

TERRORIST INVESTIGATIONS AND THE FRENCH EXAMINING MAGISTRATES SYSTEM

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This paper sets out the findings of a Home Office led study into the French examining magistrate system in relation to the investigation and prosecution of terrorist suspects. The examining magistrate system is sometimes presented as a possible alternative model for the investigation and prosecution of terrorist suspects in the UK because of the difficulty in terrorism cases of introducing intelligence material as evidence in court. There are different types of intelligence product and work is being undertaken separately on the issue of intercept as evidence.

This paper therefore addresses two issues:

- Whether there are any aspects of the examining magistrate system (and other processes associated with this model) which would be desirable to introduce in the UK. Key considerations will be whether any such changes would be achievable within the context of the English or Scots legal systems, and if so, what would be their added value.
- Whether the examining magistrate system could be used to allow the introduction of intercept evidence into criminal proceedings whilst affording the necessary protection to sources/techniques/capabilities, thus increasing the number of successful prosecutions in terrorism cases.

Background

For the purposes of this study we have concentrated on the French system. A number of other European jurisdictions have retained some aspects of the examining magistrate model in their criminal justice system, in particular Italy and Spain, but the French system is the one most commonly referred to. There is no common examining magistrates' model.

The conclusions of this study have been based on a literature search, consultation with French liaison and discussions with a wide range of French officials, including senior representatives from the judiciary and law enforcement agencies, during a visit to Paris. We are grateful to colleagues in France for their assistance in enabling us to produce this study.

The views and conclusions expressed in this report are those of the authors

Introduction

In France, there is a career judiciary referred to as the *magistrature* which includes the prosecutor (*procureur*), the examining magistrate (*juge d'instruction*) and the trial judge.¹ They come from the same stable, enjoy similar training and individuals may move between the three functions during their career. As magistrates, they exercise a judicial role in the supervision of police investigations.

The French Penal Procedural Code (*Code de Procedure Penale*) sets out the powers and responsibilities of the police and those responsible for the supervision of criminal investigations. The police are responsible for recording crime, gathering evidence and identifying those who have committed an offence. They are also required to inform the prosecutor of all crimes.² If the local prosecutor suspects that the case is terrorism related, then he/she will transfer the dossier to specialist terrorism prosecutors based in Paris, who will decide whether it is a terrorist case and one which they should therefore deal with. In all serious crimes, including terrorism, the prosecutor can open an *information*, and refer the case to an examining magistrate. In all other instances, the police remain under the direction of the prosecutor.

The French government has repeatedly reinforced its legislation following terrorist attacks in France in the 1980s and 1990s, and following more recent attacks overseas.³ This has involved strengthening the French Penal Code by centralising all judicial proceedings relating to terrorism and by creating a number of specialised functions within the French government. The legislation also extended the maximum period of police detention from 4 to 6 days and created the offence of *association des malfaiteurs en relation avec une entreprise terroriste* (criminal association in relation to a terrorist undertaking). The use of intelligence is particularly important in establishing the existence of such an association (see below).

Police Detention (Garde a Vue)

The *garde à vue* is the period of police detention following arrest. In terrorist cases, suspects can be held for up to 6 days (in non-terrorism cases the maximum period of detention is 2 days). The maximum 6 days has never been used since its creation in the 2005 bill. Extensions of detention beyond the first 2 days must be authorised by a magistrate (*juge des libertés*) who governs the conditions of detention pre-trial.

The *garde à vue* period is under the control of the prosecutor and examining magistrate, who ensure that the rights of the person being detained are respected (eg the right to see a doctor, access to a lawyer). The police must report at regular intervals to the magistrate leading the investigations. This is the case not only for terrorist cases but for any offence.

¹ Jacqueline Hodgson. "The Police, the Prosecutor and The Juge D'Instruction". 2001. (page 343).

² See above.

³ Jeremy Shapiro and Benedicte Suzan. "The French Experience of Counter-Terrorism". 2003. (page 76).

