The normative and practical obstacles to effective prosecution of ill-treatment by official persons

France Report

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Acronyms:

- ACAT : Action des Chrétiens pour l´Abolition de la Torture (= NGO against torture)
- CGLPL: Contrôleur général des lieux de privation de liberté (= Ombudsman for closed institutions)
- CNDS: Commission nationale de déontologie de la sécurité (= former independent inspection authority)
- CRS: Compagnies républicaines de sécurité (= riot control forces)
- GAV : garde à vue (= police custody)
- IGPN: Inspection générale de la police nationale (= inspection service of national police)
- IGGN: Inspection générale de la gendarmerie (= inspection service of gendarmerie)
- IGS: inspection générale des services (= former inspection service for Paris police)
- OPJ: officier de police judiciaire (= judicial police)
- SDSE: service de déontologie et de soutien aux effectifs (= inspection service for Paris police)

1. Overview of the criminal legal system and the regulation of the police

1. 1. I.1. Brief description of the criminal legal system

The organization of the French judiciary system has multiple levels and is administered by the following courts:

a) Highest judicial court (*Cour de cassation*);

b) Criminal court for serious crime (*cour d´assises*) and criminal court for other crimes (*tribunal correctionnel*)

c) Courts of appeal;

d) General courts;

e) District courts; and

f) Administrative and labour courts.

The French criminal justice system is a mixture of inquisitorially rooted procedures with increasingly accusatorial aspects. This is defined in the preliminary article of the French Criminal Procedure code as a procedure which must be *contradictoire*.[1] Historically, the preliminary police investigation and the investigating judge (*Juge d'instruction*) were striking examples of a system where one figure conducted an investigation on his/her own and in relative secrecy. However, as a response to this concentration of power, in 1897, the defence lawyer was given a role during the investigation, by allowing him/her to consult the case file before his/her client's interrogation and to be present during the interrogation.[2] In addition, in later stages of the criminal process, many adversarial techniques have been integrated, and the trial before a jury (cour d'assises) applies the principle of contradictoire.

In addition, French criminal legislation is codified. Thus, judges were traditionally required to apply the law literally. Among politicians however, there has always been a spectre of a *gouvernement des juges,*[3] which partially explains the current debate about the investigating judge and the (in)dependence of public prosecutors. The investigating judge has an ambiguous role that requires him/her both to investigate and take judicial decisions that may raise questions about his/her ability to act with complete neutrality. In addition, there is no clear definition of tasks as between the investigating judge, the prosecutor and the judiciary police. [4]

However, jurisprudence, and thus the power of judges, has become more important over recent decades, and under the influence of the institutional European framework represented by the European Convention on Human Rights (ECHR). In 2000, the legislator introduced into the code of criminal procedure a preliminary article setting

1 Preliminary article of the Criminal Procedure Code (*Code de Procedure Pénale*), (CPP).

2 Hodgson 2005, p. 27. Hodgson, J., F*rench criminal justice. A comparative account of the investigation and prosecution of crime in France*, Oxford: Hart Publishing, 2005

3 Hodgson 2005, p. 17.

4 Léger Report 2009, named after Phillipe Léger, drafted by a commission called by the French President to propose a comprehensive reform of criminal proceedings, p. 6-7.

out a list of fundamental defence rights that were directly inspired from the ECHR.[5] The authority of European Court on Human Rights (ECtHR) is also a recent development in criminal law and defence rights, since the *Cour de cassation* applies the ECHR rules and ECtHR decisions,[6] examining all relevant ECtHR decisions in criminal matters within its commission *juridictionnelle*.

Legal culture also strongly varies from one court district to another and depends on the attitude and the practice of local prosecutors and presidents of the local bar (*bâtonniers*). The practice regarding defence rights depends on the acceptance and mobilization of lawyers within the local judicial system. Although training and career development are based on a national centralized framework, all judicial actors operate differently according to the size, location and criminal background of their jurisdiction. For instance, small structures can either facilitate contacts and cooperation between lawyers and magistrates, or give a strong power to a single prosecutor, when he is the only one working at a local court.

Procureurs (Prosecutors) oversee the work of the judicial police. Each local court (*tribunal de grande instance*) has one public prosecutor. Prosecutors are magistrates (*magistrats*) and, as a result, are trained in the same school as judges (*Ecole Nationale de la Magistrature*). Although they specialise in different areas, they follow common courses. Prosecutors are judicial officers and are required to protect the public interest and apply the law.

Prosecutors are accountable to the Ministry of Justice, which has led some commentators to question some of their decisions as being political, or at least subject to political pressure and control from the executive branch. Indeed, lawyers and magistrates have regularly condemned the interference of the Ministry of Justice, or the President of France, in their work.

Until the 1980s, the role of the public prosecutor was mainly to prosecute or to close a criminal case and then to request a trial. During recent decades, they also have had to deal with public policy, judicial urban policies and judicial investigation. Their work has been particularly extended to include alternative procedures to prosecution such as mediation, restoration, guilty pleas and conditional suspension of the prosecution.

Prosecutors have also been given a stronger role in police investigations, both in the preliminary phase and the police report summons. The prosecutor decides which procedure is best adapted to cases received from police officers, according to the nature of the offence. Some cases will be charged as middle ranking criminal cases, instead of serious ones, since the costs of a procedure before a cour d'assises (delays, money and public attention) would be too high in comparison with expected results.

The prosecutor delegates many powers to the judiciary police officer, principally because prosecutors are overworked.[7] Therefore, officers of judicial police (OPJ) and prosecutor assistants (*susbstitut du procureur*) are required to work together.

Example of procedural process:

5 Law of 15 June 2000. The principle of contradictoire is also inspired by the ECHR.

6 See, for example, Crim., 15 May 2002, Bull. crim., No. 114 (reasonable time); Crim., 29 February 2000, Bull. crim., No. 86 (right to appeal); Crim., 27 June 2001, Bull. crim., No. 164.

7 See Hodgson 2005; Mouhanna 2004. Mouhanna, C., 'Les relations police-parquet en France: un partenariat mis en cause?', Droit et Société, 2004, p. 505-520.

When someone is mugged in the street, and file a report with the police, the prosecutor decides how to qualify the suspected or observed offence. Depending on the severity of the offence, it is either a minor crime (called "*délit*") or a serious crime (called "*crime*"). In case of a minor crime, the investigation will be under the direction of the prosecutor, and in case of serious crime the investigating judge will be in charge. In both procedures, the practical investigation will be done by judicial police officers (seldom by gendarmerie officers).

The other main actors of the criminal justice system are the judges, who are constitutionally independent. The *Conseil supérieur de la magistrature* is in charge of the independence by assisting the French President. On the one hand, there are the judges sitting in the court (*Juge du siège*) who conduct trials and read judgments. On the other hand, the investigating judge (*Juge d'instruction*) conducts the proceedings when the prosecution phase has begun. The French President announced in January 2009 his intention to abolish the investigating judge, leading to almost immediate opposition from all justice professionals.

1. 2. Brief description of the police and the penitentiary system

1.2.1. Police forces

In most cases, in large urban areas complaints have to be made and recorded by the Police Nationale (National Police), whereas the Gendarmerie covers small cities and the countryside. The Gendarmes are members of the army, supervised by the Ministry of Defence. A third force is the municipal police, which operates under the authority of the Mayor and only has administrative functions. The National Police is a larger force, and is sometimes considered more professional, whereas the Gendarmes operate more locally and are considered to be non-political. There are tensions and mutual distrust between members of the National Police and Gendarmes, as they often compete for cases.[8]

In 2016, there are around 144,000 persons working for the National Police: 128,000 of them working 'in the field' and the remainder (11 %) working on administrative, technical and scientific projects.[9] There are 100,000 gendarmes and 20,000 municipal policemen.

Both the National Police and the Gendarmes have two distinct functions: administrative and judicial. The administrative role is preventative and the judicial role relates to criminal investigations. There are obvious overlaps between the two roles; for instance, where a police officer is on street patrol (administrative part of his/her duties) and witnesses a crime (judicial part of his/her duties). The role of police officers is defined by the law of 21 January 1995, art. 4. These are the 'fight against urban violence, petty delinquency and traffic-road insecurity; control of illegal immigration and the fight against employment of illegal aliens; the fight against drug, organised and white-collar crime; protection of the country against terrorism and maintaining public order'.

A difficulty with this distinction is that supervision of the National Police is done through a different hierarchy, depending on the function. In its administrative capacity, the National Police is supervised by the Ministry of the Interior, which has led to claims

8 Hodgson 2005, p. 86-89

9 For a detailed analysis of policemen's profile, see Pruvost 2009. Pruvost, G., 'Les conditions de vie et d'emploi des policiers en 2003. Enquête sociodémographique', *Questions Pénales*, 2009.

of undue interference from politicians on this aspect of the police work. In their judicial capacity, the National Police answer to the Ministry of Justice. In this capacity, 'the judicial police are charged with the task of discovering violations of the criminal law, of gathering evidence of such violations and of identifying their perpetrators'. Officers of the judicial police detect and track crime, gather evidence, fulfil investigations and proceed to coercive measures, such as search, arrest, hearings, etc.

The *gendarmerie nationale* is part of the army and under the control of the Ministry of Defence, although it's at the service of the Interior Ministry. They deal with serious crime on a national scale at the national headquarters, with general law and order in rural areas and are responsible for motorway patrols, air safety, mountain rescue, and air and coastal patrols. Gendarmes include police motorcyclists, who patrol in pairs. The 3,600 brigades of gendarmes are to be linked into groups of three or four to improve law enforcement in rural areas.

The *Compagnies R*épublicaines de *S*écurité (CRS) is often referred to as the riot police, as it's responsible for crowd control and public disturbances, although it also has other duties, including life-saving on beaches in summer.

In addition to the three kinds of police mentioned above, most cities and medium-size towns have a municipal police (*police municipale*), which deals mainly with petty crime, traffic offences and road accidents, and there's a general movement in favour of 'neighbourhood policing' (îlotage) throughout France. While officers of the *gendarmerie*, the national police and the CRS are armed, municipal policemen aren't, unless the local administrative authorities decide that they should be, which is more and more often the case.

The police can hold someone in custody for 24 hours, although s/he is entitled to see a lawyer within the first hour of arrest. After 24 hours they need the authority of a magistrate. If the offence under investigation involves state security (e.g. terrorism), two further 48-hour extensions can be granted, making a total of five days. If someone is accused of a serious offence, such as possession of, or trafficking drugs, it may be difficult to obtain bail. At the end of the custody, the prosecutor has five options: to close the case (classement), to propose a médiation pénale (guilty plea), to give the suspect a return date for court (citation directe), to impose an expedited hearing for trial on that day (comparution immédiate), or to pass the case to the investigating judge. The placement in pre-trial detention is decided by the Judge of Liberties and Detention (juge des libertés et de la detention) after a request of the investigating judge.

The police don't prosecute criminal cases in France, which is done by a public prosecutor. Police can fine offenders (and do so, particularly if they're non-residents) on the spot for motoring offences such as speeding and drunken driving, and fines must be paid in cash. People are entitled to ask the name and particulars of any policeman who stop them.

