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THE ORGANIZATION FOR THE ENFORCEMENT OF THE CRIMINAL LAW IN FRANCE, GERMANY AND ENGLAND

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The administration of justice is a composite task. To deal with any one offender the efforts of police, prosecutors and judges are necessary. Europe may require in addition the intervention of an investigating magistrate (*juge d'instruction*). The success of criminal law enforcement depends upon the proper functioning of each one of these agents and upon their harmonious cooperation. Nor is it only upon these agents and the procedures they apply that satisfactory enforcement of the law depends. As an essential branch of governmental activity, the enforcement of the criminal law reflects the strength and weaknesses of the governmental structure. The composite nature of the task, the interdependence of the agents, the general dependence upon the government have been brought home to us by the American surveys of criminal justice of the past decade. The blame for the breakdown in law enforcement cannot be laid at the door of police without taking into account the subsequent activities of prosecutors and courts. No matter how intelligent police work is, it can be and often has been nullified by corruption, incompetence, or indifference in the prosecuting office. Ineffective prosecution of criminal cases, on the other hand, may be less the fault of the prosecutor than of inefficient police work or the uncooperative attitude of judges. Yet judges and juries cannot be blamed for failure to convict in a sufficient number of cases, or adequately to sentence offenders unless police and prosecutors have entirely fulfilled their duty in unearthing and presenting evidence in court. If enforcement is unsatisfactory, no assignment of responsibility is fair until it is ascertained whether the fault lies with one or another group of officials or with political interference. The party in power manipulating the machinery of criminal justice for its own ends, or powerful persons using influence for personal profit, do just as much damage in different directions. In view of all these factors it is useful to begin a discussion of the

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prosecution of crime with a brief consideration of the principal agents involved in the criminal process, their relations to each other, and their place in the governmental framework.

Probably nowhere is the contrast between European and American criminal justice so vivid and so unfavorable to America as in the field of organization. It would be impossible for an European observer of his own scene to comment as Dean Pound does on "the way in which the different agencies of justice, acting quite independently, continually hinder or thwart each other, or, if fortunately there is no interference, at best lend each other little or no aid. Each state, each county, each municipality, each court, each prosecutor, each police organization—and often more than one is operating in the same territory—is likely to go its independent course, with little or no regard for what the other is doing. It may even happen that state and federal prosecuting agencies or judicial officers may cross each others paths and interfere with each others operations. . . . Where there is but one jurisdiction involved, police, public prosecutor and coroner may proceed with parallel investigations, or with investigations that cross each other, or may even hamper each other, as the exigencies of politics, quest for publicity, or zeal for the public service may dictate."¹

Such a situation is impossible in Europe, where the organization corresponds to the reality of the interdependence of the agencies of the criminal law. All the agents engaged in the common task of the enforcement of the law are subject to one head, and linked to him by clear lines of administrative supervision and responsibility which run from him through the highest judges and prosecutors right down to the humblest policeman. If friction and jealousy do arise as they are bound to among different groups of officials, there is some means of controlling it. It is never allowed to become so serious that it undermines the general enforcement of the law.

The chief agency of integration is the Minister of Justice, a member of the national executive. In France and Italy the Minister of Justice is responsible for the functioning of the prosecuting authorities, the civil and criminal courts, and the execution of penalties. Even in pre-Hitler Germany, where the administration of justice was a function of the province rather than the Federal state, the provincial administration was modeled upon the centralized organization of France and Italy, and culminated in the Minister of Jus-

¹ Criminal Justice in America, 174-175, 176.

tice. With the Nazis has come complete centralization of authority. The independence of the provinces has been eliminated. The administration of justice has become a national and not a provincial function. The officials engaged in criminal justice administration are now subject to the orders and supervision of the Reich's Minister of Justice.²

Centralization of power in the Minister of Justice accords with the canons of parliamentary government which make a cabinet officer responsible to a popularly elected legislature for the functioning of every important branch of governmental activity. In France this situation still holds. A Minister of Justice goes out of office with the cabinet to which he belongs; if his policies are disapproved he may even be the cause of its downfall. The French arrangement was the model for Germany and Italy, but with the rise of dictators in both countries, the responsibility of the Minister of Justice has shifted from the legislature to the Duce or the Führer.

The Minister of Justice in Europe is at one and the same time the chief prosecuting officer of the State as well as the chief administrative officer of the courts. As the chief prosecuting officer he is directly responsible for the conduct of prosecutions throughout the country. All the prosecutors attached to the various courts are subject to his orders. He appoints them to their posts. He has complete powers of discipline over them. He may remove them at will. The Minister of Justice also supervises the courts. But his powers over the judges are restricted. Although he appoints and promotes judges, they are to a certain extent independent of him since they are irremovable during good behavior. If a judge is remiss in his duties, in order to effect his removal the Minister of Justice must bring him before a special disciplinary court.