The purpose of the police detention is to gather evidence to confirm the information or intelligence and to decide if an investigation is warranted. The offence of criminal association in relation to a terrorist undertaking has proved effective. Its broad interpretation covers a wide range of acts, although the police are still required to establish a terrorism link and that a concrete action has taken place. In practice, this offence has enabled the police to address those people involved in terrorist support networks. Intelligence is often used to show terrorist links to proven crime. However, the nature and scale of these arrests has sometimes generated criticism. For example, in November 1993, 88 people were arrested and questioned but only 3 were subsequently investigated for a specific offence.⁴

In the first 72 hours of detention the suspect is denied access to a lawyer (in non-terrorism cases the suspect would be granted access to legal representation from the start of his detention). The police are responsible for informing the suspect of his rights, such as the right to remain silent. The questioning of suspects during this period of detention can be intense.

During the *garde à vue* suspects can be questioned numerous times, and interviews may last 2 or 3 hours. There is no maximum time limit on periods of questioning. Interviews are not audio recorded, but a written summary of the interview is produced.⁵ It is common for suspects not to speak during an interview and the police are able to draw adverse inferences from this. Some individuals originally identified through intelligence material have subsequently been successfully prosecuted on the basis of what they said during the police interviews and subsequent investigation.

The United Kingdom also has enhanced powers in place governing the detention of terrorist suspects to reflect the nature of terrorism investigations and to ensure public safety. For example, the police may deny the suspect access to a lawyer for the first 48 hours. But this is only in certain circumstances where there are concerns about a particular lawyer. However, the presumption is that an alternative lawyer will be provided by the police. In terrorism investigations, the fundamental principles of the Police and Criminal Evidence Act still apply to pre-charge detention to protect the rights of the individual.

In France, the defence lawyer intervenes less during the *garde à vue* process. After the first 72 hours, the suspect may meet with his lawyer but only for a limited period of time and the lawyer does not have access to the facts of the case. Unlike the role of the defence lawyer in the UK, the job of the defence lawyer in France is primarily to ensure that processes and procedures are being carried out correctly and to question any irregularities rather than to provide detailed legal advice at this stage.

⁴ Jeremy Shapiro and Benedicte Suzan. “*The French Experience of Counter-Terrorism*”. 2003. (page 76).

⁵ Leonard Leigh and Lucia Zedner. “*A Report on the Administration of Criminal Justice in the Pre-Trial Phase in France and Germany*”. Research Study. 1991. (page 12).

Rather, it is the judicial oversight of the police investigation which is intended to provide a balance and recognise the rights of the suspect. At this stage, it is the police rather than the judiciary who carry out the interviews. Questions have been raised about the extent of involvement and oversight by the judiciary during this period. Some commentators have suggested that the *garde à vue* is a very distinct and separate part of the process and is largely controlled by the police.⁶

At the end of the police detention period, the suspect is either released with no further action, given a date to attend court, or brought before the examining magistrate.

The Examining Magistrate (*Juge d'Instruction*)

The opening of the *information* marks the beginning of a separate legal phase where the supervision of the case is transferred from the prosecutor to the examining magistrate. This is a seamless process and merely a continuation of the existing case.

The examining magistrate is empowered to undertake any investigations which may be helpful in establishing the truth. He is not an advocate for either the prosecution or the defence but is charged with conducting an impartial investigation to determine whether a crime has been committed.

The benefits of judicial supervision include access to a range of enhanced powers. As an impartial judicial arbiter, the examining magistrate is entrusted with superior investigative powers to authorise searches, issue subpoenas and wiretaps, the results of which can be used in criminal proceedings. In the UK, law enforcement and intelligence agencies require specific judicial/ministerial authorisation to use such powers.