1.2.2. Penitentiary system

On 1st January 2016, there were 187 prisons in France, including 86 remand prisons, in which 76,601 persons were under the responsibility of prison administration.[10] This was an increase of 25% since 2007. There were 18,158 remand inmates (23% of the total), 49,014 sentenced inmates, and 9,429 persons sentenced to electronic monitoring (+ 200 % compared to 2007). French prisons are vastly overcrowded with the number of prisoners exceeding the number of places by over 10,000 and this could not even be avoided by placing thousands of persons under electronic monitoring.

The structure of the prison population in France is very similar to the structure in other Western countries. Women and juveniles (01.01.2016) only represent 3 % and 1 %, respectively, of all detained persons, and the average age of prisoners continuously approaches 35 years over the last decade.

1. 3. Description of legal provisions regulating official misconduct

As to legal provisions regulating official misconduct, the first text to consider is the article 222-13 of criminal code:

"Violence that have caused a incapacity for work less or equal to eight days,[11] or without any incapacity for work,[12] are [can be] punished with a three year imprisonment sentence and [/or] a fine up to 45,000 euros when violence have been perpetuated as follow:

- Against a juvenile aged less than 15 years old
- Against a particularly vulnerable person due to age, health condition, handicap, physical or psychical disability
- Against a family member
- Against a magistrate [...], a police officer, a prison officer [...]
- Against a witness or a third party in a criminal procedure preventing him/her to lodge a complaint
- Because of real or supposed belonging to an ethnic, national, race or religious group
- Because of the victim sexual orientation or identity

Al. 7: by a person in charge of public authority in the frame of his/her duty

In some circumstances, i.e. cumulating two of items listed in article 222-13 (e.g. committed in a gang, al. 8), the sentence goes up to five years imprisonment and 75,000 euros fine.[13]

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10 Most numbers and figures about French prisons are issued by the Ministry of Justice (www.justice;gouv.fr) in two publications: the monthly *Statistique mensuelle de la population écrouée et détenue en France* and the annual *Chiffres clés: l'administration pénitentiaire en chiffres*.

11 Over 8 days of incapacity, the sentence goes up to five years imprisonment and 75,000 euros fine, article 222-12 of criminal code.

12 Such as assault and wounding with a weapon, indecent assault, etc. These offences are gradually punished according to the degree of violence and prejudice.

13 In principle, it does not matter whether it was committed by an official or a civilian, the primary penal sentence will be the same.

1.3.1. Ill-treatment by the police

There is no academic research on this issue. Only a few studies have assessed ill-treatment by police, but rather on a political and theoretical than on a case-based, quantitative and longitudinal approach.[14]

A complaint against police or prison officers can be lodged up to three years after they occurred (after they are prescribed). Such rights violations can be:

- Physical or verbal violence
- Excessive length of detention during police hearing (*garde à vue*, GAV) without no reasonable ground[15]
- Pressure by police officers during the GAV to obtain biased testimony
- Systematic complaint by officers on the ground of "contempt of cop"[16] in order to justify ill-treatment because of the alleged victim´s violence
- Quasi-systematic closing of victims´ complaints by prosecution services (= closing the case)
- Both victims and police officers´ complaints are rarely heard during a joint hearing before the court, so that the judge can´t provide a satisfying contradictory procedure.

1.3.1.1. General inspection of the national police (IGPN)[17]

After a reorganisation of services in 2013, the current general inspection of the national police (IGPN) has around 100 inspectors dispatched in eight delegations over the French territory. The General inspection of the national gendarmerie (IGGN)[18] has 80 inspectors all based in Paris. Both inspections can conduct administrative (then disciplinary) and judicial inquiries. If based on its investigations the IGPN and the IGGN come to the conclusion that a disciplinary procedure must be initiated, they contact the relevant police/Gendarmerie units. Judicial inquiries are initiated by a prosecutor. In case the violation by an officer amounts to a criminal offence, then the investigation of that offence is done by the IGPN/IGGN under the supervision of the prosecutor. And if the offence is a severe criminal one, an investigating judge will be in charge with possibly the IGPN/IGGN under his/her lead.

The IGPN is a service with national competency in charge of controlling all directions and services of the national and Paris police. The IGPN has mainly three missions:

- Expected and non-expected visits and inspections on particular issues
- Studies and recommendations in order to improve the functioning of services
- Guarantee that police officers respect laws, rules and deontology code. For this purpose, the IGPN conduct investigations for administrative and judicial authorities.

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14 See for instance Jobard, F., 2002, *Bavures policières ? La force publique et ses usages*, La Découverte.

15 Art. 63 ff. CPP

16 Articles 433-5 and 433-6 Criminal code.

17 Inspection générale de la police nationale

18 Inspection générale de la gendarmerie nationale

The IGPN has seven regional delegations in Bordeaux, Lille, Lyon, Marseille, Metz, Paris and Rennes, and one office in Nice, all conducting investigations.

IGPN and IGGN can be contacted by police or gendarmerie authorities, by judicial authority or by citizens. Citizens can contact an inspection by sending a mail (post or internet), or through a dedicated website, [19] or by going personally to an IGPN regional delegation. In 2014, the IGPN has received 5,178 complaints from citizens: 61% on the website, 23% at a delegation office and 16% per post letter.[20] In 2013, the IGGN has received 252 mails.[21]

Complaints are filtered and then transmitted to the investigation office if a deeper analysis is considered necessary. As a result, only 32 complaints have led to an investigation by the IGPN, which represents only 0.6% of all 2014 complaints. The IGGN doesn´t provide any figures on investigations but it admits that citizen complaints rarely end with an investigation. Both inspections explain this very small numbers of investigation because of complaints that don´t fall under the inspections´ scope of responsibility.[22]

Even if the deontology code of the national police and the gendarmerie imposes all officers to report any ill-treatment they witness, a strong corporatism weaken this obligation. The CNDS[23] has reported that "a group spirit bring officers to be solidary among each other's and to homogenise their testimonies, taking the risk to cover illegals acts committed by colleagues". [24]

The public image of the inspection authorities IGPN and IGGN is strongly criticised and citizens lack of trust as to their independency towards their police and gendarmerie colleagues. According to the researcher Cedric Moreau de Bellaing, "without absolutely unquestionable elements, an inspector will give more credibility to the testimony of a colleague than to the testimony of an applicant". [25]

An unpublished 2010 report of the Finance Higher Court, released by a weekly magazine, mentioned strong dysfunction inside the IGPN and the IGS. The report tackled the impartiality of these two institutions: "contrary to some other European inspection institutions, they are both under the direct authority of the head of all police forces that are in their investigation scope". One issue is that inspectors of the IGPN and IGGN are employed by the police, even if they are attached to the Ministry of Justice. They have a police officer status. Chief inspectors are former commissars and other inspectors are former police officers. The Court criticised the absence of external intervention in the process of control and concluded that "without any reform conducting to more transparency, the relevance of such an internal control is uncertain, especially in the light of European independent institutions". [26] The same questions and critics apply also to the IGGN.

The SDSE (*service de déontologie et de soutien aux effectifs*) is an autonomous investigation service related to the Paris jurisdiction, in charge of facts linked to all officers working

19 The website of the IGPN has been installed in September 2013, and the one of the IGGN in 2014.

20 IGPN, Annual report 2014, p. 6

21 IGGN, Annual report 2013, p. 14

22 ACAT, p. 66. There is no information on what types of complaints those are and under whose responsibility they would fall.

23 *Commission nationale de la déontologie de la sécurité*. Independent authority created in 2000 and replaced in 2011 by the Défenseur des Droits.

24 CNDS, Activity report 2004, p. 13

25 Moreau de Bellaing Cédric « Violences illégitimes et publicité de l'action policière », *Politix* 3/2009 (n° 87), pp. 119-141.

26 « La police des polices épinglée par la Cour des comptes », L'Express, 17 January 2012

in Paris for ill-treatment leading to an incapacity for work under 8 days (more than 8 days: see IGPN).

1.3.1.2. Ill-treatment by the penitentiary

There is no general, systematic available data on ill-treatment committed by prison officers.

As some prison directors indicated us during this study, the central prison administration communicated some years ago – only for internal purposes and not released for the public – on the numbers of prison officers who had been disciplinary sanctioned. But in the last years, even prison directors and head officers don´t receive this type of data on their internal professional mail box.

As to internal rules, there is since 2010 a code of deontology[27] that has been drafted as a by-law (*décret*) and applies for disciplinary sanctions.[28] As to ill-treatment, article 12 of the code stipulates that "prison officers can use force only in circumstances and limits set by laws and internal rules". Article 13 obliges prison officers to intervene and inform their hierarchy if they witness wrong behaviours. If ill-treatment are observed, they have to be communicated to the prosecutor.

During this study, prison directors reported that there is a trend showing a decrease of disciplinary suspensions because prison authorities await for judicial (penal) judgments before they take any disciplinary decisions. Since such judicial procedures can take sometimes more than one year before a court decision falls, prison officers accused of ill-treatment remain in duty, sometimes even in the same prison.

1. 4. Brief outline of the mechanisms for dealing with ill-treatment and torture

1.4.1. Complaint procedures

The law obliges any police or gendarmerie officer to register any complaint concerning an offence. [29] Nevertheless, it is quite pointless to lodge a complaint at the police or gendarmerie station. Usually, police officers won´t even register the complaint against theirs colleagues, and even if they do so, they won´t communicate it to their hierarchy or to the prosecutor, so that the complaint will remain in a complaint registration book without any follow-up.[30] It is of course an abuse of official power and disciplinary sanctions could be taken, but there is not data available on this abuse and possible disciplinary sanctions

Repeatedly, the CNDS and then the *Défenseur des droits* have criticised this situation (see more about this institution under 1.5).[31] In 2010 and for the tenth year in a row, the CNDS has reported on police officers refusing to register complaints against other police

27 https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023333257&categorieLien=id

28 Décret n° 2010-1711 du 30 décembre 2010 portant code de déontologie du service public pénitentiaire.

29 Art. 15-3 CPP

30 Moreau de Bellaing Cédric « Violences illégitimes et publicité de l'action policière », Politix 3/2009 (N° 87), pp. 119-141.

31 http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-mds-2016-040-du-17-fevrier-2016-relative

officers.[32] Several lawyers contacted by the ACAT have dealt with similar cases and they advise their clients to lodge their complaint directly by the prosecutions services in order to avoid useless procedures at the police station.[33]

Accordingly, a person victim of ill-treatment by the police should send directly a complaint per post to the prosecution services. In cases where prosecution services are commonly known to classify the complaint without any investigation, the victim should constitute itself as third party (*partie civile*) by the local court.[34] This complaint as partie civile is written by a lawyer and the applicant must provide a bail of around 1,000€. Even if legal aid can help to pay this bail, the complexity and costs of the procedure 'partie civile' stop many victims from doing it.