It is to the officials in the central office of the Ministry that the Minister of Justice must look for assistance in performing the manifold duties of his office. In France, this central office is divided into three main divisions. The personnel division, has charge of all matters relating to the choice and discipline of the judicial and prosecuting hierarchy. The division in charge of civil cases is concerned with all matters of judicial organization, the functioning of the courts, and the discipline of ministerial officers and lawyers. The division in charge of criminal cases has great importance for criminal justice. It is intimately in touch with what the prosecutors are doing. It is this division to which prosecutors refer cases when

² See I Reichsgesetzblatt 1934, *Ibid.*, 1935, 68, 403, 65.

they are in doubt as to the proper course of action and from it they receive instructions.⁵ In organization and function the Ministers of Justice in Italy and Germany are similar.

Thus it is that the Minister of Justice holds in his hands the government of all judicial and prosecuting officers. The cardinal virtue of this system is the power of administrative supervision that it gives to the Minister. Through the various bureaus of the Ministry, the Minister of Justice can keep in touch with what all agents and agencies engaged in the enforcement of the law are doing. Not only can he supervise their activities; he can also bring them up to required standards of efficiency. His disciplinary powers are ample enough to compel cooperation between various branches of the administration or to remove inefficient or corrupt public servants. Being in close touch with the entire administration of justice, it is not very difficult for the Minister to uncover its weaknesses and take steps for their correction. Reforms can be planned with reference to the manner in which they affect the entire organization. In Italy, for example, a new code of criminal law and a new code of criminal procedure as well as laws reforming the judicial organization were all prepared under the direction of Minister of Justice Rocco, within a period of five years. In France the committee of lawyers, professors and judges which is at present drawing up a revision of the century old Code Pénal works under the general direction and in close touch with the Minister of Justice.

The nearest approach in America to a European Ministry of Justice is the Department of Justice in Washington, which controls the activities of the various Federal District Attorneys throughout the country and is in touch with the operation of the Federal courts. It has a unit of its own for criminal investigation. Various police agencies of other Federal departments can be made to cooperate with it through their ultimate responsibility to the President, who is also the chief of the Attorney General. But the Federal Government is engaged only in the enforcement of Federal laws, while the real burden of criminal law administration falls upon the states. Each state makes and enforces its own criminal law and is governed by its own code of criminal procedure. There is nothing in state administration to correspond to the European Ministry of Justice. Prosecutors are locally elected and are responsible only to the citizens that have elected them. Police are responsible to

⁵For a description of the organization of the Ministry of Justice see H. Chardon, *L'Administration de la France*, pp. 414-424.

the chief executive in the various cities and towns. In many states there is a small state police force, but their chief has no way of compelling a prosecutor to cooperate with them, nor can a prosecutor necessarily insist and obtain their assistance. The attorney general, the chief legal officer of the state, is also usually elected. If he has the power to supervise and control the activities of the local prosecuting offices, he is usually in no position to exercise it because of the possible political consequences to him. The Governor, upon whom rests the duties of enforcing the law, can act only through the independent agencies already enumerated. The courts are also independent of any link with the other agencies. Judges are for the most part locally elected and responsible only to their electorate.

In Europe the Minister of Justice exercises his authority through two separate though related hierarchies: the one of judges and the other of prosecutors. They are both erected on the basis of the organization of the courts, which embodies the simple and practical principle that the more serious the offense the greater must be the formal guarantee to the accused against unfair conviction. Each country has a three-fold classification of courts according to the gravity of the offenses with which they deal. In France and Italy the inferior criminal courts are manned by a single judge and have a limited jurisdiction. The French Police Courts (*tribunaux de simple police*) try only petty offenses; "contraventions," punishable by fines up to fifteen francs or imprisonment up to five days.⁶ In Italy, the jurisdiction of the inferior courts (the *pretori*) extends to cases in which imprisonment up to three years or fines up to 10,000 lira may be inflicted. To keep cases of any seriousness or complication out of these courts the Italian code provides that the prosecuting attorney may bring a case ordinarily within the competence of the *pretori* before a higher court.⁷

In both countries the courts of general civil jurisdiction⁸ have criminal branches which dispose of most of the offenses of medium gravity. The competence of the French *tribunal correctionnel*

⁶ Art. 137, Code d'Instruction Criminelle, hereinafter referred to as C. I. C. There are some exceptions to this general jurisdiction of the *tribunaux de simple police*. Some special contraventions are tried in the *tribunal correctionnel*. On the other hand, some special matters ordinarily within the jurisdiction of the *tribunal correctionnel* are tried by the *tribunal de simple police*. See J. A. Roux, *Cours de Droit Criminel Francais*, Vol. II, pp. 74-75.

⁷ Art. 31, Codice di procedura penale hereinafter referred to as C. P. P.

