VISITING EXPERTS' PAPERS

SOME ASPECTS OF THE FRENCH PENAL PROCEDURE

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To explain the French procedure, which is very different from the Anglo-Saxon model in force in Great Britain, the United States, and the largest part of the Asiatic world, it is necessary to present some of the rules that govern the judiciary personnel and the organization of the criminal jurisdiction.

I. FRANCE: THE COUNTRY OF WRITTEN LAW

French law is a mixture of Frank and Germanic customs with regulations coming from Roman law, which has profoundly influenced the formation of legal concepts still in force in the continental system. Contrary to the common law countries, the French system has the law as its principal legal source, and jurisprudence has only a very marginal creative role in the law. In France, the principal rules have been codified by the legislature. In criminal matters, the Penal Code, promulgated by Napoleon at the beginning of the XIX century, has been replaced by a new penal code in 1994. The Code of Penal Procedure, which dates from 1959, was modified in profoundly 1993.

International treaties and agreements duly ratified have, in France, a superior authority to that of domestic law, and are immediately applicable. France has, thus ratified, the European Convention of Human Rights in 1974, and has accepted in 1981, the right of individual appeal by any person before the European Court of Human Rights in Strasbourg. Thus, France has not only signed these international commitments protecting human rights, but has also accepted that an international jurisdiction safeguards their effective respect. Moreover, the domestic courts have the right to put aside the application of the national law if it does not recognize one of the rights protected by the European Convention of Human Rights, or any other international provision of the same rank.

II. UNITY OF THE FRENCH JUDICIARY BODY

In France, there are two different legal systems, which for historical reasons date back to the French Revolution. On the one hand, actions at law against governmental and administrative authorities are judged by special courts called Administrative Courts. They are organized in a hierarchy headed by the Supreme Court of the Administrative Body, the Conseil d'Etat (highest administrative court and advisory body to the government in matters of legislation). Members of the Administrative Court are recruited in the same manner as high-ranking civil servants.

On the other hand, all civil and criminal cases are judged by jurisdictions called the judiciary, headed by a different Supreme Court called the Cour de Cassation. Members of this judicial court, the judges as well as the public prosecutors, belong to the same body in France, the Magistrature. This term in France has a very different meaning than the one in English, where the word "magistrate" designates non-professional judges in charge of ruling in cases of minor importance, whether civil or criminal.

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III. THE SAME RECRUITMENT, IDENTICAL EDUCATION FOR JUDGES AND PUBLIC PROSECUTORS

French magistrates, judges and public prosecutors, are recruited in the same manner, i.e., by competitive entrance examinations, and their education is identical. Contrary to the Anglo-Saxon system, judges in France are recruited from among students and not from experienced jurists.

A very selective competitive exam is organized each year for students receiving a diploma after finishing at least four years of university studies in law. The candidates admitted join the Ecole Nationale de la Magistrature *(National School of Magistrature)* (whose main headquarters are in Bordeaux, and was established in 1958 by General de Gaulle) where they receive training for two and a half years. The number of places offered at the beginning of each competitive exam depends on the number of places vacated due to retirement in the magistrature. On average each year, 150 students are admitted to the school, from more than 3,000 candidates. It should be pointed out that the majority of candidates admitted are women. The French magistrature is presently in the majority female. Two other competitive examinations to enter the Ecole Nationale de la Magistrature are organized: one for civil servants having a certain seniority, and the other for persons having held certain publicly elected functions, or other activities which particularly qualify them for the exercise of judiciary functions.

During their training at the Ecole de la Magistrature, the students are remunerated. Their education consists of learning the procedure and professional techniques, as well as a training period of one year at a court of justice. However, the education has a probationary character as well. At the outcome of the final exam, certain students could be obliged to redo a part of their schooling, or be declared unsuited for judiciary functions. Those students declared qualified may choose to practice, according to their rank of classification at the end of the exam, as judges or public prosecutors. They are then given supplementary training in the area to which they will be nominated.