1.4.2. Disciplinary procedures

We present here some selected elements of the general disciplinary procedure applying for police, gendarmerie and prison officers. According to By-law N° 84-961 of 25 October 1984 on disciplinary procedure concerning State civil servants[35], In the case of a disciplinary procedure launched against a civil servant, the administrative authority[36] must inform the person of his/her rights to obtain all pieces of his/her case and to be assisted by any person of his/her choice to be his/her legal defence. The procedure will be conducted in front of the disciplinary council. The disciplinary council, when its advice is needed, is contacted through a report drafted by the disciplinary authority. The accused employee can provide written or oral observations before the disciplinary council, with the help of witnesses and his/her legal defence. Witnesses can also be presented by the administrative authority. The accused employee is then invited by the president of the disciplinary council 15 days prior to the hearing. The hearing can be postponed by the employee or his/her defence only one time. The disciplinary council takes then its decision without any audience. If the disciplinary council considers that it hasn´t enough information on the case, it can order an investigation. The disciplinary council gives its advice on the follow-up of the disciplinary procedure. The president of the council proposes to its members to vote on the harshest sanction discussed during the decision-making. Potential sanctions are for example a temporary (max. 2 months) or permanent exclusion of the service, or a transfer from one service to another.[37] If this proposition is not accepted by the majority of the present council members, there is a vote on the possible other sanctions, starting with the more severe one. The voted proposition must be reasoned and sent to the disciplinary authority. If the disciplinary authority takes another decision than the one proposed by the disciplinary council, the authority must inform the council on the reasons it hasn´t followed its proposition. When there is a judicial procedure against the accused employee, the disciplinary council can propose to suspend

32 See for instance CNDS, Avis 2008-44, 2008-88, 2008-120, 2009-48, 2009-155 and 2010-10 ; Défenseur des droits, Annual report 2011, p. 129

33 ACAT 2016, p. 74

34 See II/2.6.1.

35 Also completed with by-law N° 83-634 of 13 July 1983 on rights and duties of civil servants, especially its article 19 [on disciplinary procedures].

36 The Ministry of Interior is conducting these proceedings in the case of police officers or Gendarmes.

37 Décret n°84-961 du 25 octobre 1984 relatif à la procédure disciplinaire concernant les fonctionnaires de l'Etat.

the disciplinary procedure until the court takes a decision. There is the possibility to contact the appeal commission of the Supreme council of the State public service to challenge the sanction.

1.4.3. I.4.3. Criminal proceedings

Depending on how serious ill-treatment is evaluated by the prosecutor, it might be investigated as a "*crime*" (serious offence) or as a "*délit*" (less serious offence). *Crimes* can be punished up to life imprisonment where *délits* are sentenced to a maximum of 10 years (general maximums).[38] *Crimes* are investigated by an investigating judge, *délits* are investigated by prosecutions services. Judicial police investigates police violations as it does for other criminal offence, with no interference with the investigations of the IGPN and the IGGN since criminal investigations are conducted under the authority of the prosecutor or the investigating judge, whereas disciplinary investigations are under the authority of administrative authorities. IGPN and IGGN come into play before and/ or after a decision of the disciplinary council, according on the complexity of the case. Judicial police officers work with the prosecution services and the investigating judge. *Crimes* are brought to a Cour d´assises (three professional judges with a jury of nine persons) whereas *délits* are brought to a tribunal correctionnel (only professional judges).

1.4.4. Civil actions

The Civil Code provides that every person is responsible of his/her acts and has to compensate any damage caused.[39]

1.4.5. Exclusion of evidence

A piece of evidence is not admitted if it has been gathered by fraud or other[40]

1. 5. Special oversight institution

1.5.1. The Ombudsperson

In cases of ill-treatment by police or prison officers, the competent institution since 2011 is the *Défenseur des droits* (Rights´ defender). This institution has replaced several administrative authorities, among others the *Commission nationale de déontologie de la sécurité* (CNDS). According to its task "Deontology of security", this young institution is in charge of "insuring the respect of professional deontology rules from persons dealing with security issues" (national police, local police, gendarmerie, boarders, prison, etc.…).

The Défenseur can be contacted by anyone victim of ill-treatment, and by the victims´ relatives, by a witness, a member of the French parliament or a similar foreign institution. The Défenseur can also initiate itself an investigation if needed, which is the case in practice[41].

38 Article 131 penal code.

39 Articles 1382-1386 of the Civil Code. There might be cases in which damage was claimed and granted, but no information has been found on this issue.

40 Highest Civil and Penal Court (Cour de Cassation), 7 October 2004.

41 http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/investigation; and recently in May 2016: http://www.liberation.fr/france/2016/05/30/le-defenseur-des-droits-ouvre-une-enquete-sur-la-blessure-d-un-homme-lors-d-une-manifestation-a-pari_1456101

Once a case has been opened, the Défenseur conducts an investigation and pronounces advices. The Défenseur can hear victims, witnesses, accused officers or their hierarchy, and can ask to receive any type of information and documents. In principle, it is binding to provide any type of information requested by the Défenseur. Once the investigation is achieved and concludes to ill-treatment, the Défenseur can recommend to the competent authority to proceed to disciplinary measures against the accused officer, but s/he cannot initiate a criminal procedure.

The Défenseur can also give its advice on general issues and provide appropriate recommendations. However, these advices and recommendations are not binding for the concerned authorities. The Défenseur has no power of sanction and is not part of the judicial or disciplinary procedure. Since advices and recommendations are made public and available on its website,[42] there is still a certain medial power of the Défenseur.

As to its activities, the section in charge of deontology of security is composed of some ten employees with a total workload of 461 cases,[43] and therefore behind deadlines to investigate on due time all cases as it shall be. In 2014, the Défenseur has received 702 complaints regarding deontology of security. The two main grounds of complaint are ill-treatments (27.6%) and verbal violence (15.1%). Among accused persons, every second one is a police officer from the national police (50%), every fifth is a prison officer (22%) and gendarmes are mentioned in 15% of the complaints. [44]

During its first years of functioning, the former CNDS has faced many obstructions against its activities. [45] Even if things have positively changed over the years, the CNDS still encountered difficulties after a decade in service. Several types of issues were pointed out:

- Authorities took too long time to answers to the CNDS / Defenseur´s requests
- Authorities didn´t even answer to the CNDS / Defenseur´s requests
- Authorities refused to communicate information or documents
- Officers didn´t come to hearings

In one famous case (among others) concerning the death of Mr Ali Ziri, the CNDS requested three times some documents, especially the medical certificate, but never got any answer and was then obliged to stop and closed its investigation.

According to the 2016 ACAT report, the Défenseur also estimates that there are positive changes since its institution developed a better dialogue and communication with administrative authorities.

One major obstacle remains the cooperation with the judicial authorities. If a prosecutor has opened a procedure on a case, the Défenseur must ask him/her for authorization in order to investigate on the case, which can take very long time, as in the case of migrants in Calais in which the prosecutor communicated documents within excessive delay or eventually not at all. [46]

42 http://www.defenseurdesdroits.fr/

43 Situation in April 2015.

44 Défenseur des droits, Annual activity report 2014, p. 20

45 CNDS, Bilan des six premières années d'activités, 2001-2006.

46 Regarding the attitude towards migrants in Calais (North of France).

Another difficulty is how far Défenseur´s advices and recommendations are taken into account by administrative authorities. In 2005 for instance, the former CNDS indicated on the one hand that its general recommendations were followed by internal instructions within the concerned administrations, but on the other hand that its recommendations on disciplinary measures were rarely applied. [47] This seems to be still the case today according to informal declarations of a Défenseur ´s team member.

The ACAT reports points out that even in cases in which disciplinary sanctions have been taken, following here the Défenseur´s recommendation, there were very light compared to the seriousness of the ill-treatment. [48]

The CNDS and after it the Défenseur have criticised many times the fact that administrative authorities often decide to wait, in order to take disciplinary measures, until a judicial authority has taken a decision regarding the accused officer, [49] even if disciplinary and judicial procedures are independent from each other and that administrative authorities can impose disciplinary sanctions without waiting for any court judgment. The CNDS indicated in 2005 that "in cases were the reality of the facts is not doubtful, administrative sanction shall be taken without any delay". [50] In 2001, the Défenseur repeated the same statement, and the Minister of Interior [51] declared that he would "guarantee that the strict independency between administrative and judicial procedures is applied" and he would take provisory measures in most serious cases, such as sending an officer to another service. [52] According to ACAT, there was no evidence that such commitments have been fulfilled.[53]

2. Experience of police and prison ill-treatment in the French jurisdiction

2. 1. Statistical data

The IGPN decided in an internal email sent to at all police central administrations in April 2016 that the Ministry of Interior foresees to create a statistic instrument in order to quantify ill-treatment committed by police officers. This decision would be in the right direction. [54] The daily newspaper *Le Monde* quotes that this "tool would review serious and importance ill-treatment and persons´ death that happened during or as a consequence of national police´s interventions".

This tool will be directly managed by the IGPN – also called in France the 'police of polices' – and will be used in "real time" by police services "as soon as they receive [a

47 CNDS, Activity report 2009, p. 65

48 2016, pp. 69-70.

49 CNDS, Bilan des six premières années d'activités, 2001-2006, p. 22

50 CNDS, Activity report 2005, p. 13

51 M. Manuel Valls, Prime Minister in 2016.

52 Défenseur des Droits, annual report 2012, p. 22

53 2016, p. 72.

54 No official copy of this document available (yet at 19 April 2016), only copy published by the daily newspaper *Le Monde* (7 April 2016): http://www.lemonde.fr/police-justice/article/2016/04/07/la-police-va-enfin-recenser-les-cas-de-violences-policieres_4897384_1653578.html

certificate indicating] a total incapacity for work equal or more than twenty days, or as they receive a complaint [...], or after the opening of a police investigation". The email was send with an attached document to fulfil. The competent service shall indicate the date and the place of ill-treatment, the context (riot order, terrorism, other activities), the used weapon (if any) and the consequences (from injuries up to death).

This tool "aims at creating transparency" and providing data that can be communicated to external purposes. These data shall "fight the general impression that serious or important injuries as well as death are [necessarily] the result of an illegitimate use of force or weapons".

Even if some NGOS as ACAT are satisfied with this first step towards more transparency, the scope of this tool is quite narrow since it deals with incapacity for work equal or more than twenty days, which represents only a minority of all ill-treatment assessed. As an example, a punch is estimated with eight day for work incapacity, a broken wrist three days or cranial traumata ten days, and most severe cases selected by ACAT in their report are under these twenty days of incapacity for work.[55] These numbers of days are issued from real cases reported by ACAT. The assessment of the number of days with incapacity for work is made by any type of doctor (general or specialised practitioner working as an employee or in her/his own practice).[56]

Furthermore, published data might be underestimated regarding real facts. As an example, the joint report released by the IGPN and the IGGN after the death of a young man in October 2014[57] minimise the number of victims during actions of riot order. A figure called "cases of serious injuries observed over the last ten years during actions of riot order" present numbers that are much reduced compared to those registered by ACAT.[58]

The only available data on the number of the complaints are communicated by the Défenseur des droits, by the IGPN and the IGGN. In 2014, half of the complaints received by the Défenseur were concerning national police officers, 15% the gendarmerie and 4.7% municipal police. [59]

In 2014, the IGPN dealt with 1,035 judicial investigations and 257 administrative investigations concerning police officers. 43% concerned ill-treatment.[60] In 2013, the IGGN dealt with 252 complaints concerning breaches to the deontology by gendarmes.