⁸ In France these courts are known as the *tribunaux de première instance*, in Italy as the *tribunale*.

extends to cases in which penalties up to five years may be imposed.⁹ In Italy the comparable courts, the tribunale, try cases in which penalties up to eight years may be inflicted. In both countries these cases are heard by three judges and constitute the bulk of the important criminal business.¹⁰ Special courts created as the need arises try the most serious offenses in both France and Italy. The French cour d'assises consists of three magistrates of superior rank and a jury of twelve citizens to which issues of fact are submitted. The Italian corte d'assise, formerly a jury court, now consists of two magistrates of high rank and five laymen sitting together as one judicial tribunal.¹¹

Each country has a limited number of appellate courts which hear appeals on matters of fact and law from the intermediate courts.¹² In a French cour d'appel every appeal was formerly heard by five judges; a recent decree reduces the number of judges necessary to three.¹³ An Italian corte di appello requires four judges to decide appeals. The decision of the cour d'assises in France and the corte d'assise in Italy on the facts are final; appeals can be taken only on matters of law, and go to the supreme court of the land, the Cour de Cassation in Paris, the Corte di Cassazione in Rome. Appeals on matters of law may also be taken to these courts from decisions of the appellate courts.

In Germany, the law of 1924 placed the brunt of criminal jurisdiction upon the inferior court, the Amtsgericht. The Amtsrichter, either alone¹⁴ or with two laymen¹⁵ (in which cases the court is

⁹ Art. 40, Code Pénal and Art. 182, C. I. C.

¹⁰ In 1929 the tribunaux de simple police tried cases against 723,760 defendants. The tribunal correctionnel tried cases against 246,690 defendants, the cour d'assises tried cases against 1,704 defendants. *Compte Général de la Justice Criminelle*, 1929, p. vi. In Italy, the pretori in 1930 tried cases against 637,435 defendants, the tribunale tried 118,313 defendants and the corte d'assise tried 3,807 defendants. *Statistica Giudiziaria Penale 1929-1930*, pp. XXXVII, XXXIX.

¹¹ See Art. 2, Regio Decreto 23 marzo 1931, n. 249.

¹² Appeals from the inferior courts go to the intermediate courts.

¹³ Decree of 25 June 1934, *Les Lois Nouvelles*, pp. 543, 545.

¹⁴ The Amtsrichter has jurisdiction to try alone: (1) in general all offenses punishable by more than six months imprisonment; (2) offenses turned over to him for trial by the Prosecuting Attorney where a prison penalty of no more than one year is expected. But the Amtsrichter is not bound by this limit; (3) cases of grand larceny, receiving stolen goods, and certain other offenses (Arts. 243, 244, 258, 260, 261, 264, *Strafgesetzbuch*). These cases may be turned over to the Amtsrichter by the Prosecuting Attorney. But before the Amtsrichter may try them, the consent of the accused to such trial before a single judge must be obtained. See Arts. 25, 26, *Gerichtsverfassungsgesetz*, hereinafter referred to as G. V. G.

¹⁵ In general, the Schoffengericht has jurisdiction over offenses in which the penalty may be up to ten years' imprisonment. See also 24, 28, G. V. G.

known as the *Schoffengericht*) can now try most of the offenses in the penal code. In specially serious or difficult cases, the prosecuting attorney may demand that a second judge be added to this tribunal.¹⁶ The most serious offenses are now triable by a court (*Schwurgericht*) composed of three judges and six laymen sitting together as one judicial tribunal, the traditional distinction between fact and law having been destroyed, along with the old jury organization, as in Italy.¹⁷ The old court of intermediate jurisdiction (*Strafkammer*) which, prior to 1924 consisted of five judges, has been completely transformed in character. It no longer has any trial jurisdiction. It acts as an appellate court on matters of fact and law from the decisions of the *Amtsrichter* and from the *Schoffengericht*. Instead of five judges, it now sits with one judge and two laymen when trying appeals from decisions of the *Amtsrichter* and three judges and two laymen when trying appeals from the *Schoffengericht*.¹⁸ The provincial appellate court in Germany (*Oberlandesgericht*) which formerly decided appeals on matters of fact and law, is now limited to appeals on matters of law alone from decisions of the *Strafkammer* and the *Amtsrichter*.¹⁹ Where a violation of national law is alleged the appeal may usually be taken to the *Reichsgericht*,²⁰ the supreme court of Germany.

In all three countries every court, whether it be inferior court for petty cases, trial court of general jurisdiction or appeal court, is part of one judicial organization which has as its ultimate chief the Minister of Justice. The presiding judge of every court is its administrative head to whom all officials connected with the court are responsible. The presiding judges of inferior courts are in turn responsible to the chief judge of the court next above theirs in rank. The presiding judges of the intermediate courts are responsible for the functioning of their own courts and for the other courts that they supervise, to the chief judge of the appeal court in their jurisdiction. Thus the chief judge of every court of appeal is not alone the responsible administrative head of his own court, but also the chief supervisory officer of every inferior court within the jurisdic-

¹⁶ Art. 29(2) G. V. G.

¹⁷ Arts. 80, 81, 82, G. V. G.

¹⁸ Art. 76, G. V. G.

¹⁹ Art. 121(1), G. V. G. In treason cases the *Oberlandesgericht* may be called upon to act as a trial court. Arts. 134, 120, G. V. G.

