a strict hierarchy and defense attorneys whose function is strictly limited at the investigative stage is fragile. "Much as the author had been impressed by the qualities of the members of the French Parquet and their conviction they are part of an independent

judiciary, reforms would be necessary reinforcing this independence if they were really to take over the function of the juge d'instruction. And this change would necessarily mean a reinforcement of the defense and a development of legal aid .

The Human rights commission makes no bones about the situation which would result from the suppression of the juge d'instruction; if it is to be so, reform the Parquet.

But the snag is here that the question is just one that any government, and particularly a right wing government would very much hope to avoid. Not less because our conception of criminal prosecution is a bit too near the censorship of the European court; also it involves reforming the Constitution with the requisite political majority in Parliament .

The government therefore very much hopes that a new step in the procedure ,involving a special judge, not from the Parquet , to control the way the Parquet is carrying out its investigation , will satisfy its critics. It has not been the case for the Human Rights commission. It believes this isolated magistrate , who is not entitled to act if there is not a specific complaint against a negative decision from the Parquet and who can be efficiently thwarted by the same , will never have the means to go over each case. He is not sufficiently high in the hierarchy and in the present proposals is not more than an intermittent judge without authority.

And of course if equality in arms relies on a wider capacity for the plaintiff ,this can only work through a spectacular increase in the funding of legal aid.

As the summer has allowed the magistrates to brood over these conflicting perspectives , the debate has come to a standstill Its outcome is uncertain .

For us lawyers who look with interest to what is happening at our neighbors, this unfinished saga opens fields for discussion that are not peculiar to France and concern the status of justice in our society. We as old democratic nations are responsible for the vitality of the principles which have founded our liberties This means that we have to show some form of common approach to the evolution which is affecting not only our conception of justice founded on separation of powers , but the whole way new generations will accept and respect justice This is not a given formula .

III CONCLUDING REMARKS

You may at this stage wonder why I have presumed this unfinished French saga could be a concern for the legal community in another country, where a very different organization of justice is hopefully not meeting the same difficulties.

In a few concluding remarks, I want to come back to Joëlle Godard .As you all know here, we shall remember her as a pioneer of comparative law, a pioneer who believed it was useful and necessary in our shrinking world to understand how our democratic societies are facing similar problems and may derive useful knowledge from other countries experiences .When she imagined new ways to bring us together, comparative law was not fashionable. Things have now moved .Nowadays, what happens in one country may be of importance for the others, and this is true for justice. Not only is it a matter for treaties as binding legal obligations. Comparisons inspire the judges when dealing with difficult interpretations and in what has been described in France as a dialogue between different

judicial systems, the case law takes new directions.

This is why it is very important to refer to valid comparisons .And I, in my modest way, would deem it a due memorial to Joëlle if the British members of your association, the Scottish members I mean would reflect on some of the grave questions revealed in the disorderly French experience .

First question ,do we agree on principles?

Of course , we say we do. The relation between civil liberties and justice is as old as democracy itself, older if we remember that in the lines of Magna Carta one reads "Thou shall not deny justice nor delay it. "If one leafs through the Universal Declaration written in 1948 or the recent European Charter for Human rights, the fundamentals have not changed. There is cause for serious concern whenever any person is detained without legal justification or accused without being allowed proper defense or denied the presumption of innocence until proved guilty. This "Back to basics" attitude to the problem is healthy, as I have seen over and over again when confronted in the field of human rights with events appeared in countries less fortunate than ours. If in the seventies ,a respectable old fashioned Chilean lawyer travels to Paris to seek support because his client has disappeared in prison, something is very wrong .

But the implementation of the principles will always be difficult and controversial At all levels, the legislator, the courts , the individual judges conscience , the police ,who one must be reminded work under the rule of law and also have a conscience, il will always be a matter of balance. Each individual case is a new test for a this balance of arguments ,and so it should be .

How then can we find the proper way to channel the new forces and influences that affect the balance ? What lessons can we gather from our neighbors?

I think that in the recent months we have discovered two questions of law which require an answer rooted in a generalized acceptance from society .

What do we expect from the very sophisticated system of checks and balance set to preserve our liberties, which we now share in Europe?

What do we mean ,in modern times, by an independent judge ?

You have certainly noted, in the course of my story, how the traditional, rooted institution of justice has had to rely on the new judges, the Constitutional council and even more the European court of justice to preserve its status .