Another important data source comes from the medical-judicial unit of one important hospital in Paris (Hôtel-Dieu), that also provides information to victims on how to

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55 http://www.lefigaro.fr/actualite-france/2016/04/07/01016-20160407ARTFIG00252-un-outil-mis-en-place-pour-recenser-les-violences-policieres.php

56 http://www.has-sante.fr/portail/upload/docs/application/pdf/2012-01/reco2clics_certificat_medical_initial_personne_victime_violences.pdf

57 Mr. Rémi Fraisse, 21 years old.

58 IGPN and IGGN, Rapport relatif à l'emploi des munitions en opérations de maintien de l'ordre, 13 November 2014, p. 23.

59 Défenseur des droits, Bilan annuel d'activité 2014, p. 20. The other complaints concern prison services (22.20 %), private security sector (3.60 %), surveillance in public transports (1.80 %).

60 IGPN, Annual report 2014, p. 9

complaint[61], explained that in 2006, among the 50,000 medical examinations done, half of them concerned persons placed in police custody. Among these ones, 2,500 explained that they were victims of ill-treatment (e.g. handcuffs are too tight).[62]

2.1.1. Statistical information on the number of reports and the outcome of the investigation into complaints of ill-treatment and torture

There is a lack of transparency on disciplinary issues. As the Défenseur communicated in 2015, "we lack data on imposed sanctions and on the nature of sanctioned facts following our recommendations: authorities answer us that there is no central collection of these data, neither by inspection services nor by the Ministry of Interior. For the sake of transparency, it shall be compulsory to know which sanctions are imposed on police, military of gendarmerie forces and for which facts". [63]

When they are contacted, IGPN and IGGN can propose, at the end of an administrative investigation either:
- to close the case when no ill-treatment has been found, or
- to take sanctions of "low intensity" (reprimand, warning, traineeship, lecture of the rules, etc.),
- to bring the case before a disciplinary council when facts are more serious.

There is no data available on the number of disciplinary sanctions.

There is also only partial information on decisions taken by the inspection services. In 2014, the IGPN has dealt with 1,035 judicial investigations and 257 administrative investigations. Knowing that 43% of judicial investigations were conducted on facts with voluntary use of violence, there is no data on the number of administrative investigations conducted on facts with disproportionate use of force.

In 2014, the IGPN has observed 668 breaches concerning 289 officers. Regarding all administrative investigations, the IGPN has proposed:

- 78 reprimands
- 47 warnings
- 4 to be sent before a joint consultative council [where both employees and employer are represented]
- 81 to be sent before a disciplinary council
- 79 closing
- As the IGPN has informed the ACAT, 35 administrative investigations were on disproportionate use of force concerning 38 officers.[64] In these cases, the IGPN has proposed:
- 6 reprimands

61 http://www.urgences-serveur.fr/information-aux-victimes,1049.html

62 Council of 'Europe, Report of the French government after the CPT visit made from 27 September till 9 October 2006, p. 13

63 Défenseur des droits, Opinion 15-06, 16 April 2015

64 2016, p. 68.

- 4 warnings
- 11 to be sent before a disciplinary council
- 14 closing (40 % of the total)

But the IGPN annual report doesn´t indicate to which facts are linked these propositions of sanction.

As to the IGGN, there is even less data. The 2013 annual report – the only one over many years that has been released public – doesn´t provide clear information on these issues. It is only mentioned that the service of administrative investigation has been contacted 18 times, without indicating which facts they concern and what sanctions have been proposed by the inspection services.

2.1.2. Success rate of investigations

There is no available data on success rate of prosecution.

One piece of documentation is the research conducted by the sociologist Cédric Moreau de Bellaing on the 1996-2001 reports of the General Inspection of Services (IGS).[65] One of his results showed that administrative authorities are not severe regarding ill-treatment.

It´s a paradox but ill-treatment are less often sanctioned and are less severe sanctioned than other types of breaches of professional duties. According to M. Moreau de Bellaing, "the Ministry of Interior is much more severe on breaches of internal rules than on police violence. Police violence as an investigated fact represents less than 5% of all disciplinary sanctions imposed in the police territory of Paris". Another specialist of police forces draws the same picture: "studies show that sanctions taken against police officers are inversed proportional to the seriousness of the investigated fact. Thus, police officers have a higher risk to be sanctioned for, for instance, losing their professional card than for illegitimate violence".[66] A third observer of police practices wrote that "like all other administrations, police seems to pay more attention to the respect of its internal rule of functioning rather than to the treatment of its clients".[67]

An investigative daily newspaper wrote that "the scale of sanctions is sometimes surprising. A wrongful use of the petrol card for the tanks of duty cars and the theft of a mobile phone are sanctioned with a two-year-exclusion of the service, whereas two cases of ill-treatment are sanctioned with a one-year-exclusion (plus one year suspended). And as to dismissals and compulsory retirements that have be decided (N = 10), none seems to be resulting from ill-treatment".[68]

Accordingly, an IGPN report indicated that out of 40 investigations concerning breaches of deontology, 20 were proposed to be sent to a disciplinary council. It is stated that "a breach of deontology is a serious breach of trust given by authorities and citizens to police

65 Moreau de Bellaing Cédric « Violences illégitimes et publicité de l'action policière », *Politix* 3/2009 (N° 87), pp. 119-141

66 Jobard Fabien, « *Police et usage de la force* ». Notice de dictionnaire en ligne sur l'usage de la force par la police, 29 September 2010.

67 ACAT 2016, p. 18

68 « Les policiers sont sanctionnés... rarement pour des violences », *Médiapart*, 8 June 2012

officers, for that reason, in the majority of cases, accused officers are sent to disciplinary council". [69] In total, one-fourth of all cases proposed to be sent to disciplinary councils by IGPN concerned breaches of deontology. According to Cédric Moreau de Bellaing, the cases that have been dealt by disciplinary councils are mostly cases concerning facts committed out of duty (69%), whereas the majority of complaints concerns facts committed during duty (73%).

2.1.3. Number of perpetrators and sanctions for ill-treatment

The French government declared before the United Nations Committee against Torture in 2008 that "as soon as complaints on verbal or physical violence is communicated to authorities, a deepen investigation is conducted, and any observed breach is administratively sanctioned, without influencing a possible judicial sanction [...]. These sanctions are strictly enforced as soon as a breach of professional duties is established. ."[70]

However, there are no reliable data to be convinced by this official statement. The IGPN 2014 annual report indicates that administrative authorities have taken 2,098 disciplinary sanctions regarding national police officers (all types of facts):

- 826 reprimands
- 989 warnings
- 146 sanctions of the 2nd group (e.g.: temporary exclusion under 15 days, grade lowering)
- 9 sanctions of the 3rd group (e.g.: temporary exclusion from 16 days up to 2 years demote)
- 63 sanctions of the 4th group (e.g.: dismissal).[71]

Still, these data don´t allow to really evaluate the disciplinary follow-up of cases in which there is an illegal use of force. Since there is no data on how many cases are related to the use of force and to which facts sanctions are linked, it is no possible to evaluate their proportionality.

As already observed before, there is no data from the IGGN: neither the number of facts nor the number of proposed sanctions, nor the severity of these sanctions with regard to the facts.

2.1.4. Court decisions

As already mentioned before, many cases are closed by prosecutors without prior investigation based on the principle of opportunity to investigate or not a case.[72] Prosecutors are free to decide to investigate, to reprimand the accused person or to close the case. [73] There is no data available enabling any comparison between the rates of

69 IGPN, 2014 Activity report, p. 13

70 Fourth to sixth reports of France to the UN Committe against Torture, CAT/C/FRA/4-6, 30 June 2008, p. 10

71 IGPN, Annual report 2014, p. 14

72 Art. 40-1 CPP

73 Articles 40 and 40-1 CPP

closed cases in cases of violence where police officers are accused and where there is no police officer involved.

In the ACAT report, some magistrates consider that complaints based on ill-treatment by police officers are more often closed than other types of offences,[74] which is also criticised by the researcher Fabien Jobard.[75] In many cases observed by ACAT, victims had to constitute themselves as third party (*partie civile*) to the court because prosecution services had closed their case.

The United Nations Committee against Torture has criticised several times this "principle of opportunity" held by prosecutors since they are not even obliged to investigate the case. French authorities consider though that victims still have the possibility to complaint against the decision to close the case or to become third party, and that the statutes of French prosecutors guarantee their objectivity.[76]

If there is no public data available on dismissed cases and discharged judgments, French authorities has communicated some figures to the UN Committee against Torture: in 2006, 76 sentences have been pronounced for cases of ill-treatment committed by official persons.[77]

This lack of public, yearly published data has been criticised over the last years. [78]

As to sentences by court decision, the few cases analysed by ACAT show that they are rarely proportionate to the seriousness of the offence, and don´t go beyond suspended prison sentences, are not registered in criminal records and are not combined with an interdiction of work as a police or prison officer.[79]

2.1.4.1. Some Decisions of the European Court of Human Rights

*Case **Darraj v. France** (2010)*[80]

A juvenile has suffered ill-treatment (fracture of testicle) in police custody committed by two police officers. They had been sentenced in first instance to respectively four and eight months of suspended imprisonment, but the appeal court reduce the sentence to just a fine. Beyond that, there was no disciplinary sanction at all taken against the two police officers. The ECHR considered the investigation as correctly conducted, but "sentences to an eight hundred euros fine can´t be accepted as a proportionate reaction to a violation of article 3 of the Convention. Such a sentence is clearly disproportionate doesn´t present the necessary deterrent effect in order to prevent future violations concerning ill-treatment in difficult situations".[81]

74 2016.

75 Jobard Fabien, « La puissance du doute », *Vacarme* 4/2002 (No. 21), pp. 15-22

76 United Nations, information received by France after the final observations of the Committee against Torture on the fourth till sixth French reports, CAT/C/FRA/CO/4-6/Add. 1, 22 June 2011

77 United Nations, information received by France after the final observations of the Committee against Torture on the fourth till sixth French reports, CAT/C/FRA/4-6, 30 June 2008, p. 23

78 United Nation, finale observation No 31 of the Committee against Torture on the fourth till sixth French reports, CAT/C/ FRA/CO/4-6, 20 May 2010, p. 9.

79 ACAT 2016, p. 86

80 EctHR, No 34588/07.

81 ECtHR, Darraj v. France, 4 November 2010, § 49

Case Rivas v. France (2004)[82]

Violation of article 3. A police officer has hit a juvenile so strong on his testicle that he had to be operated in emergency because a testicular was broken.