²⁰ This is true of appeals on matters of law from decisions of the *Schwurgericht* and the *Strafkammer* sitting as an appellate court from decisions of the *Schoffengericht*. Art. 135, G. V. G. Likewise a defendant tried by a *Schoffengericht* of two judges and two laymen may take an appeal on law alone directly to the *Reichsgericht*. See Gerland, *Der Deutsche Strafprozess*, p. 91.

tion of his court. He, in turn, is the judicial officer most directly in touch with the Minister of Justice. There is therefore possible in every country a continued administrative supervision of the courts exercised by various members of the judicial hierarchy. All the courts of the country are knit together by the supervision exercised from the Ministry of Justice.

This unified interrelated hierarchy of courts in Europe contrasts sharply with court organization in America. Independence and lack of administrative unity characterize our system. Few American courts of trial jurisdiction are fortunate enough to have administrative superiors who direct, apportion and supervise the work of the whole court. But even in such cases, as for example the Chicago Municipal Court, the Detroit Recorder's Court, the Cleveland Common Pleas Court, the influence of the supervisory judge is persuasive. Individual judges can defy the authority of the chief judge. They hold their posts by as good a title as that of the chief judge, election by the people. Their ultimate responsibility is to their electorate. They cannot be compelled to recognize the authority of an administrative superior. There is therefore little internal unity in individual American courts. There is also no administrative supervision in the European sense by the appellate courts over the inferior courts or by a chief appellate judge over the inferior court judges. In some cases judicial councils exist which suggest better ways of performing judicial business or which lay down rules of court or discuss matters relating to the judicial organization generally. Whatever authority these councils exercise over individual judges is also persuasive in character. The only legal tie between inferior and appellate courts is that the inferior courts must abide by the rules laid down by the higher courts.

In France, the hierarchic organization of prosecution like the judicial hierarchy parallels the courts and culminates in the Minister of Justice. Because of the complete dependence of the prosecutors upon the Minister of Justice it is possible to speak of the prosecuting authorities as representatives of the executive authority attached to the courts. From highest to lowest, the prosecutors are connected directly or through their superiors to the Minister of Justice and are subject to his administrative supervision.

Attached to every court in France is a *parquet*, that is, a group of prosecuting officials. The *parquet* of the Cour de Cassation consists of a chief prosecuting officer and six assistants, called *avocats*

généraux. The chief prosecutor is responsible directly to the Minister of Justice but does not exert any direct authority upon the ordinary prosecution of criminal cases. He comes in touch with criminal cases only when they come before the Cour de Cassation on appeals on matters of law, when either he or one of his subordinates presents the case for the state.

The chief of the parquet of every cour d'appel is known as the Procureur Général. He and his assistants (avocats généraux and substituts au Procureur Général) usually perform the functions of prosecuting attorneys in the cours d'appel and in the cours d'assises which being temporary courts, have no permanent parquets of their own. The Procureurs Généraux of the 27 cours d'appel are the chief medium by which the Minister of Justice exercises his control over prosecutions. Every Procureur Général is responsible to the Minister of Justice for the conduct of prosecutions in all the courts within the jurisdiction of his cour d'appel. The Procureur Général must report periodically to the Ministry of Justice as to the action taken in prosecutions and the dispositions of the criminal cases. Whenever an offense occurs which is of special interest to the public order or one which may have political repercussions, the Procureur Général must make a special report to the Minister of Justice of the particulars of the offense and the steps taken in its prosecution. Through the Procureur Général the Minister of Justice transmits any orders he may have in connection with criminal cases. Obedience to his orders are enforced by his powers of disciplining or removing any subordinate.

The Procureur Général is in turn the immediate administrative superior of the Procureurs de la République, the chiefs of the parquets attached to the courts of first instance (tribunaux correctionnels) within his jurisdiction. The Procureur de la République must make periodic reports to the Procureur Général on all cases considered in his office and the action taken thereon. He is also required to report specially on any case in which the Procureur Général is interested. Any orders that are given to the Procureur de la République by the Procureur Général with respect to criminal cases must be obeyed by the former official. The Procureur Général also has a disciplinary power over his subordinates.²¹

The parquet of the police court, the French petty court, is rudimentary in character. Its functions are performed usually by

²¹ Faustin-Helie, *Traité d'Instruction Criminelle*, Vol. I, pp. 575-578; F. Goyet, *Le Ministère Public*, pp. 1, *et seq.*; for the administrative organization of prosecution see Garraud, *Traité d'Instruction Criminelle*, Vol. I, p. 17, *et seq.*

a police official (*Commissaire de police*) in the town in which the court is located.²² Insofar as he functions as a prosecutor in the petty offenses which come before the *tribunal de simple police*, he is subject to the supervision of the *Procureur de la République* and the *Procureur Général*.

The Code expressly places the power of initiating prosecution in the hands of the *Procureur de la République*. He is charged with the ascertainment and prosecution of all offenses within the jurisdiction of the *tribunaux correctionnels* or the *cours d'assises*.²³ Neither the Minister of Justice nor the *Procureur Général* has the power of initiating prosecutions. Where a *Procureur de la République* refuses to prosecute in any case, their only recourse is to remove him and substitute a more pliant official. Nor can the Minister of Justice or the *Procureur Général* stop a prosecution once it has been properly begun. Even though it were started contrary to the expressed orders of a superior the prosecution can be ended only by decision of the competent court.