By combining both an investigative and judicial function, the examining magistrate has an appreciation for how the law enforcement and intelligence agencies work but also experience of what is required evidentially to secure a conviction. The purpose of judicial supervision is to ensure a wider and more comprehensive investigation which follows leads that exculpate as well as incriminate the suspect. Some argue, however, that there is, in the examining magistrate system, less of a distinction between the role of the magistrate and the role of the prosecutor than in adversarial systems such as those in the UK.

During the investigation the defence lawyer is given direct access to the examining magistrate and the *dossier* of evidence. The defence lawyer can also request that certain lines of enquiry are explored although ultimately the examining magistrate can refuse. The role and input of the defence lawyer in this process is though less than that of the examining magistrate as a senior judicial figure.

⁶ Jacqueline Hodgson. “*The Police, the Prosecutor and The Juge D’Instruction*”. 2001. (page 352).

A key strength in the French system is the centralised and specialised investigation process in terrorism investigations and the synergy between those involved. At the core of the system is the relationship between the DST (*Direction du Surveillance Territoire*) and the examining magistrate. The DST is the French domestic intelligence agency which also has police judicial functions. They are geographically based close to each other in Paris and both are experts in dealing with terrorism. There are other law enforcement agencies which can also play a judicial role in CT cases, including the SDAT in the Judicial Police – but again, they have close links with the examining magistrates.

There are currently 16 examining magistrates based in Paris who specialise in terrorism investigations. Over time, these individuals have developed an expertise by investigating cases which are often connected and this enables them to build on and transfer knowledge and evidence from one investigation to another. They also specialise in different types of terrorism such as separatist domestic terrorism and international terrorism.

In order to address previous concerns about efficiency and communication, examining magistrates now work closely with the DST during a terrorist investigation. The examining magistrate keeps in regular contact, both formally and informally, with the DST and this close working relationship and tight integration of intelligence generates confidence and professional trust between those involved in the process. As a result, it is common for the DST – which unlike our domestic security service, also has a police role - to approach the examining magistrate with information they feel would benefit from a judicial investigation.

Counter-terrorism investigations therefore depend both on the DST on the one hand, and the examining magistrate on the other who remains in control of the wider strategy by deciding the direction of the investigation.⁷ There is a genuine mutual appreciation for each other's expertise and professional judgement. For example, there is regular discussion and exchanges between the two on the decision to follow certain leads and the general development of the judicial investigation.

Counter-terrorism examining magistrates are seen as a repository of knowledge and expertise. A potential weakness in the French system is the reliance, in part, on a relatively small number of expert examining magistrates. To help address this there is a career structure in place allowing counter-terrorism magistrates to move up the promotion ladder while remaining in their area of expertise. In terms of training, it has been suggested to us that it can take between 5-10 years before an examining magistrate can become fully effective in the most complex terrorism investigations.

⁷ Jeremy Shapiro and Benedicte Suzan. “*The French Experience of Counter-Terrorism*”. 2003 (page 83).

Although the examining magistrate, the prosecutor and the DST all have separately defined roles and responsibilities, this close working and synergy does not appear to raise any particular concerns in relation to the independence of each party. The development of these relationships and the flow of information are provided for in legislation.⁸ This appears to have addressed any cultural and professional barriers between the intelligence agencies, the police and the judiciary.

The system provides for differences of opinion and there is an appeal mechanism in place to challenge decisions. The decisions of the examining magistrate are frequently challenged by the defence lawyer. It is less clear how often a prosecutor challenges the decisions or conclusions of an examining magistrate in a terrorism case. This has generated some criticism from commentators.⁹ However, the *Chambre d'Instruction* does exercise judicial control over the examining magistrate – both on matters relating to procedure and on issues of fact. If the court deems charges to be inconsistent, it can cancel decisions taken by the examining magistrate.