Case Douet v. France (2013)[83]

Violation of Article 3 on the fact that the Government have failed to prove that the use of force against the applicant had been both proportionate and necessary, and just satisfaction: EUR 15,000 (non-pecuniary damage) and EUR 7,000 (costs and expenses).

On 27 August 2005, Mr. Douet was driving home at night. His car was stopped by military police officers. 2 military police officers beat him up and arrested him. During his police custody, he was examined by a doctor who found him "unfit for police custody", due to his multiple wounds. Informed of the medical certificate, the prosecutor of the tribunal of Clermont-Ferrand ordered his release from police custody but didn't open any investigation.

On 5 September 2005, Mr Douet pressed criminal charges for "aggravated assault" by filing a complaint to the prosecutor. The prosecutor decided to close the investigation without charging any military police officers. On 22 November 2005, he pressed charges again by filing a complaint to an investigating judge. On 12 December 2007, the investigating judge charged 2 military police officers.

On 3 July 2008, the 2 military police officers were acquitted by the tribunal of Clermont-Ferrand. The prosecutor didn't appeal the acquittal. On 1 April 2009, the appeal court of Riom rejected the civil claim for damages of Mr. Douet. On 8 July 2009, the Supreme Court refused to hear his appeal.

On 10 March 2010, Mr. Douet filed an application to the ECHR on the ground that his beat up by military police officers was a violation of article 3 of the Convention. He added that the fact that he couldn't appeal the acquittal of the 2 military police officers was a violation of article 13. On 29 September 2011, the application was communicated to the agent of the French Republic with questions to be answered within 16 weeks. The applicant is represented by Me Jean-François Canis (Clermont-Ferrand) who didn't answer our email for comments.

The Clermont-Ferrand tribunal de grande instance imposed a suspended sentence of 4 months' imprisonment, suspended his driving licence for 5 months and fined him three hundred euros for having offered violent resistance to the two gendarmes, knowingly failed to obey an order to stop, driven under the influence of alcohol and having failed to stop his vehicle at a stop sign. He appealed and was acquitted of forceful resistance.

*Case **Tomasi v. France** (1992[84])*

The case dealt with pre-trial detention. The applicant was arrested and charged with several criminal offences including murder. The proceedings beginning at the date of the arrest lasted for over five years. Throughout the period the applicant remained in custody despite his numerous appeals. Both the judicial authorities and the public prosecutor delayed the investigations. The applicant also alleges that he was beaten in

82 ECtHR, no. 59584/00

83 ECtHR, no. 16705/10

84 ECtHR, no. 12850/87

jail and physically abused. Four different physicians examined him in days immediately subsequent to the period he spent in police custody, and found evidence of slight physical injuries. The applicant files this suit alleging that violations under Articles: 3, 5(3), and 6(1) of the convention. The Court found for the applicant.

The following case Selmouni v. France shall be more precisely described as it gives a very practical analysis of how ill-treatment is investigated in France.

The ECtHR held that there was a violation of Article 3 of the Convention and a violation of Article 6 § 1 of the Convention on account of the length of the proceedings. The Court held that the respondent State is to pay the applicant, within three months, 500,000 (five hundred thousand) French francs[85] for personal injury and non-pecuniary damage and 113,364 (one hundred and thirteen thousand three hundred and sixty-four) French francs for costs and expenses.

Selmouni v. France (1999)[86]

"Mr Selmouni was first questioned on 26 November 1991 by the police officers against whom he later made a complaint. Having been questioned and taken back to the court cells, Mr Selmouni had a dizzy spell. The court cell officers took him to the casualty department at of a hospital at 3.15 a.m. The medical observations made by the casualty department read as follows:

"[...] Date of examination: 26 November 1991. 3.15 a.m. Attends casualty complaining of assault. On examination, several superficial bruises and injuries found on both arms. Bruises on outer left side of face. Marks of bruising on top of head. Chest pains increase with deep respiration."

After several questioning by the police, on the same day the applicant was brought before the investigating judge, who charged him with offences against the dangerous drugs legislation and remanded him in custody. On Mr Selmouni's first appearance before the investigating judge, the latter, on his own initiative, appointed Dr Garnier, an expert in forensic medicine on the Paris Court of Appeal's panel, to examine Mr Selmouni, "who claim[ed] to have been ill-treated while in police custody".

On 7 December 1991 Dr Garnier, the expert appointed by the investigating judge, examined the applicant at the prison[87]. The conclusion of the report is as follows: "Mr Selmouni states that he was subjected to ill-treatment while in police custody. He presents **lesions of traumatic origin on his skin that were sustained at a time which corresponds to the period of police custody.** These injuries are healing well."

In a judgment of 7 December 1992 a Criminal Court sentenced the applicant to fifteen years' imprisonment and permanent exclusion from French territory and, as to the civil action by the customs authorities, ordered him to pay, an important fine. In a judgment of 16 September 1993 the Paris Court of Appeal reduced the prison sentence to thirteen years and upheld the remainder of the judgment. On 27 June 1994 the Court of Cassation dismissed the applicant's appeal.

85 Around 80,000 euros.

86 EctHR, no. 25803/94

87 First systemic issue: delay. 10 days have gone before Dr Garnier examined the applicant.

On 1 February 1993 the applicant lodged a criminal complaint together with an application to join the criminal proceedings as a civil party with the senior investigating judge at the Bobigny tribunal de grande instance for "assault occasioning actual bodily harm resulting in total incapacity for work for more than eight days; assault and wounding with a weapon (namely a baseball bat); indecent assault; assault occasioning permanent disability (namely the loss of an eye); and rape aided and abetted by two or more accomplices, all of which offences were committed between 25 and 29 November 1991 by police officers in the performance of their duties"[88].

On 22 February 1993, in the proceedings numbered B.92.016.5118/4, **the public prosecutor requested that an investigation be opened into the complaint lodged by Mr Selmouni concerning offences committed by a person or persons unknown of assault and wounding, with a weapon, of a defenceless person and indecent assault**. The complaint lodged by the applicant on 1 February 1993 was registered on 15 March 1993. These new proceedings were given the reference number B.93.074.6000/9.

On 27 April 1993 **the investigating judge** at the Bobigny tribunal de grande instance to whom the case had been allocated, **issued formal instructions to the Director of the National Police Inspectorate to take all necessary steps to establish the truth.** She set 15 June 1993 as the date for filing his reports.

On 9 June 1993 Dr Garnier re-examined Mr Selmouni, at the investigating judge's request. In his report, which he filed on 21 June 1993, he made the following observations: "When I first examined Mr Selmouni, he stated that he had been assaulted while in police custody. The somatic lesions recorded in the previous medical certificate are healing well with no complications. The lesions recorded in the first medical certificate and observed when I prepared my first expert report are traumatic lesions with no serious features (haematomas and bruises) and **necessitate a total incapacity for work of 5 days."**[89]

The investigating judge interviewed the applicant on 14 May 1993, instructed an expert on 9 June 1993 and served the parties with the expert's medical report on 15 September 1993.

In a formal instruction of 8 October 1993 the investigating judge reiterated her request of 27 April 1993 as the 15 June 1993 time-limit for sending in the police inspectorate's reports had not been complied with.[90] She also ordered Mr Selmouni's medical files to be seized at Fresnes Prison Hospital, Fleury-Mérogis Prison and Hôtel-Dieu Hospital.

The investigating judge interviewed the civil parties again on 6 December 1993, after receiving on 2 December 1993 the evidence taken by the police inspectorate on her instructions. On 26 January 1994 a lawyer was officially appointed to represent the applicant under the legal aid scheme.

The civil parties were interviewed again on 10 February 1994, on which date **an identity parade was organised in order to identify the police officers against whom the allegations had been made. Mr Selmouni picked out four police officers from the ten who took part**

88 Second systemic issue: non-action of prosecution services. The prosecutor shall have opened an investigation after Dr Garnier´s report two years ago in December 1991.

89 Again delay issue: medical report done a second time after more than two years.

90 Third issue: non-cooperation of police services.

in the identity parade. With a view to charging the police officers identified by the civil parties, the investigating judge sent the case file to the public prosecutor's office on 1 March 1994.

The public prosecutor referred the case to the Paris Principal Public Prosecutor who, in turn, referred it to the Court of Cassation. In a judgment of 27 April 1994 **the Court of Cassation decided to remove the case from the Bobigny investigating judge and transfer it to a judge of the Versailles tribunal de grande instance, in the interests of the proper administration of justice.** On 21 June 1994 the public prosecutor at the Versailles tribunal de grande instance reopened the investigation, under the reference V.94.172.0178/3, into offences of "assault by public servants occasioning total unfitness for work for more than eight days and sexual assault by several assailants or accomplices, against any persons identified as a result of the investigation".

On 19 September 1995 **Mr Selmouni underwent an operation on his left eye** at Hôtel-Dieu Hospital. In an order of 22 September 1995 the investigating judge appointed an eye specialist, Dr Biard, to examine Mr Selmouni. On 5 January 1996 the medical expert was granted an extension of time in which to file his report. He filed it on 18 January 1996.

On 6 February 1996 the medical report was served on Mr Selmouni, who also gave evidence. He maintained his allegations against the four police officers he had named. On 21 October 1996 **the investigating judge officially informed the five police officers implicated by the applicant that they were being placed under investigation**.The five police officers against whom Mr Selmouni had lodged his complaint were questioned on their first appearance on 10, 24 and 31 January, 28 February and 7 March 1997. They were placed under investigation **for assault by public servants occasioning total unfitness for work for more than eight days**.

On 24 April 1998, in view of the denials by the police officers, who maintained that a "struggle" had ensued when Mr Selmouni was arrested, the investigating judge appointed Dr Garnier as expert again, instructing him to examine all Mr Selmouni's medical files and certificates and give his opinion as to whether the injuries found could have been caused in a "struggle" when he was arrested at approximately 8.30 p.m. on 25 November 1991 or whether they supported the applicant's allegations. On the same day the applicant requested that a number of investigative measures be carried out, including a further confrontation between witnesses and further medical reports in order to determine the damage he had suffered, and an inspection by the judge of the premises on which he had been held in police custody.

On 4 June 1998 a **confrontation was held between the applicant and the four police officers**. He described the part each of them had played while he had been in their custody. Dr Garnier's report was filed on 3 July 1998. The expert concluded his report in the following terms: "An examination of the medical file shows that doctors found a progression of injury marks on the patient's body during the period in police custody. A number of them could certainly have been caused during a 'struggle' when the patient was arrested at approximately 8.30 p.m. on 25 November 1991, as described by the CID officers in question. The injuries, particularly those on the lower limbs and buttocks, which were not seen on the first examination, would certainly have been sustained after that arrest and support the patient's statements".