Though the *Procureur de la République* is expected to obey orders received and may suffer disciplinary measures for disobedience, he is within his rights if at the trial of a case he presents his own opinions, according to his reason and his conscience, as to the results of acts he has done as a representative of the executive power. He is thus not a servile functionary of the government. Although he is removable at will while a judge has a position for life, a prosecutor is still a magistrate. He must have the same qualifications, take the same examinations, serve the same kind of apprenticeship as a trial judge; he is so much a magistrate that promotion may carry him to a judicial post instead of to another post in the prosecution hierarchy, or he may have come to his post as prosecutor from a post in the judiciary. The French way of expressing the double responsibility of a prosecutor, to his superiors and to his conscience as a magistrate, is the saying: "*La plume est servie mais la parole est libre*."²⁴

Prohibiting a superior from exercising the powers of a subordinate and giving the prosecutor the right to express his own opinion in court, is an attempt to conciliate the necessity of a unified direction with independent judgment in the exercise of the

²² Art. 144, C. I. C. If there is no *Commissaire de police* in the town, or if the *Commissaire* is prevented from performing these functions, his place may be taken by a *commissaire* stationed in a different town, the assistant (suppleant) to the *juge de paix*, by the *maire*, or assistant to the *maire* (adjoint).

²³ Arts. 22, 274, C. I. C.

²⁴ Goyet, *op. cit.*, p. 12.

power of prosecution. If a Minister of Justice could at any moment interfere in a criminal prosecution and quash it once it is started, he would have the power of putting certain classes of individuals above the laws and of oppressing others. If a prosecutor had to express the opinion commanded by his superior he would belie his position as a magistrate. The fact that a Procureur Général or a Minister of Justice must adopt the roundabout method of removal and replacement by another official if a prosecutor refuses to perform acts which they want done, prevents a too frequent and too easy interference with the official to whom the duties of the initiation of prosecution are assigned.

The French organization of prosecution has been a model for both Germany²⁵ and Italy.²⁶ The prosecuting authorities in Germany and Italy, as in France, are under the unified control of the Minister of Justice. The organization of prosecution is hierarchical and parallels that of the courts. A shift in careers is possible. The organization of prosecution in the inferior courts is rudimentary.²⁷

In one important respect German and Italian organization differs from the French. The chief prosecuting officer in the former countries can always substitute himself for the subordinate prosecutor and can at any time take over the duties of his office.²⁸ There is also in Germany a greater degree of subordination of the prosecutors in the lower ranks of the hierarchy to their superiors than is the case in France. Orders which are given must be obeyed, even to the expression of opinion at the trial.²⁹

No prosecuting officer in America has the supervisory powers comparable to those of the Procureur Général in France. The locally elected district attorney runs his office as he pleases. If he is lax or inefficient, if he is disposed to play politics with his office, the only real check upon him is his political accountability to the electorate. But this is a poor substitute for routine supervision. What impresses the public is what the prosecutor has done in the

²⁵ For the German organization see Arts. 141-147, G. V. G., and E. Friedersdorff, *Einführung in die Staatsanwaltschaftliche Praxis*, pp. 6-11.

²⁶ For the Italian organization see Arts. 77-96, R. D., 30 dicembre, n. 2786 and Manzini, *Trattato di Diritto Processuale Penale*, Vol. II, p. 261, *et seq.*

²⁷ The law of Jan. 4, 1924, which gave a large criminal jurisdiction to the inferior courts (Amtsgerichte) in Germany has somewhat blurred the lines of the German organization of prosecution. The prosecutor who handles petty offenses (Amtsanwalt) and the prosecutor who is in charge of the prosecution of all the more serious offenses, may now both appear in the inferior courts.

²⁸ For Germany see Arts. 145 and 146(1), G. V. G.; Löwe-Rosenberg, *Die Strafprozessordnung für das Deutsche Reich*, pp. 1193-94; for Italy see Manzini, *op. cit.*, Vol. II, p. 272.

²⁹ See Gerland, *op. cit.*, pp. 110-111.

sensational or striking cases; it is usually ignorant of his handling of the great mass of ordinary offenses upon which the efficiency of his office really depends.

On the continent the chief agent of supervision, the Procureur Général, has many different means of exercising control over the every day functioning of the local prosecuting attorney's office. The Procureur Général receives reports which provide information as to the kind of cases handled by the local prosecutor, the action taken and the reasons. The Procureur Général moreover, may at any time demand information and may inspect the dossiers of any cases in which he is particularly interested. The Procureurs also make periodic visits of inspection to the offices of their subordinates. It is possible through these means for the Procureur Général to know what is taking place in the various prosecuting offices in his jurisdiction. An energetic Procureur Général can keep his subordinates up to a high standard of efficiency in the enforcement of the criminal law. Since the Ministry of Justice is in direct contact with the Procureurs Généraux, it is possible for it to maintain high standards of efficiency in prosecution throughout the country.