Approximately four-fifths of the 4,800 French judges and 1,800 public prosecutors are trained at the Ecole Nationale de la Magistrature. However, it is possible to become a magistrate without passing the competitive entrance exam, or graduating from the Ecole de la Magistrature. Professional jurists and attorneys at law for the most part, having practiced at least eight years, could be nominated as a judge or public prosecutor, after a few months in a training program, in order to verify their aptitudes. Nonetheless, this type of recruitment is in the minority.

All magistrates are obliged, during their entire career, to attend a one-week continuous training program every year.

IV. DISTINCT STATUTORY RULES FOR JUDGES AND PUBLIC PROSECUTORS

During his career, a magistrate may occupy successively the functions of judge and public prosecutor. This is a direct consequence of the unity of the judiciary body. However, the specificity of the functions of judge and public prosecutor is expressed by district rules. Judges are irremovable ispo jure, they cannot be given another assignment, nor have their jurisdiction changed, even by promotion, without their agreement. Judges are independent and in the exercise of their functions cannot be given orders from any source. The disciplinary power over judges belongs to the Superior Advisory Board of the Magistrature, an organ composed in its

majority by magistrates elected by the judiciary body. Public prosecutors could be transferred in the interest of the department and receive a new appointment without their consent, even though, in practice, this is very rare. The disciplinary power over public prosecutors belongs to the Minister of Justice. The Superior Advisory Board does not decide the sanction to be applied; rather, it may only propose a sanction.

The promotions of judges and public prosecutors follow rules in part distinct. All magistrates are formally nominated by the President of the Republic, but according to different procedure terms as that for judges and public prosecutors. The heads of the prosecution departments at Courts of Appeal are chosen by the Cabinet of the government. Other public prosecutors are nominated on the advice of the Advisory Board of the Magistrature. However, this is only a simple advice which the government need not take into account. Judges are nominated in accordance with the advice of the Superior Advisory Board of the Magistrature. Thus, the government cannot go against the advice of the Superior Advisory Board in naming a judge, but it could in the naming of a public prosecutor. Moreover, the government takes no part in the choice of certain judges, such as members of the Cour de Cassation, or those presiding judges at misdemeanor and appeal courts. It is up to the Superior Advisory Board to select the holders of these functions.

V. THE DEPARTMENT OF THE PUBLIC PROSECUTOR: A HIERARCHICAL INSTITUTION

Public prosecutors have as their task to defend the interests of society before these courts. They must initiate legal proceedings of criminal infractions before the appropriate court, and demand the judges to punish the authors. Beyond this task, they intervene before civil courts in cases where law and order is implicated. Public prosecutors are in a hierarchy. Collectively they form an institution, the Department of the Public Prosecutor, still called "the parquet" *(the prosecution department)*.

At each of the 171 courts of higher instance and the courts which judge all civil and criminal cases at the first instance, there is a department of the Public Prosecutor composed of several public prosecutors. The public prosecutors at the court are placed under the authority of the head of the Prosecution Department at the Court of Appeals. There are 33 heads of Prosecution Departments at the Courts of Appeal in France, and one Director of Public Prosecution in each Court of Appeal. The heads of the Prosecution Departments at the Courts of Appeal are under the authority of the Minister of Justice.

The Minister could give instructions of a general nature to the heads of the prosecution departments and to the public prosecutors, and ask them to initiate legal proceedings in a particular manner for a certain category of infractions. The Minister could also order the head of the Prosecution Department at the court of first instance to initiate legal proceedings in a particular case, or to adopt a determined attitude in an individual case. In this event, the head of the prosecution department must follow the instructions given him, and initiate legal proceedings in the direction desired by his hierarchy.

However, at the open hearing before a jurisdiction, the public prosecutor is entirely free to express his convictions orally, and if he considers it useful, to criticize the instructions given him, or the legal proceedings he initiated. The principle of the freedom of expression at the hearing—very specific to the continental system—marks the adherence of the members of the Department of the Public Prosecutor to the judiciary. Under

the hierarchical authority, public prosecutors must initiate legal proceedings in accordance with the instructions given to them. The judiciary body can express itself freely before the judges. This rule is given in the saying, "the pen is slave, but speech is free". In practice, it is very rare that public prosecutors receive orders in particular cases. Their daily latitude of manoeuvre is important, and only cases having a strong incidence on law and order, or having a political character give rise to instructions from heads of prosecution departments at the Courts of Appeal or the Minister.