There is nothing directly comparable to the role of the examining magistrate in England and Wales. However, our prosecution and police counter-terrorism functions are also specialised and centralised. The specialist terrorism division within the Crown Prosecution Service (CPS) is responsible for all terrorism prosecutions and prosecutors work very closely with the police and the intelligence agencies. Prosecutors are now based in major police stations, such as Paddington Green, and work closely with senior investigating officers on charging decisions and the review of evidence. This process has been a success and the decision to undertake joint press conferences during Operation OVERT (the alleged airline plot in August 2006), for example, demonstrated this more joined-up approach.

In being co-located the CPS can review the case as it develops and indicate where more is needed evidentially. Although the CPS is acting in an independent and advisory capacity, this process could also be described as providing direction to the police 'de facto'.

In France the period of pre-trial detention can last up to 4 years (*detention provisoire*). This period of detention is not directly comparable to our pre-charge detention period (which currently has a maximum duration of 28 days), as there is no equivalent to our formal charging process in France. Nor therefore is it directly comparable to our period of pre-trial custody.

During this period, the examining magistrate in France can continue to question the suspect, in the presence of his lawyer, as new evidence emerges. This is an obvious advantage as the case is developed over a significantly longer period of time. In the UK, the purpose of the formal

⁸ Jeremy Shapiro and Benedicte Suzan. "The French Experience of Counter-Terrorism". 2003 (page 77).

⁹ Jeremy Shapiro and Benedicte Suzan. "The French Experience of Counter-Terrorism". 2003 (page 85).

charging process is to mark the point at which the evidential threshold has been met and to prevent unnecessary questioning of the suspect and unlimited periods of detention.

The length of terrorism investigations has attracted some criticism in the European Court of Human Rights . There are a number of factors which contribute to the length of investigations including resources and the workloads placed on examining magistrates, the international nature of terrorism investigations and access to forensic services.

However, examining magistrates would also argue that the length of time taken to investigate a case reflects the depth and breadth of an investigation and that their objective is to identify and target entire terrorist networks rather than just uncover evidence relating to particular individuals.

The role of the examining magistrate has also recently been challenged and criticised following the collapse of a high profile paedophile investigation (the *Outreau* case) which prompted a parliamentary inquiry. In this case, 17 people were detained on suspicion of paedophilia. At the trial, 6 of them were acquitted after spending nearly 3 years in detention. Questions were raised about safeguards, such as the role of the *juge des libertés* and the experience of the examining magistrate. Those involved were accused of failing to act in an impartial way, seeking to strengthen the case against the suspects, rather than conduct a more wide ranging enquiry.¹⁰

However, the problems exposed in the *Outreau* investigation might never occur in a terrorism case; nor has it damaged the public confidence in terrorism investigations. In terrorism cases, examining magistrates work closely together in small teams which ensure a degree of peer evaluation. All 16 magistrates also retain an oversight of all ongoing investigations. However, although these are two very different forms of crime, the system in place for investigating them is the same and some might argue that these examples of best practice may not necessarily address the wider structural concerns raised by the *Outreau* case – which are still the subject of discussion in France.

Prosecution

Once the examining magistrate has concluded his investigation, he submits the *dossier* of evidence to the prosecutor. The prosecutor then gives his/her opinion on both legal and factual issues. The prosecutor then returns the file to the examining magistrate who can agree or disagree with the Prosecutor and takes the final decision on the case.

The trial itself is to some degree adversarial. The prosecution asks for the conviction of the suspect and Counsel for the defence fights their claims. The examining magistrate does not participate in the trial process and the case is

¹⁰ Jacqueline Hodgson. “*French Criminal Justice. A Comparative Account of the Investigation and Prosecution of Crime in France*”. 2005. (page 218)

presented and argued by the prosecutor. All terrorism trials are conducted by a special terrorism court made up of a panel of 3 specialised judges, sitting next to nine other professional judges. There is no jury in terrorism cases because of concerns about intimidation, historically in cases involving separatist domestic terrorism.