The strong administrative supervision over local prosecutors makes unlikely any such abuse of the prosecutor's office as is encountered in America. The ordinary run of criminal, the burglar, pick-pocket, hold-up man, etc., could hardly buy immunity from prosecution. It is usually beyond their means. There are no sumptuary laws to create golden opportunities for illicit activity. Professional criminals in Europe do not reap the large gains which fall to their more fortunate American brothers, and lack the large sums of money available to corrupt the machinery of law enforcement. The system of administrative supervision makes immunity an expensive commodity, since not only the local prosecutor has to be reached but also his superior. Furthermore, prosecutors are frequently shifted and the protection bought could not be had for a long period. The traditions of honesty in the magistracy also make this type of corruption unlikely. Europeans do not accuse their judges and prosecutors of venality. Despite miserable salaries, high standards of integrity are maintained, so far as the taking of money is concerned.

Obviously, on the other hand, the unified and strong administrative control creates the possibility for those in control to manipulate the machinery of criminal justice for personal and

party ends. Two features of the organization enhance this danger. The Minister of Justice, the directing and active head of the judicial and prosecution hierarchies, is a politician, not a career official. He owes his position to political ties and friendships. On this politician, judges and prosecutors are dependent for advancement. The magistracy is a career on the continent. The various gradations in the hierarchies of judges and prosecutors are so many prizes to be attained. They are distributed, by promotion, by the Minister of Justice. Although bound by certain rules, he still has the power to retard a man's career or advance him more rapidly than he deserves. It is well-recognized in Europe that the promotion system makes judges and prosecutors as a class subservient to the group in power.

Thus individuals who are well connected politically and socially, and who have had the foresight to enlist prominent politicians in their ventures, have not encountered very much difficulty in obtaining protection, for their illicit activity in Europe.³⁰ If the Minister of Justice can be reached, either directly or through his political friends, the inactivity of prosecutors may usually be achieved through orders from the Minister. The Stavisky case is an outstanding example of this type of interference in the administration of justice. This possibility of interference in the prosecutions of individuals with some degree of political influence is so well recognized in France that every time a prosecution may involve some political personage or some political interest, the prosecutors must consult the Minister of Justice as to their course of action. He is the master of what is to be done in this type of case.³¹

The use of the criminal law as an instrument to destroy opponents of the political group in power, is also a familiar evil in Europe. The Reichstag fire trial is but a recent and striking example of this type of political manipulation of justice. Less flagrant instances were known in Pre-Hitler Germany,³² in France³³ and in Italy.³⁴

Political interference from the top has led many European writers to demand that the prosecutor be made independent of the

³⁰ See R. De La Grasserie, *De la Justice en France et à l'Etranger*, Vol. III, p. 1093, et seq.

³¹ H. Chardon, *op. cit.*, p. 416.

³² See remarks of E. Schiffer, *Die Deutsche Justiz*, pp. 11, 21-22; M. Behrad, *Der Deutsche Richter*, pp. 214-217.

³³ See remarks of Jeanvrot, *De l'Inadmovabilité de la Magistrature*, p. 196, et seq; Morizot-Thibault, *op. cit.*, pp. 26-31.

³⁴ See brochure of Saverio Merlino, *Politica e Magistratura*.

Minister of Justice.³⁵ To do so, it would be necessary to give him guarantees against dismissal except for specific cause similar to those given the judges. It would also be necessary to reform the promotion system, taking away the right of promotion from the Minister of Justice. There is little likelihood that these reforms will be adopted. Control of the prosecution machinery is too valuable a privilege for any government to throw away lightly. If prosecutors were made independent, Europe would face the problem of how to maintain the strict supervision which now proves an obstacle to local deals between prosecutor, criminal and politician.

France, however, has recognized the necessity of giving the members of the prosecuting hierarchy greater guarantees in the exercise of their functions. A decree issued last June (1934) provides that a prosecutor may not be dismissed, demoted, or transferred as a disciplinary measure unless the charges are first passed on by a newly created commission. The commission consists of the Procureur Général à la Cour de Cassation, who is its chairman, two of the oldest judges of the Cour de Cassation, a Director of the Ministry of Justice, and three prosecutors named by the Minister of Justice. This Commission may make an investigation of the charges against the prosecutor and may also examine him personally. The decision of the Commission is only advisory. It does not bind the Minister of Justice. He retains full freedom of action.³⁶ But flagrant dismissals or other disciplinary action against prosecutors may be prevented by these provisions. The opinion of the judiciary and the prosecution hierarchy may be mobilized in support of a decision of the Commission. It would not be politically wise for a Minister of Justice completely to disregard a decision which may have behind it the full weight of the French "magistrature."

The investigating magistrate is as thoroughly integrated in the administrative organization as is the trial judge and the prosecutor. At least one judge is attached to every court of general jurisdiction in France, Germany and Italy to perform the duties of an investigating magistrate (*juge d'instruction*, *guidice istruttore*, *Untersuchungsrichter*). In the larger centers several judges are so designated. In Paris, there are at least forty.

³⁵Morizot-Thibault, *op. cit.*, p. 13; H. Saussier, *Le Ministère Public, et le Pouvoir Central*, pp. 55, *et seq.*; Dr. Lobe, in the *Verhandlungen des 35 Deutschen Juristentages*, Vol. II, p. 576, *et seq.* For an opposing view see Dr. Hoepler, in the *Verhandlungen*, p. 605, and T. Tinsch, *Die Staatsanwaltschaft in der Deutschen Reichsprozessordnung*.