The institution of the Department of the Public Prosecutor in France does not have an equivalent in the Anglo-Saxon system, with the exception of the "fiscal procurator" in Scotland. French public prosecutors have appreciably more extensive responsibilities than those of members of the Crown Prosecution Service in England.

VI. TOWARDS A RAPPROCHEMENT OF THE STATUTORY RULES BETWEEN JUDGES AND PUBLIC PROSECUTORS?

The successive governments in France between 1990 and 1997 tried to divert the hierarchical power of the Minister over public prosecutors in order to curb the criminal proceedings against politicians belonging to the party in power, who were accused of illicit financing of political parties. This interference of the political power in the normal functioning of judicial institutions led to a very net rejection in the public opinion. The electoral body severely penalized, in 1993, 1995 and 1997, the majority governments or the presidential candidates who wanted to take advantage of their functions in order to hinder the course of justice.

Aware of these deviations, the President of the Republic, in January 1997, entrusted an independent commission, chaired by the Senior Presiding Judge of the Cour de Cassation, to draw up proposals rendering public prosecutors more independent from the executive power. The alignment of the disciplinary system of the members of the Department of the Public Prosecutor with the one for judges, and the reinforcement of the intervention by the Superior Advisory Board of the Magistrature in the nomination of public prosecutors is being considered. Breaking with the custom of his predecessors, the new Minister of Justice, since June 1997, abstains from giving instructions to public prosecutors in particular cases.

VII. THE ORGANIZATION OF CRIMINAL TRIAL COURTS IN FRANCE

Criminal courts in France consist of judicial inquiry courts and trial courts. The trial courts are to declare guilty or innocent the defendants brought before them, and to apply the penalties provided for by law. There are three categories of trial courts. The Penal Code, in fact, classifies infractions into three categories according to their gravity. Each category of infractions corresponds to a different trial court.

The Police Courts, 454 in France, judge the breach of police regulations, that is to say, the least serious offences, liable, at the maximum, to a fine of 20,000 francs, and for which a prison term cannot be pronounced. A single judge rules in these courts. Only the more serious petty offences are prosecuted by the head of the Prosecution Department at the courts of first instance. For the minor offences, the legal proceedings are done by the police. In many cases for infractions of the Road Regulations, the police do not bring the affair before the court if the author of the infraction accepts to pay a fine immediately to avoid prosecution.

Infractions of a more serious nature, called misdemeanors, are brought to trial before the Tribunal Correctionnel *(Court sitting in criminal matters for misdemeanors)* (hereinafter referred to as the Petty Sessions Court). This court is benched by one or three judges, depending on the gravity of the infractions. The legal proceedings before the Petty Sessions Court are engaged by the head of the Prosecution Department at the court of first instance. In France, there are 171 Petty Sessions Courts which judge each year around 400,000 cases. The Petty Sessions Court can impose a prison term of up to ten years.

The most serious infractions, called felonies, are brought to trial before the Assize Courts, numbered 95 in France. These courts are composed of three professional judges, as well as nine jurors randomly picked from electoral lists. The particularity of the French system resides in the fact that the professional judges and the jurors deliberate together, and confer in common as to the verdict and the penalty to be imposed. The Assize Courts, since the abolition of the death penalty in France in 1981, could pronounce a punishment of up to life imprisonment. They judge approximately 2,500 cases per year.

The decisions of the Police Courts and the Petty Sessions Courts could be the object of an action before the Court of Appeal, contrary to the decisions of the Assize Court. There are 33 Courts of Appeal in France. The judgment pronounced by the court of first instance could be the subject of appeal by the defendant, the public prosecutor, and in certain cases, the victim. The Court of Appeal again judges the case in its entirety, from the point of view of the verdict and the punishment, as well as of the facts and the law.