In an inquisitorial system, the emphasis is on the pre-trial phase conducted by either the prosecutor or the examining magistrate.¹¹ As the evidence in the *dossier* is the result of a judicially supervised enquiry written statements and intelligence reports are more readily accepted, there is less focus on oral testimony and cross examination. The trial in France is not therefore the focal point of the process and the role of the court is to make an objective evaluation of the evidence presented.

In an adversarial system, the trial is the centre piece of the investigation where evidence can be introduced and overturned and witnesses can be challenged. In the examining magistrate system, many of these issues will already have been tested and resolved during the lengthy investigation. Any challenges to the process will also have been dealt with by the end of the investigation. A combination of these factors may go some way to explaining the low acquittal rate in France.

Given the historic roots of the examining magistrate system, there is less challenge to these arrangements from French lawyers or civil society than might be the case in the UK. . However, there is now an increasing trend towards the defence waiting until the trial begins before challenging procedures and processes such as the legality of the police detention, for example. This is still a relatively new tactic in France .

Material from the interception of communications is used as evidence in trials. In France there is a dual intercept warrant system in place. An administrative intercept warrant used by the intelligence agencies has to be authorised by the Prime Minister and the intercept product can only be used for intelligence purposes. A judicial intercept warrant used by law enforcement can be authorised by the examining magistrate, the results of which can be used as evidence in criminal proceedings.

For the purposes of the trial, the recordings of judicial intercept are placed under a legal seal (*place sous scelle*). The *dossier* of evidence contains a note from the examining magistrate stating that the intercept had taken place and the transcript is attached and made available to the defence lawyer. Lawyers can also request the actual recordings, to verify that the person was indeed their client. In practice this rarely occurs.

Protecting intercept capabilities does not appear to be a significant problem in France, mainly because the work of the intelligence agencies is walled off from law enforcement and the courts by separate intelligence-only warrants.

¹¹ Jacqueline Hodgson. “*French Criminal Justice. A Comparative Account of the Investigation and Prosecution of Crime in France*”. 2005. (page 245).

Culturally, it is reasonably common knowledge that French telephone companies are obliged to cooperate with intelligence agencies in setting up interception and this basic capability is provided for in the French Penal Code. Not all recordings are kept and the examining magistrate is responsible for advising the police on selecting which recordings to keep. This follows a ruling by the Court of Appeal which concluded that only those recordings which relate to the search for proof of a crime need to be kept. Equally with listening devices, the examining magistrate records why and how the device was installed but again in general terms. This is rarely challenged as the device can only be installed under the examining magistrate's authority. The examining magistrate can, and is expected to, probe intelligence provided.

Other forms of intelligence or sensitive information can be introduced as evidence by 'judicialising' the material. The intelligence is summarised, without revealing sources or methodology, and produced as a police statement. This is then submitted to the examining magistrate during the investigation and included in the *dossier* of evidence. French law also provides a clearly defined basis for secrecy and the need to protect secrets.

The police report may say, for example, that there is intelligence to show that X was in contact with Y. However, no party, including the examining magistrate, the defence lawyer or the trial judge can probe the information underpinning the report. During the trial, Counsel for the defence may challenge the facts in a report by seeking to prove that his client was not at a certain address at a certain time, for example, but he cannot challenge the information on which the report is based. However, the report does not have the value of proof: no statement is made on its reliability.

This demonstrates the confidence placed in the intelligence by the judiciary. In reality, the examining magistrate can never be fully confident about the validity of the information without having access to the methodology or the raw intelligence. However, in practice any particular concerns tend to be resolved through regular communication and the professional trust which exists between the DST and the examining magistrate.

Intelligence material is only used to "give colour" to a prosecution and it is not possible to secure a conviction on the basis of intelligence material alone. The courts still have to be convinced on the basis of other corroborating evidence. However, in practice it is likely that any intelligence material admitted in court will have some form of impact on the outcome of a trial.

There are therefore significant differences between the French and English disclosure regimes.