³⁶Decree of June 5, 1934, in *Les Lois Nouvelles*, p. 497, *et seq.*

In every country the investigating magistrate is appointed to his post by the Minister of Justice, on the recommendation of the prosecuting authority, from among the judges attached to the court. As a judge he has a position for life, but his position as an investigating magistrate is temporary. He is appointed in France for three years,³⁷ in Italy,³⁸ and in Germany³⁹ for one year. He may be dismissed from his position as a juge d'instruction by the Minister of Justice at any time; in such a case he returns to his previous status as a trial judge.

The investigating magistrate has a dual function. He is an active investigator in a criminal case with large powers for getting at the truth. At the same time he is a judge called upon to make judicial decisions in the case he is investigating. In France, this dual character subjects him to a double control. As an investigator, he is made an officer in the police judiciaire, the group of police officials charged with the investigation of criminal cases. The chief officer of the police judiciaire is the Procureur Général. With respect to these functions, therefore, the juge d'instruction is subjected to the supervision of the prosecuting authority.⁴⁰ The Procureur Général may take possession of the dossier at any time and thus inform himself of what the juge d'instruction is doing. He may also order the juge d'instruction to do specific acts of investigation. The Procureur Général may admonish the juge d'instruction if he refuses to obey orders, and may ultimately secure his removal from his post as juge d'instruction. The recommendation of the Procureur Général is also a factor in the advancement of the juge d'instruction. Another control which the prosecutor has over the juge d'instruction in France, is that in any court where there are numerous judges d'instruction, it is the prosecutor who distributes the cases among them.⁴¹ Besides the supervision of the prosecuting authority, the juge d'instruction, like any other judge, is also submitted to the administrative supervision of the president of the tribunal to which he is attached and on whom he is dependent for recommendation for advancement in the judicial hierarchy.

In theory the juge d'instruction is independent of the prose-

³⁷ Art. 55, C. I. C.

³⁸ Art. 32, R. D., 30 Dec., n. 2786.

³⁹ Art. 61, G. V. G.

⁴⁰ Art. 279, C. I. C.

⁴¹ For France, see Garraud, *op. cit.*, Vol. II, pp. 550-551; For Italy see 296(1), C. P. P.

cuting authority. Being a judge and not a prosecutor, the juge d'instruction is expected to bring to his investigation of criminal cases that spirit of impartiality which may be expected in judges. But the actual position made for the juge d'instruction seems to belie both his impartiality and his independence. It is difficult to see what formal guarantees of impartiality and independence in the juge d'instruction may be had where the prosecuting authority in effect names the juge d'instruction; where the juge d'instruction is the subordinate of the Procureur Général with respect to part of his functions; and where, if there are several juges d'instruction the choice in any particular case is made by the Procureur. Garraud sums up the situation with the remarks, "One understands in what limited measure the independence of the juge d'instruction is guaranteed with respect to the government and how true it is to say that the choice and direction of this magistrate belongs in reality to the executive power."⁴²

However, inferences from these conditions must not be overdrawn. Independence is largely a matter of character and the French laws do make it possible for a juge d'instruction to be independent. The law has provided that in no case is he compelled to follow the opinions of the Procureur de la République or the Procureur Général. He is free to do whatever is necessary in carrying out his investigations according to his own conscience and honor as a magistrate.⁴³ Any independence that the juge d'instruction does show with respect to the prosecuting authorities unquestionably finds support in the rest of the judicial hierarchy. Moreover, independence is not ruinous. At the most the juge d'instruction may lose his functions as investigating magistrate. But he does not lose his livelihood. He resumes his position and career as a trial judge.

The independence of the juge d'instruction from the prosecuting authorities is enhanced, moreover, by a new French decree. Appointments to this position are no longer completely in the hands of the Minister of Justice. The Minister must make his choice from three names proposed to him by the newly instituted promotional commission of five judges.⁴⁴ The judiciary has therefore a de-

⁴² Garraud, *op. cit.*, Vol. II, p. 549. See also discussion by Donnedieu de Vabres, *La Justice Penale d'aujourd'hui*, and Guillot, *Les Principes du Nouveau Code d'Instruction Criminelle*, pp. 34-35.

⁴³ Garraud, *op. cit.*, Vol. III, pp. 33-35.