The decisions of the Courts of Appeal and the Assize Courts could be the subject of an extraordinary action taken before the Cour de Cassation (supreme court) competent over the entire national territory. The Cour de Cassation does not judge the cases on its grounds. It assures that the decisions were rendered with full respect of the law. If it deems that an unlawful decision was taken, it does not judge the case but nullifies the judgment and refers the case to another court to be rejudged.

Finally, there exists specialized courts judging infractions committed by persons under the age of 18 years. These courts, which are not open to the public, are compelled to impose, when possible, educative rather than punitive measures.

VIII. JUDICIAL INQUIRY COURTS

Since the beginning of the XIX century, judges have participated considerably in the investigation of criminal cases. Thus, in each of the 171 courts in the country, there exists one or more Examining Magistrates, numbering around 570, over the entire territory. The Examining Magistrate is a judge of the court, he is independent and may not receive orders from the executive power, the head of the Prosecution Department at the court of first instance, or another judge. He can place a suspect in preventive custody before trial. It is also possible for him to sit in judgment in a case that he has not investigated.

The decisions of the Examining Magistrates are subject to appeal before the Chambre d'Accusation, a specialized chamber of the Court of Appeal.

IV. LEGAL PROCESS OF CRIMINAL PROCEEDINGS IN FRANCE: A PROCEDURE IN THREE STAGES

After the presentation of the principal aspects of the French legal and judicial systems, the legal process of the criminal procedure in France should be examined. It consists of three stages: the

investigations made by the police of the Criminal Investigation Department (C.I.D.), the judicial inquiry by the Examining Magistrate, and the trial.

A. The First Stage of the Criminal Proceedings: The Inquiry Made by the Criminal Investigation Department

When a crime is committed, it is up to the police officers of the C.I.D. to record it, search for the perpetrators, identify and arrest them, and inform the judicial authority.

The police officers of the C.I.D., in urban zones, are part of the national police and under the authority of the Minister of the Interior. In rural zones they are part of the national gendarmerie having a military training and under the authority of Defence Minister. Certain specialized services, in the fight against organized or economic crimes come under the Ministry of the Interior, and their jurisdiction covers both urban and rural zones. The officers of the C.I.D. under the Ministry of the Interior or Defence, are placed under the authority of the Head of the Prosecution Department at the court of first instance when conducting their criminal investigations.

When an infraction is committed, the officer of the C.I.D. must inform the Head of the Prosecution Department, who generally asks the police officer to continue the inquiry, but he could also remove the case from him and give it to a police officer belonging to another police service or to the gendarmerie. The public prosecutor could give directives to the police officer in charge of the inquiry, ask him to orient his investigation in a given direction, or to carry out certain acts of inquiry.

In France, the police have certain powers if they act quickly when an infraction is committed. Specifically they can start an inquiry immediately when a person is caught red handed. In this case, it is possible for them to proceed to search the domicile of the suspects without their consent, to seize objects useful in the manifestation of the truth, arrest the suspects and take them to the police station. If the police react in a space of time further removed from the commission of the act, they must proceed to a preliminary investigation and do not have the power of restraint, i.e., they cannot arrest a suspect, nor enter his home without his authorization. In all cases, officers of the C.I.D. can prescribe technical or medical examinations, and transmit the samples to a laboratory.

When a person has been arrested by the police, he can be detained at the police station for a duration of 24 hours. This is called police custody. The person placed in police custody has several guaranties: he may benefit from a medical examination and request that a member of his family be notified. However, the latter could be refused if it interferes with the progress of the investigation. The person placed in police custody can also consult with a lawyer for 30 minutes. During police custody, the person could be interrogated and does not have the right to be assisted by a lawyer during these hearings at the police station. The lawyer who conversed with the person in police custody does not have access to the procedure file drawn up by the police and may not assist in the interrogations. According to a movement of opinion that is presently developing in France, persons restrained by the police should have the right to be assisted by a lawyer during their interrogations from the very start of their police custody.