On 25 August 1998 the investigating judge served notice on Mr Selmouni that the investigation was complete. **The investigation file was sent to the public prosecutor's office** on 15 September 1998. On 19 October 1998 the public prosecutor submitted his written statement of how he wished the investigating judge to proceed with the case. He submitted, inter alia: " … the denials by the police officers concerned do not stand up to examination any more than does their reference to a 'struggle' when effecting the arrest or to forceful resistance during questioning. **The absence of any variation or inconsistency in the statements made by Ahmed Selmouni justifies taking them into consideration. They are, moreover, corroborated by medical findings and therefore amount to sufficient evidence against the five persons in question for the allegations to be examined by the trial court** …"

In an order of 21 October 1998 the investigating judge committed the five police officers in question for trial at the Versailles Criminal Court. In respect of Mr Selmouni's allegations, the judge committed the four police officers concerned for trial at that court on charges of assault occasioning total unfitness for work for less than eight days and indecent assault committed collectively and with violence and coercion.

The trial was held at the Versailles Criminal Court on 5 February 1999.[91] At the end of the trial the public prosecutor requested that one police officer be sentenced to four years' imprisonment and the other ones to three years' imprisonment. In a judgment of 25 March 1999 the Versailles Criminal Court found that "the evidence gathered during the investigation and produced at the trial show[ed] that events [had] indeed occur[red] in the manner described by the victims" and convicted the police officers of the offences charged. **The court considered itself bound to "apply the criminal law in a way that [would] serve as an example to others" and sentenced three police officers to three years' imprisonment**. With regard to the fourth police officer, the court held:

" … in his capacity as Detective Chief Inspector in charge of the group of police officers, he was responsible for the methods used to conduct the investigation under his control and direction. In addition, he had been directly involved in the assault since he had pulled the civil parties' hair. The civil parties had unequivocally identified him as the officer in charge. The Court therefore deems it necessary to punish him more severely for his actions and sentences him to four years' imprisonment. **As he is still in a position of responsibility, it is necessary, as a matter of public policy, that sentence be executed immediately. The Court issues a warrant for his arrest**."

The police officers appealed. In a judgment of 1 July 1999, following hearings on 20 and 21 May 1999, after which one officer was released, the Versailles Court of Appeal acquitted the policemen for lack of evidence on the charge of indecent assault, but held them to be guilty of **"assault and wounding with or under the threat of the use of a weapon, occasioning total incapacity for work for less than eight days by police officers in the course of their duty and without legitimate reason"**. It sentenced one officer to eighteen months' imprisonment, of which fifteen months were suspended, two others to fifteen months' imprisonment suspended and the fourth one to twelve months' imprisonment suspended.[92]

91 Again delay issue: trial starts more than 7 years after the facts.

92 Last issue: only suspended sentences, while minor crimes committed by non-officials are sentenced with firm imprisonment.

2. 2. Description and criticism concerning the legal system and practice plus specific issues

A person held at the police station in the frame of a GAV must be immediately informed by an officer of the judicial police of his following rights:[93] the prosecutor has been informed of the GAV; possibility to communicate with a lawyer during the first hour and the 24th hour of the GAV; access to an interpreter; be examined by a doctor; contact a friend or relative.

2.2.1. Recording of police action

2.2.1.1. Recording of police action in the street

Since the beginning of 2016, there should be around 2,000 body cameras carried by police officers, after 200 have been experimented since 2013. Unfortunately, there is still no legal basis for body cameras as the government has postponed several time a law draft on this issue. Consequently, police officers turn them off and on as they wish and citizens don´t have any constituted legal access to videos.[94]

2.2.1.2. Recording of police action in the police station

There are two procedures for investigations, the Garde à Vue (GAV) and the instruction, which determine who is responsible for the investigation. The two procedures are not mutually exclusive and a suspect may be first dealt with under the GAV procedure and then through the instruction. As will be discussed later, the suspect has different rights under both procedures. The GAV is more oppressive than the instruction since the suspect is kept in police custody, thereby leading some prosecutors to delay as much as possible resorting to the instruction. The instruction is simply the name of the investigation procedure conducted by the investigating judge. The suspect might be restricted in his/her liberty during the instruction when s/he is placed under home arrest.[95]

The GAV is used in almost all cases,[96] when the police investigate a case under the supervision of the prosecutor. The prosecutor is responsible both for the conduct of the investigation and the way in which the GAV is conducted. A police official will make the initial decision to detain someone and subject them to the GAV procedures, but he/she must inform the prosecutor of this decision from the beginning of the GAV. By law, the suspect must be brought before the prosecutor within 20 hours after the start of GAV (or shall be released); if not, the complete proceedings are a nullity, which means that he/she must be released from detention and that information gathered during the GAV cannot be used against him/her.[97]

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93 Article 62-2 ff. CPP

94 http://delinquance.blog.lemonde.fr/2015/10/26/les-cameras-pietons-nen-finissent-plus-detre-generalisee-dans-la-police/

95 Art. 142-5 CPP.

96 In 95% of the cases, Data from Annuaire Statistique de la Justice 2008.

97 Crim., 6 December 2005, Bull crim., No. 321. In practice, the suspect is almost never brought before the procureur and exceptional circumstances are invoked systematically.

The prosecutor must give his/her express authority for detention beyond 24 hours. The maximum amount of time someone can spend in GAV is 96 hours for serious offences. Although the prosecutor has an obligation to ensure that the GAV is conducted properly, he/she is not obliged to attend the police station in person or check how the evidence is being gathered. Evidence shows that prosecutors rarely visit police stations and, in a majority of cases, announce their visit beforehand, thereby preventing any meaningful supervision on their part.[98] As a result, the GAV procedure continues to allow the police to exercise power with minimal supervision.

In practice, supervision by the prosecutor deals with legal issues and requests for evidence. The prosecutor rarely supervises the police on the way in which they obtain this information.

France has regularly been criticised for the condition of police detention and police treatment during the GAV.[99] As will be discussed in paragraph 2.2.2, the French courts have taken different approaches to the GAV and whether the system complies with the ECHR.

There were around 500,00 GAV in 2010,[100] which represents a rise of 50 % since 2001 – in fact there were 800,000 GAV if road traffic related GAV is also included.[101]

2.2.1.3. Recording of the interrogation

There is no statistical data available on this issue.

The legal basis of video recording during police custody is article 64-1 of the Code of penal procedure.

Video recording in police custody is foreseen for persons accused of a *crime* (serious offence, different from *délit* that are less serious offences).

When the number of persons who shall simultaneously be interrogated at the same time is too important to enable video recording of every single interrogation, an officer of the judicial police must immediately inform the prosecutor who will decide in a written document which persons shall be video recorded or not.

When video recording is not possible for technical reasons, it is written down in the interrogation report, indicating the reason of this impossibility. The prosecutor is immediately informed of this reason.

2.2.1.4. Storage of and access to recorded data

Access to recorded data during investigation or before the court is possible only in case the interrogation report is challenged by the defendant or the prosecutor, and the investigating judge or the court decides on this access.

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98 Hodgson 2005, p. 157. Data also collected by the author through a questionnaire.

99 See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2001 (§ 22).

100 CGLPL, Annual report 2012.

101 This covers police detention and interview. Since 2002, there have been instructions to increase police and gendarmerie activities, so that some local police offices have to fulfil a quota of, for example, five gardes à vue per day; see Portelli 2007, chapter XI. Portelli, S., 2007, Ruptures, http://www.betapolitique.fr

Once the case is definitely closed (by prosecutor or court decision), recorded data are stored five years and then destroyed.

The fact to broadcast such video recording is sentenced up to one year imprisonment and 15,000 euros fine.

2.2.2. Medical examination and medical documentation

Article 63-3 CPP stipulates that every person placed under police custody (garde à vue) can, when s/he requests so, be examined by a doctor nominated by the prosecutor or the officer of judicial police (OPJ). In case of prolongation of the GAV duration, the person can request to be examined a second time. There is an issue of independence of the doctors since prosecutors and police officers usually nominate and work with some doctors over years, which create a proximity that might influence the objectivity of the doctor´s examinations.

At any time, the prosecutor of the OPJ can decide to nominate a doctor to examine the held person. In case none of them – the victim, the prosecutor or the OPJ – request such a medical examination, it is compulsory to organise of when a victim´s relative request it.

The doctor examines without delay the person held by the police. The medical certificate must among other state whether the person may be held longer.

2.2.3. Right to a lawyer

2.2.3.1. The different types of detentions during the investigation

Pre-trial detention:

In 2010, the national average length of pre-trial detention for those awaiting trial in *Cour d'assises* (for serious crimes) was 25.3 months, whereas the average length before a *tribunal correctionnel* (for less serious crimes) was 3.9 months.[102] In *correctionnel* proceedings, the detention may not exceed four months; it can be prolonged every four months up to one year in case of recidivism, and up to two years in case of drug trafficking or organized crime.

In crime cases, the maximum length varies from one to three years.[103] Once the investigation is closed, two years is the maximum time until the trial before a *cour d'assises* takes place; otherwise the detained person must be released.[104] Before a *tribunal correctionnel*, the maximum length is two months (plus a maximum of another two months) once the prosecutor has decided to send a person to court (*ordonnance de renvoi*). As to adequate access to a lawyer in remand prisons, most of them provide meeting hours, such as for women in Fleury-Merogis from Monday until Saturday between 8.30 and 11.30 am.

Police custody

102 Annuaire statistique de la justice 2011-2012

103 Art. 145-1 CPP (Procedural criminal code).

104 Art. 181 CPP

Reforms of 1993 and 2000 afforded a (very limited) right to legal advice to a special category of suspects who are subject to a preliminary investigation, namely for those held in GAV. The jurisprudence underlines that the police officer must inform the suspect of his right to consult a lawyer immediately after his placement under GAV, otherwise the procedure will face being considered a nullity.[105]

The extent of the legal assistance provided during the GAV, however, remains nominal: some call him/her a 'social worker'[106] or even a 'tourist'.[107] It is limited to a 30 minute private consultation[108] with a lawyer prior to the first suspect's interrogation by police, at the expiry of first 24 hours of the GAV, and after 12 hours if the GAV is prolonged. In special circumstances, such as organized crime, the lawyer can intervene only 48 hours after the beginning of police custody, and only after 72 hours for drug and terrorist cases.[109]

However, an interrogation can commence prior to any consultation with a lawyer.[110] Lawyers are excluded from the interrogation of suspects. They are also not given access to the case file. The lawyers' role during the GAV is not to participate in the police investigation or to defend a suspect, but to monitor that the GAV was conducted in conformity with the formal rules and that no excesses occurred, thus contributing to the credibility of police inquiries.[111] Lawyers themselves reportedly see their primary role during the GAV as providing moral and psychological support, rather than legal advice, to the suspect.

The information concerning the right to a lawyer must be written and signed by the suspect. An oral notification is exceptional and temporary.[112] The request for a lawyer must be written down in an official report (*procès-verbal*) of the interrogation and be signed by the suspect.[113]

In practice, legal advice during police custody is requested in a minority of those criminal cases that result in the GAV.[114] While it is plausible that the majority of suspects do not ask for an interview with a lawyer during the GAV because they believe that such interview would not be necessary in their case, empirical research found that, occasionally, police officers were actively discouraging suspects from calling a lawyer.[115] Suspects may opt

105 Crim., 6 May 2003, Bull. crim., No. 93

106 Soulez La Rivière 2009. Soulez La Rivière 2009, Website Bibliothèque Zoummeroff, interviewed by S. Enderlin in July 2009, http://www.collection-privee.org/

107 Portelli 2009. See also Hodgson 2005, p. 131-139.

108 The client-suspect interviews observed by Field and West in 1996-7 were brief, with many lasting no longer than 15 minutes; Field and West 2003, p. 287. Field, S. & West, A., 'Dialogue and the inquisitorial tradition: French defence lawyers in the pre-trial criminal process', Criminal Law Forum, 14, p. 261-316.