Pre-Trial Sift

We have looked at the examining magistrate's system primarily to see whether it could be used to allow intercept material to be adduced in criminal proceedings. Key elements of the system which facilitates this in France include the existence of separate intelligence only warrants, the judicialising of

intelligence or sensitive material and the fact that whilst the *dossier* of evidence can be challenged on the facts in the report, no party can probe the information underpinning the report. These elements make it more akin to a pre-trial sift mechanism which has also been suggested to us as a means of adducing intercept and other intelligence material into UK criminal proceedings.

In 2005 work, led by the Home Office, examined the possibility of using judges in a pre-trial sift model as recommended by the Newton Committee in 2003. The objective of the pre-trial sift would be to produce a statement of open evidence and conclusions, derived from closed material, which would be admitted as evidence in a trial. The defence would be able to challenge the statement but would have no right to go behind it to examine the material on which it was based. However, Counsel concluded that denying the defence the opportunity to see and respond to potentially significant parts of the prosecution case would, in the UK system, have Article 6 implications.

An independent, cross party review, led by the Right Honourable Sir John Chilcot, has recently been set up to take a further look at the use of intercept in UK court proceedings. It is due to report at the end of this year.

Conclusion

Attempting to compare an inquisitorial system with an adversarial system is problematic. The two systems have their own histories, their own cultures, and necessarily their own strengths and weaknesses. They are not easily compared. Nor could they easily be combined.

However, there are notable features worth highlighting in the examining magistrate system. The specialisation and the synergy between those involved are at the core of terrorism investigations in France. In the UK, our prosecution and police CT functions are also specialised and centralised and work closely together. However, there may be scope for reinforcing and enhancing the role of the CPS further in terrorism investigations by drawing on some of the joined-up practices within the French system.

Particular magistrates who have developed significant experience over many years, have forged these close working relationships and made the system work. Retaining and developing this expertise is a particular issue for both the French and British systems. Training and career development opportunities would provide resilience and help retain and develop this specialisation in the longer term.

There has been some criticism in the European Court of Human Rights about the length of terrorism investigations in France. Terrorism cases are developed over a significantly longer period of time prior to trial than in the UK, and the examining magistrate is able to continue questioning the suspect as the investigation progresses. This period of detention is not comparable to our period of pre-charge detention as there is no equivalent to our formal

charging process in France. However, the Government is committed to considering extending in the UK the scope for post-charge questioning.

It has been suggested that the examining magistrate system could provide a model for the introduction of intelligence as evidence. In an inquisitorial system, evidence, including intelligence material, is more readily accepted by the court because it is the result of a judicially supervised enquiry. There is therefore less challenge and cross-examination, but ultimately the prosecution is still required to build a case based on corroborative evidence. In our adversarial system, the trial is the focal point of the investigation where evidence is introduced and challenged.

Denying the defence the opportunity to respond to potentially significant parts of the prosecution case would, in the UK system, have Article 6 implications. The inability to probe or question the material underpinning the intelligence reports has never been challenged in France. Protecting the intercept capability of the intelligence agencies in France also appears to be less of an issue. This is partly because this basic function, and the role of the telephone companies, is openly set out in legislation (as it is in the UK: RIPA Part 1, Chapter 1, Section 12) but also because the work of the intelligence agencies is walled off from law enforcement and the courts by a system of intelligence-only warrants.

There are significant cultural and constitutional differences between the French and English criminal justice systems, but one is not necessarily more effective than the other. A fundamental conclusion of this study is that if we were to try and emulate the examining magistrate system here, we would need to import the system in its entirety rather than borrow and graft certain elements on to our CJS. This would require fundamental changes to our adversarial, common law tradition. This was also the conclusion of the Runciman report on criminal justice in 1993 and more recently the Joint Committee on Human Rights in their report on prosecution and pre-charge detention.¹²

¹² Joint Committee on Human Rights. “*Counter-terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*”. 2005-06. HL Paper 240. (paragraph 76).