This is fundamentally important and in a way unexpected. In fact, for a French lawyer of my generation ,the conscience of change is overwhelming. I did, in what seems another life, witness René Cassin, one of the drafters of the Universal Declaration and of the European Convention onHuman rights, sitting at the time as member and even President of the Court, pleading desperately with the French authorities for the ratification by France of the Convention. For years ,the door would close on him with a flat refusal .Then in the eighties ,my country took the step and you have seen how meaningful it was to be .

Rule of law has become very sophisticated in our societies, and the system of controls we share partially on our European boat is elaborate. Some of the decisive steps on the bumpy voyage in France have been taken by these new judges ,the very new mechanism of constitutional control,and more probably on the long run by the European Court. Governments will not enjoy this, are we sure

the public will? For the moment these checks are very efficient .But as it is the rule nowadays for all judges, they will be criticized .Already ,in the stream of respectful commentary of the European Courts decisions, crop up here and there rather brutal critics arguing of bias or putting forward with glee the dissenting opinions .And one has to note In France that the Constitutional Council has made it a rule it will not come back on a a law it has once examined, and this means the scope of its supervision will shrink with time .This leads me personally to believe it is better to have a system of criminal justice working day to day in conformity with human rights, than to rejoice with the commentators in the spectacular intervention of the more prestigious courts, exercising a necessary, but ,we should hope, exceptional control.

We must remember after all that they are judges, any way as judges or so called judges derive their authority from the public's respect for its judges. And this leads me to my second question. What is an independent judge?

In our growing urban societies , crime and delinquency have changed. In fact they have progressed ,like all our activities and thrive on the same factors as growth itself. The breaking up of traditions and family ties, the growing literacy and independence of the young adults , the dire economic conditions and employment in some sectors of society , discrimination, fanaticism ,all the same trends are at work in our different countries. And ,is this a necessary consequence, we are all afraid This is at the same time very real and quite artificial. The victims of crime have become audible, in a society where they have been able as in any field of life to rely on the modern techniques of communication. Not only have they found a relay in the media. The media themselves have fed the society's interest with an international culture of thrilling dramas and exciting violence , so much so that I do not see how any child does not grow up with the idea problems are to be solved with a gun ,and old people are now generally terrified they will not die in their beds , and vote as hard as they can for law and order.

Penal law reflects this by becoming more repressive , and there seems to be a general tendency to fill the prisons , even if it may be for short sentences. Simultaneously, the science of rehabilitation is continually questioned as is the efficiency of prison itself, the protagonists of conflicting theories becoming more and more entrenched in conflicting positions yet unhappy about results. There does emerge one result : in France nobody agrees about the figures nor is happy with any evaluation. So the politicians fall back on procedural formulas and hope the legislator will be satisfied with a new way of drafting the eternal dilemnas .As for the judges, they are under fire .

So ,just a few weeks ago ,we hear a minister of government in charge of the police overtly accusing the judges. In his words , it is at their stage that there is a break in the chain of security. I only quote this as significant of a central problem : Justice as a symbol is not protected anymore and this I believe is serious. It used to be forbidden under penal law to criticize a decision of justice , it is still the rule but the contrary has become common practice. So our common problem is that we cannot let this happen. So much the better for the UK if they do not face this situation ,but if this is the case, what is their secret ?

The judge has to remain under his tree or protected by his wig or whatnot, because it is not given that our contemporaries will always believe in justice. This belief in the independence of the judge is an essential bulwark of democracy, more fragile than we thought .We for instance In France, who pride ourselves on the independence of the courts whether they belong to the judiciary or to the

administrative courts were more than offended when the European Court began to question age old procedures. They delivered a message that was humbling. You maybe know that you are independent ,but you must appear so. This is a good reason why we as citizens must rally to defend our judges, defend them as they see their mission with their rather old fashioned pride, a bit like the figure on the wall of the town hall in Sienna who is since centuries holding the scales ,while the artist has depicted on one side good government and on the other side bad .For this to be acceptable in a materialistic world, we must provide them with the proper ways and means to be independent This could mean money say for a collegiate system of instruction, or help for speeding up the difficult administration of justice , or funds and hands so that the police can efficiently cope with protective procedures ,all technicalities which the media are not very interested in . It certainly means separation from the executive and a transparent and well accepted formula for the appointment of judges .

So I shall come back to comparative law We have much to learn and to share in the defense of the principles. We are all requiring advice in those difficult times. It could be to describe what works and explain why, to identify common difficulties and suggest research, to uphold the role of judges wherever they stand and to explain that in our difficult world there are some problems which require confidence in our fellow beings, the judges, trained to deal with them .We now live in an open society, where the words confidence, independence must have the same meaning for all of us and find strength in a common acceptance .