109 Art. 706-88 al. 6 CPP

110 Crim., 13 December 2006, Bull. crim., No. 312.

111 This is important since mistreatment can occur; see the condemnation for violation of art. 2 in ECtHR 1 June 2006, Taïs v. France, No. 39922/03.

112 Circular CRIM 00-13 F1 of 4 December 2000, 2.1.

113 Art. 63-1 CPP.

114 According to the Rapport Lazerges No. 1 486 sur la presomption d'innocence et la reforme de la procedure penale, Assemblee Nationale, a lawyer is requested in 40 % of criminal cases which result in a GAV.

115 ACAT 2016, p. 74.

for an interview with a lawyer of their own choosing. If they do not have one, a duty lawyer will be appointed to them. Local bar associations are responsible for organising emergency legal assistance, and the responsibility of police ends with the notification of the local bar about a suspect in the GAV who has requested legal advice.

Legal assistance during the GAV is provided predominantly by inexperienced lawyers (*avocats-stagiaires*), or by non-criminal law specialists. Lawyers who specialize in criminal law would normally participate in the GAV only if requested by their (paying) clients. Naturally, this places persons who, for various reasons – lack of financial means, first contact with criminal law – do not have their own lawyer, in a disadvantaged position compared to those who may know a lawyer from a former case, or through their social network.

There is an ongoing debate in France about the role of the lawyer in the GAV. The debate was initiated by lawyers' groups, following a series of ECtHR judgments emphasising the need for legal advice from the outset and throughout police detention. The debate coincided with the larger movement against the excessive use and harsh conditions of the GAV (such as the indiscriminate use of the handcuffs and strip searches),[116] coupled with ongoing public discussion of the Criminal Procedure Code reform. Not surprisingly, the police are reluctant to allow lawyers a greater presence during the GAV than they have at present, and are opposed to the proposed changes.

The response from the government has been mixed. Some concessions have been made – such as tightening the legal grounds for the GAV, audio recording of GAV interviews in serious matters (crimes), the possibility for a lawyer to access his client at the 12th hour of the GAV, etc. At the same time, the government is not prepared to allow a lawyer' presence at the first interrogation and continuously throughout the GAV.

The reaction from courts has also been mixed. A recent court decision condemned a GAV that was 'incompatible with human dignity' because; the suspect had not eaten or drunk during the 48 hours detention at the station office in Nancy. In the cell, there was one bed that was already occupied by another suspect. The person has since been released without charge, as the court considered the conduct of this GAV lead to the nullity of the entire procedure.

Further, the *cour d'appel* of Nancy has ruled, in a decision dated 19 January 2010, as inadmissible statements made in GAV where suspects had not had access to a lawyer for 72 hours, again following the jurisprudence of the ECtHR.[117] In addition, the Paris court (tribunal de Grande Instance) on 28 January 2010 nullified 5 GAV, as being incompatible with European Law. The court said that legal assistance during a GAV – only 30 minutes at the beginning of detention – did not constitute a proper consultation between a lawyer and a defendant. Despite these rulings, the Paris appeal court recently confirmed the compliance of the GAV regime with the ECHR.[118]

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116 See Commission Nationale de Déontologie de la Sécurité, Rapport 2008 Remis au Président de la République et au Parlement available at http://lesrapports.ladocumentationfrancaise.fr/BRP/094000187/0000.pdf

117 Cour d'Appel de Rennes, Arrêt N 350/2009, 17 December 2009.

118 Cour d'Appel de Paris, 9 February 2010, unpublished.

Outside of the GAV, lawyers play a modest role in the *enquête*. In cases where no instruction (investigation conducted by investigating judge for serious crimes) is envisaged, lawyers would only appear at the end of the investigation, when a suspect is brought before the *procureur* with the view to refer the case to court.

2.2.4. Right to inform a third person

The right to inform via telephone a third person concerns several persons:[119]

- the person s/he lives with
- one of his/her direct relatives
- one of his/her sisters or brothers
- his/her legal representative (tutor or curator)

The detained person has also the right to inform his/her employer. Foreign nationals have the right to inform their embassy.

When the officer of judicial police considers, for the sake of investigation, that s/he can refuse the request to inform a third person, s/he shall immediately inform the prosecutor who will decide on this issue.

2.2.5. Investigation of the complaint of ill-treatment

As already developed above, the investigation can start either by a complaint to the hierarchy, to the inspection services, to the prosecutor or to the court.

There is no available data on the issue of sentencing practice in torture cases.

2.2.6. Procedural status of the complainant

2.2.6.1. Legal standing of the victim in the criminal proceedings

The right to oblige the prosecutor to investigate

In case the prosecutor doesn´t investigate, the applicant can constitute itself as partie civile by requesting it to the court. If so, the applicant becomes third part to the procedure and an investigating judge is obliged to investigate. While the instruction is not on the basis of the instructions of the partie civile, the partie civile can ask the investigating judge to hear a witness or search a house. The partie civile cannot motion for pre-trial detention.

It is also possible to become third partie during the investigation when the applicant considers that the prosecutor doesn´t investigate as s/he should. The applicant has then full access to the investigation files and can request prosecution services to conduct certain investigations.

The right to be informed

Police, gendarmerie and judicial authorities must inform victims that there can constitute as third party.

119 Article 63-2 CPP.

During the judicial investigation, the investigating judge informs the victim every six months about the development of the investigation.

Victims as third party can request documents, confrontation of persons/witnesses, expertise, searches or transportation on the spot in order to communication their reasons to the judge or the defence.

In résumé, third parties have the same procedural rights as the defence and the prosecutor.

2.2.6.2. Special circumstances of the hearing of the victims belonging to a vulnerable group

There is no special measures in the French criminal procedure for the protection of vulnerable witnesses.[120] Neverthelesse, there are special rules as suspect of a criminal procedure for access to a lawyer for certain classes of people, in which case a lawyer is compulsory: in juvenile cases,[121] before military courts, for vulnerable adults (*majeur protégé*),[122] and for a guilty plea. Further, there is an obligation to have a lawyer at the cassation stage. Finally, according to article 417 CPP, a lawyer is 'compulsory where the victims suffers of an infirmity liable to compromise his defence'.[123]

Juveniles are persons under 18 years. For juvenile victims, special provisions apply. If a juvenile victim is held in the GAV, the public prosecutor, the parents, a doctor and a lawyer must be immediately informed. Pre-trial interrogations of juvenile victims are videotaped. In addition, 'the minor must be assisted by his legal representative except where this is impossible'.[124] Further, the provisions of 'fast-track' proceedings are not applicable to minors.

There are also special provisions for mentally vulnerable victims.[125] They were introduced in the CCP by the law No. 2007-308 of 5 March 2007, which provided reforms for the protection of adults, following a condemnation by the ECtHR.[126] Called *majeur protégé*,[127] this concerns adults whose mental or psychological state could endanger their own person or property. The public prosecutor must inform the guardian and the judge of guardianship about the proceedings. The guardian has access to all files and permission to visit the person in custody. There must be a medical report before any judgment evaluating the criminal responsibility of the person. Failure to apply these rules results in a nullity.

2.2.6.3. Measures for protecting the victim in the criminal proceedings

Confidential treatment of the personal data of the witness

120 https://www.tutelleauquotidien.fr/item/le-mjpm-et-le-protege-dans-la-procedure-penale.html

121 Art. 13 al. 1 of Ordonnance of 2 February 1945.

122 Art. 706-116 CPP

123 Art. 417 al. 4 CPP

124 Art. 78-3 CPP

125 Art. 706-112 CPP

126 ECtHR 30 January 2001, Vaudelle v. France, No. 35683/97.

127 Under Titre XI of Livre I of the civil code.

There is an offence to the dignity of victims.[128] Victims can request to prevent any broadcasting of some images that would violate their dignity.

Wrongful broadcasting, without the agreement of the victim, can be sentenced up to 15,000 euros.

Witness protection program

In a case dealing with an offense sentenced with at least five years imprisonment, and if requested so by the prosecutor or the investigating judge, the judge in charge of detention[129] can authorise that an interrogation is conducted without mentioning the name of the interrogated person if s/he is in danger while giving information to authorities.

The decision of the judge in charge of detention is put in the interrogated report without the signature of the protected witness. Identity and address of the witness are mentioned in another report put in another file than the investigation one.

2.2.7. Prosecution by the complainant

This type of procedure doesn´t exist in French law.

2.2.8. Evidentiary issues

Victims of ill-treatment have in principle many difficulties to prove the facts they have suffered. The absence of material pieces of evidence represents an obstacle to judicial procedures since such complaints without evidence are usually ending as closed cases. The prosecutor of one of the most inhabited regions of France (*département de la Seine-Saint-Denis*) declared: "it happens that I close cases without communicating the files to the IGPN or the SDSE when files don´t contain any material piece of evidence, especially without medical certificate indicating violence. In some very few cases in which the investigation shows serious or corroborated evidence (since many investigations end with one testimony against another testimony, without witness or piece of evidence), I launch a judicial procedure".

The difficulty to bring evidence of what happened has several factors. Some are due to the fact that police forces eliminate pieces of evidence, interpret facts to their profit or even invent them.[130] Some are due to judicial authorities when they give more credibility to a police officer´s testimony, when they refuse to investigate some facts, etc...[131]

The issue of credibility is a major one. Police or prison officers benefit from a presumption of credibility among magistrates, inspectors or even the public opinion. Whereas official reports and fines have a legal status, the testimony of a police officer has no superior value than the testimony of a citizen.[132] Fact is that inspection services and magistrates base their decisions on officers´ testimony as if they had legal force. As already shown by

128 Article 35 quater, Law No 2000-516, 15 June 2000

129 *Juge des libertés et de la détention*

130 Jobard Fabien, « La puissance du doute », Vacarme 4/2002 (n° 21), pp. 15-22.

131 Moreau de Bellaing, Cédric, 2012, « L'État, une affaire de police ? Ce que le travail des dispositifs policiers de
discipline interne nous apprend de l'État », Quaderni n° 78.

132 Art. 537 CPP

NGOs and researchers, judges tend to believe more police officers and give them easier the benefit of the doubt,[133] and this is even stronger when the applicant has already a police (or criminal) record.[134] This plays a major role in cases where there is no other witness than the accused police officer and the applicant.