The 24-hour detention period under police custody could be extended for a new period of 24 hours by the head of the Prosecution Department at the court of first instance. Police custody could be extended up to 4 days in drug or terrorist cases. In the investigations concerning

these infractions, the consultation with a lawyer takes place only 72 hours after the commencement of custody.

In France, approximately 500,000 persons are placed in police custody each year, of which 100,000 for a duration of more than 20 hours.

Decision to Institute Proceedings

When the police have finished their inquiry, they communicate the results to the head of the Prosecution Department at the court of first instance, who may ask the police to make additional investigations. The public prosecutor could, given the inquiry, classify the case, and not institute criminal proceedings, even if it is established that an infraction was committed and the author identified. In certain countries, such as Germany, the public prosecutor must initiate proceedings for infractions that are exposed to him. Thus, by virtue of the principle of the legality of the proceedings, all infractions must be prosecuted if the author is identified. However, in France, the head of the Prosecution Department at the court of first instance, could decide not to institute proceedings for an infraction when the author is known because he is in command of the timeliness of the proceedings.

However, the public prosecutor does not have a monopoly on the institution of proceedings. In France, the victim of an infraction could also institute criminal proceedings. The trial judge not only decides as to the guilt of the defendant and the penalty to be imposed, but also the amount of damages to be allocated to the victim. Thus the proceedings instituted by the victim before a criminal court will lead, not only, to the attribution of damages to his benefit, but also the pronouncement of a penalty against the author of the infraction.

If the public prosecutor takes the decision to institute proceedings, he could bring the case directly before the trial court, when the inquiry made by the police is completed. This happens in approximately 90 percent of the cases where a misdemeanor has been committed. However if the infraction committed is a felony, or if the misdemeanor in question is particularly serious and complicated, the head of the Prosecution Department could refer the matter to an Examining Magistrate.

B. Inquiry by the Examining Magistrate

At the outcome of the police inquiry, the more serious and complicated cases are transmitted by the public prosecutor to an Examining Magistrate. The affair could also be brought before the Examining Magistrate by the victim, in the event the victim decides to file a lawsuit. The Examining Magistrate has at the same time powers of investigation and action, and jurisdictional powers.

The Examining Magistrate must initiate all investigative acts useful in the manifestation of the truth. He could carry out any or all of these investigative acts personally, but he is obliged to proceed in person to the interrogation of the suspects, who could, if they wish, be assisted by a lawyer when they are questioned by the Examining Magistrate. The Examining Magistrate could relegate the responsibility of investigation to the police or experts. In this case, the police or the experts are under his authority. The Examining Magistrate conducts the investigations in an independent manner, i.e., he is not an auxiliary of the public prosecutor. He must investigate both on behalf of and contrary to the interests of the defendant. The investigations conducted by him should not have as their sole objective to find evidence against the suspect, but also to uncover the truth. The public prosecutor, the defendant and the victim, could demand that the Examining

Magistrate proceed to certain investigative acts. The Examining Magistrate, if he does not carry out the acts solicited, must explain his decision by a ruling, which could be appealed before the Chambre d'Accusation. All the investigative acts are written down in a report and placed in the file, which is at the disposition of all parties. The Examining Magistrate could decide to tap telephone conversations.

The Examining Magistrate can indict any person he suspects of having participated in the acts concerning the case referred to him. Thus, the Examining Magistrate investigates the facts, not the individual. He must search for the person who committed the acts, and can indict all those who participated.

The Examining Magistrate can also place a suspect in preventive custody, and send him to prison before the person appears for trial. After a person has been detained by the police at the station for a period of 48 hours—which could be extended up to 96 hours in certain cases of terrorism and drugs—the suspect, if he is not judged, is freed. He could be placed in detention before judgment if the Examining Magistrate decides upon it. Also, the Examining Magistrate has the choice of not placing the suspect in detention, but under judicial control, in order to limit his movements and to keep an eye on his activities. The decisions rendered by the Examining Magistrate concerning judicial control or preventive custody could be appealed before the Chambre d'Accusation.

Approximately one-third of the 50,000 persons detained in French prisons have not been brought to trial. A public opinion movement contests the power, often considered excessive, granted by the law to the Examining Magistrate to decide alone as to the detention of a suspect. The reform projects contemplated are to remove from the Examining Magistrate the power of placing a suspect in preventive detention, and to have this capacity exercised by another judge of the court.

At the end of the inquiry, the Examining Magistrate could estimate that there is not sufficient evidence and renders a decision of nonsuit. If he decides that the suspect committed the misdemeanor, he orders a committal to trial before the Petty Sessions Court. If he thinks that the suspect committed a felony, he transmits the case to the Chambre d'Accusation, which could refer the case to the Assize Court.

Therefore, the Examining Magistrate not only conducts the inquiry, but also he appreciates the value of the evidence gathered during the inquiry and decides whether to continue or terminate the proceedings.

C. Pre-trial Procedure

Most of the time, it is the public prosecutor who refers a case to the trial court, when he estimates that the police inquiry is finished and that there is sufficient evidence to prove the existence of a misdemeanor. This jurisdiction could also be seized by the victim. However, in more serious cases, the trial court is seized by the decision of the Examining Magistrate.

Before trial, the defendant is assisted by a lawyer, who has access to the procedure file. The trial is public and the defendant could, contrary to the rules in force in the Anglo-Saxon countries, be tried in his absence. The public prosecutor upholds the accusation and indicates to the court which penalties appear to be most appropriate to reprimand it.

The judge, at the trial stage of the case and in order to decide the guilt, could take into consideration all the elements of proof that were presented before him. Contrary to the system in force in common law countries, France does not have the principle of the legality of proof. Thus, testimonies, confessions before the investigators or the Examining Magistrate

(even if they are retracted afterwards), documents, expert opinions, technical analyses, and the contents of telephone taps are susceptible to be retained by the judge in order to assess the guilt of a suspect. A simple indirect testimony is admissible. It is up to the judge to determine, in each case, the probative value of the different elements in the procedure. The suspect is questioned at the hearing, but is not sworn in. He is not obliged to tell the truth, and his lies before the judge are not punishable. The accusation is upheld by the public prosecutor before the court. However he may freely present his observations before the court, even to maintain that the prosecution is unfounded, or that the infraction was not constituted. The public prosecutor asks the court to pronounce a sentence that he believes the most appropriate for the defendant. It is up to the judge to decide, case by case, according to his intimate conviction.

This system confers a much more important role to the judge than in Anglo-Saxon countries. The freedom given to the judge to appreciate the probative force of the evidence presented before him may be difficult to comprehend by someone who exercises within the common law system, used to handling the principle of the legality of proof. If, in this respect, the French system offers less guaranties than the Anglo-Saxon system, it is, nonetheless, much more flexible.

Especially, the principal guarantee offered to the suspect by the French procedure is that he cannot be condemned without a trial, even if he does not deny the charges against him. The meaning of a defence by the suspect becomes immaterial in such cases. A conviction cannot be pronounced if all the evidence against the suspect has not been submitted for review by the judge. In the common law system, it is possible for a defendant to plead guilty and be sentenced without trial, even though the evidence against him would not have been sufficient to find him guilty had he been tried.

X. CONCLUSION

A country of written law, France at the beginning of the XIX century set up a criminal procedure which rests on two essential organs: the head of the Prosecution Department at the court of first instance and the Examining Magistrate. Both belong to the same judicial body. The head of the Prosecution Department at the court of first instance, placed under the authority of the Justice Minister, conducts the police inquiries when an infraction is committed, and intervenes during the entire procedure representing the interests of society.

The Examining Magistrates, an institution proper to the continental system, are completely independent and make inquiries in the more serious case, at the request of the public prosecutor or the victim. Their status protects them from political pressures, and thereby avoids important prosecutions of politicians from being hampered. However, it is more than likely that in the future they will lose the power to decide alone the placement suspects in detention before trial. This is the direction of advancement of French criminal procedure, and in line with the European Convention of Human Rights, in its attempts to increase the guaranties offered to the suspects, yet at the same time to assure an efficient supression of criminal offences.