The *Défenseur des droits* stated in 2014 that it is "regularly contacted by applicants who challenge the content of official reports drafted by police or prison officers" and it has observed several breaches to deontology while assessing the way official reports were written. The Défenseur indicates that "cases with false pieces of information in official reports might be the result of: serious divergences between officers, omission in précising some elements, lies on the circumstances of the facts". [135] During its hearing before the commission of parliamentary investigation on the missions and the modalities of riot control in 2015, the Défenseur stated again that there is a "recurrent problem of strictness in the redaction of procedural reports as soon as there is a use of force. This lack of strictness can lead, for instance to cases of demonstration with a lot of involved officers, to the impossibility to establish who has shot". [136]

2.2.8.1. Police reports

Police reports have a strong weight as evidence since they are considered as "being truth until the contrary has been proven".[137]

2.2.8.2. Witnesses

Witnesses must swear to tell the truth. The judge indicates them that, in case of lie, they might be sentenced up to five years imprisonment and 75,000 euros fine.[138] The sentence goes up to seven years imprisonment and 100,000 euros fine if the person victim of the lie risks to be sentenced to prison.

2.2.8.3. Confrontation

There might be a confrontation of witnesses before the investigating judge.[139]

3. Recommendations

The NGO ACAT requests in its last report on police ill-treatment that authorities publish each year following data:[140]

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133 Amnesty International, France, „des policiers au-dessus des lois", April 2009, page 22 ; Moreau de Bellaing Cédric « Violences illégitimes et publicité de l'action policière », *Politix* 3/2009 (n° 87), pp. 119-141

134 Jobard Fabien, « La puissance du doute », Vacarme 4/2002 (n° 21), pp. 15-22.

135 Défenseur des droits, *La fidélité des propos dans les écrits des forces de l'ordre*, 9 October 2014.

136 *Commission d'enquête sur les missions et les modalités du maintien de l'ordre républicain dans un contexte de respect des libertés publiques et du droit de manifestation*, Hearing of M. Jacques Toubon, 16 April 2015.

137 Art. 537 CPP.

138 Article 434-13 penal code

139 Article 102 CPP

140 2016

- Number and type of disciplinary sanctions taken by national police and gendarmerie in cases of ill-treatment
- Number of conducted administrative investigations
- Type of facts investigated
- Rate of disciplinary sanctions taken according to investigated facts
- Quantum of taken sanctions according to investigated facts
- Number of complaints communicated to courts
- Number, types and severity of sentences taken by courts
- No to suspend the decision of disciplinary sanctions until there is a judicial decision; See article 9 of By-law N° 84-961 of 25 October 1984 on disciplinary procedure concerning State civil servants

Furthermore, there is a need for an independent investigation service since the investigations conducted by IGPN and IGGN are not complying with international standards.[141] The European committee against torture also request independent authorities that could be directly contacted by citizens as it is already the case in other countries (e.g. Canada).[142]

According to the Commissioner for Human Rights, "the creation of independent mechanisms for complaints against police forces, as it exists in the United Kingdom, Ireland and Denmark, could be one solution to this issue".[143]

3. 1. Analysis of the relevant provisions of the legal system with a view to a hypothetical case

The facts of the hypothetical case

The complainant was riding his motorbike at 10.00 p.m., when he was stopped by the police for a check of his ID and blood alcohol level. The complainant insisted that he had not committed any violation of the traffic rules, so the police had no legal basis to perform the check on him. The officers told him that if he did not comply with their instructions, they would use coercive measures and take him to the police station. The complainant told the officers that he would undergo the test if his friend, a former police officer confirmed that the officers had the right to perform it without any reasonable suspicion of a violation. He stepped aside and attempted to make the cell phone call to the lawyer, when Officer "A" started to behave aggressively and kicked him. At this stage Officer "B" tried to calm down his colleague.

At this point, the complainant kicked towards one of the officers then tried to run away, and in his attempt to escape he pushed Officer "A" aside. Officer "A" fell to the ground, but officer "B" started to chase the complainant and finally managed to stop him by grabbing his clothes. The two officers forced the resisting complainant to the ground and

141 LDH and Commission d'enquête citoyenne sur Sivens, Rapport sur les conditions ayant conduit à la mort de Rémi Fraisse, 23 October 2015.

142 Council of Europe, 14th Annual report CPT, 1 August 2003 till 31 July 2004, § 37.

143 Commissioner for Human Rights, Council of l'Europe, Les violences policières, une menace grave pour l'État de droit, 25 February 2014

handcuffed him. After he was on the ground, they started to hit him. The reinforcement that was called in by Officer "B" arrived and joined their colleagues in beating and kicking the complainant. An officer knelt on the complainant's back, while another forced his truncheon against his neck, thus compressing his throat. The complainant lost consciousness. Eventually, he was driven to the police station. In the police car, two officers sat next to him (one on each side), and slapped him from time to time during the 15-minute drive to the station.

At the police station an alcohol test was administered to the complainant. The complainant was over the legal limit. He was placed in custody until the morning. In the middle of the night he was taken to the basement of the police station, where two officers slapped and hit him and then took him back to his cell. In the morning he was interrogated regarding suspected offences of driving with excess alcohol and attempted violence against a police officer. The officer interrogating him was not one of those involved in the beatings. After the interrogation, he was released.

The complainant suffered the following injuries: a contusion and a haematoma on the right cheek, another over the right eye, a further one behind the right knee, several abrasions and contusions on the chest and the belly, and a brain commotion. The complainant wants action to be taken against the officer in respect of his ill-treatment.

Based on the questions below, please outline the most probable course of action of the investigation into the complainant's claim of police ill-treatment in your jurisdiction. In relation to all the questions please outline the most important legal provisions, and also indicate whether the most probable course of action would be based on these laws and the practice (that may be in line or in contradiction with the law).

Lawfulness of the police actions

The police or the Gendarmerie has the right to control any person driving on a road or street, even if there is no obvious infraction or offence committed by the driver.[144] As such, the first action of the complainant can be considered as unlawful since he didn´t fulfil his obligation to obey police instructions.

The police officers would have had the right to check the complainant and escort him to the police station, place him under short term arrest in order to perform the blood-alcohol test. However, there is an article concerning the use of coercive measures in the Police Code of Deontology which stipulates that the police officer may use force only on the conditions set out in the law, respecting the principle of proportionality and the use of force shall not cause a disproportionate harm to the person subjected to the police measure.[145] The complainant tried to call his friend for help which can be qualified as a resistance to the police measure, but by kicking the complainant, "Officer A" violated the requirement of proportionality.

Then, the complainant committed an assault on the police officers by kicking one of them and pushing "Officer A" aside. When the complainant started to run and tried to

144 Article L233-2 of the Code of road traffic.

145 Article R. 434-18, Code de déontologie de la police nationale et de la gendarmerie nationale.

escape, Officer B was acting lawfully when he started to chase the complainant and finally managed to stop him by grabbing his clothes. The two officers forced the resisting complainant to the ground and handcuffed him. After he was on the ground, they started to hit him. Article R. 434-17 of the Police Code of deontology provides that the person placed under the authority of the police shall not suffer any violence. Since beating, slapping and kicking are considered as violence, police officers behaved unlawfully.

At the police station the blood-alcohol test was administered, the complainant was over the legal limit and was placed in custody. According to article 62-2 of the CPP, the custody of the defendant may be ordered upon a reasonable suspicion that the defendant has committed a criminal offence subject to imprisonment. Driving under the influence of alcohol is a criminal offence punishable by imprisonment and the complainant had already tried to escape from the officers which – based on the practice of the courts – probably be enough for the order of pre-trial detention. Thus the complainant's placement in custody was not unlawful. However, nothing justified the physical abuse of the police officers during the custody, therefore it was unlawful.

The complainant was then interrogated by a police officer not involved in the beatings. Based on the injuries that the complainant suffered, the interrogating police officer must have noticed that the complainant was abused. The officer should have reported the suspicions of the commission of a criminal offense.

Qualification of the police measures

Officer A violated the principle of proportionality when he kicked the complainant but officer B reacted lawfully up to the point he handcuffed the complainant who tried to escape since, even if it shall remain an exceptional measure (article 803 CPP), escape and dangerousness are reasons stipulated by many legal texts[146] authorising the use of handcuffs.

Once the complainant was handcuffed, further actions were not needed and might be considered as unproportioned and even dangerous. France has been condemned in a case where a person died after police officers knelt on the complainant's back, and thus compressing his breast.[147]

The police actions in the street and in the police car constitute a mistreatment punished by disciplinary sanctions.[148] Furthermore, since the mistreatment was committed by at least three officers, the qualified version of the crime can be established because committed in a group.

The placement in custody had a legal basis, so it cannot be considered as unlawful detention.

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146 Article R. 434-17 du Code de la sécurité intérieure ; circulaire du 14 juin 2010 relative à l'harmonisation des pratiques dans les centres et les locaux de rétention administrative et lors de l'exécution des escortes (NOR : IMIM1000105C) ; note DGPN 08-3548-D du 9 juin 2008 relative aux modalités de mise en œuvre des palpations et des fouilles de sécurité, et du menottage.

147 ECtHR, Saoud v. France, N° 9375/02, 9 October 2007, § 102

148 Code de déontologie de la police nationale et de la gendarmerie nationale (intégré au code de la sécurité intérieure).

The physical abuses during the custody can also be qualified as mistreatment in official proceedings, since nothing indicated that the aim of the physical abuse was to coerce the complainant to make a confession.

Even though the interrogating police officer was under the legal obligation to report the suspicion of the commission of a criminal offence, this omission does not constitute a crime in itself. The interrogating police officer can still be called to account in a disciplinary procedure.

The most probable course of action

Based on the analysis above, the complainant would go to any doctor of his choice for a medical examination. If he told the doctors that he was ill-treated by police officers, the physician would be obliged to report the crime. The complainant can also report the crime personally.

The medical report documenting the injuries is convincing enough, so most probably the investigation would not be terminated and the prosecutor would file an indictment against the police officers. During the trial the court would probably hear the defendant police officer, their colleagues who may have information about the circumstances, the physician examining the complainant in the hospital, a medical expert, the complainant himself and his relatives (who may have noticed the injuries).

If the complainant really went to a doctor and the medical report properly described his injuries, it is relatively easy to prove that the complainant was abused by the police officers. The court will rely on the findings of medical reports and the opinion of the medical expert. If these evidences support the story of the complainant, the judge is willing to exclude the testimonies of the police officers who are obviously loyal to each other and their testimony cannot be seen as unbiased.

Sanctions to be imposed

With regard to those police officers who ill-treated the complainant on the scene and in the police car, the judge would probably find them guilty in the commission of mistreatment in official proceedings committed in a gang. The judge might impose, if any, an imprisonment of a few months and suspend its execution.[149]

Those police officers abusing the complainant during custody would be found guilty in the commission of mistreatment in official proceedings. The judge might impose an imprisonment of 1 or 2 months and suspend its execution.

If these cases, notwithstanding whether police officers served in the Police for a relatively long time and they had not committed any serious misconduct before or not, they would most probably be exonerated from the detrimental consequences of their conviction and would also be allowed to keep serving in the Police by the minister[150].

149 See examples of sentences, ACAT 2016, p. 88-89.

150 ACAT 2016, p. 69.