⁴⁴ The Commission is composed of the Chief Justice and two other judges of the Cour de Cassation, and two judges of inferior rank.

cisive influence in the selection of juges d'instruction. It must be pointed out, however, that the Minister of Justice still has full powers of revocation.⁴⁵

In Germany, although the arrangements are somewhat different the investigating magistrate (Untersuchungsrichter) is no more independent of the prosecuting authorities than in France. There, too, the magistrates are appointed by the Minister of Justice for one year and may be dismissed from these functions at any time. Germany has avoided two mistakes of the French organization. In the first place, the distribution of the dossiers among various magistrates is removed from the hands of the prosecutor and vested in the President of the court. Thus the prosecutor cannot pick investigating magistrates whom he knows to be amenable to conduct particular investigations in which he may wish to dictate the result. Secondly, the investigating magistrate is not a member of the police judiciaire, and thus the prosecutor has no formal supervision over his acts of investigation. The investigating magistrate is submitted only to judicial supervision. But the Germans have made him very much dependent upon the prosecutor as to when he can begin his investigation and have very rigidly limited him in the extent of his investigations.⁴⁶

In Italy, appointment of the investigating magistrate is made as in France and Germany. The Fascist Code provides that the chief prosecutor (Procuratore Generale) has the right to see that his investigations are expeditiously performed and that the forms fixed by law are observed.⁴⁷ This provision has been declared by its proponents to provide purely formal supervision.⁴⁸ But the opinion has been expressed that it will increase the factual dependence of the investigating magistrate upon the prosecuting authority.

Both the prosecutor and the investigating magistrate require the help of officials and agents in all parts of their jurisdictions to bring the commission of offenses to their attention and assist them in making their investigations. In France this need has been met by designating certain administrative and police officers as agents of an institution known as the police judiciaire and making the Procureur de la République and the juge d'instruction its superior officers in every jurisdiction. Germany and Italy have adopted this French

⁴⁵ Decret, 20 Feb., 1934, in *Les Lois Nouvelles*, 1934, p. 246.

⁴⁶ Arts. 179, 155, St. P. O. See Graf zu Dohna, *Das Strafprozessrecht*, pp. 145-6.

⁴⁷ Art. 298, C. P. P.

⁴⁸ *Lavori Preparatori*, Vol. VIII, p. 57 *et seq.*

conception, but in these countries the investigating magistrate is not formally named as an officer, though the agents of the police judiciaire are required to carry out his orders.

In France many different functionaries are named as agents of the police judiciaire and hence subordinates of the juge d'instruction and the Procureur de la République.⁴⁹ Some of them, such as the gardes champêtres (rural guards), the gardes forestiers (forest guards)⁵⁰ and the special police of the various governmental departments⁵¹ have a limited competence. Others, like the mayors (maires) of the communes and the justices of the peace (juges de paix) have a more extensive jurisdiction. But they intervene rarely in criminal prosecutions.⁵² The officials upon whom the Procureurs and the juges d'instruction place most of their reliance for assistance are (1) the Commissaires of Police, (2) the Brigades Mobiles, and (3) the Gendarmerie.

The police of most French cities and towns is municipal in character under the control of an elective mayor (maire) who is in turn responsible to the prefect of the département, an administrative official named by and responsible to the central government. The police of the larger cities (Paris, Marseilles, Lyon, Toulon-et-la-Seyne, Nice, Mulhousen, Metz, Strasbourg) are directly under national control. But even where the police is municipal, its officers, the commissaires, are agents of the central government. They are appointed by the Minister of the Interior and are responsible to the Prefect who is a subordinate of the same Minister. The law provides that there must be at least one commissaire of police for every 5,000 inhabitants. In the larger cities, there is a commissaire in every section of the city, working under the direction of a chief commissioner for the whole city.

Besides his duties in connection with the preservation of order, the commissaire has important functions in connection with "police judiciaire." In practice he is the first to be notified when an offense

⁴⁹ See Art. 9, C. I. C.

⁵⁰ The garde champêtre is charged with the ascertainment of "contraventions" and rural "délits" and certain special offenses such as public drunkenness, traffic offenses, etc. The garde forestier is charged with the surveillance of forests and has capacity to determine all "délits" and "contraventions" committed therein. See Goyet, *op. cit.*, pp. 198-199; See also Art. 16, C. I. C.

⁵¹ See Le Poittevin, *Code d'Instruction Criminelle*, Vol. I, p. 157, sec. 3, for the duties of the agents of the various governmental departments in connection with "police judiciaire."

⁵² See, as to the assistance of the maires in the work of justice, the remarks of Henri Chardon, *op. cit.*, pp. 190-191; as to the judges de paix, Garraud, *op. cit.*, Vol. II, pp. 590-591.

is committed in his district. If an arrest has been made he is usually the first to interrogate the accused and decide provisionally what shall be done with him. The commissaire receives the complaint of the injured party and the declarations of those who have discovered the offense. He gives notice of the offense to the parquet, makes the summary investigations and arrests when his suspicions are fixed. When the offense is not serious, it is usually cleared up by these summary investigations. In serious cases, the activities of the commissaire are preliminary to the main investigation conducted by other officials. Frequently the commissaire, on the request of the Procureur de la République, makes a summary investigation (*enquête officieuse*) of a complaint which the Procureur has received, or provides him with information concerning a particular accused.⁵³ Despite these important functions, the criticism is made that "the service of police judiciaire in the smaller French cities is practically non-existent."⁵⁴ The commissaire has almost no means of action. His personnel is limited to a few guards and secretaries, badly paid and poorly recruited. Criminal investigation of any difficulty is usually beyond his means.⁵⁵

In the larger cities and especially in those in which the police is under national control, the situation is very much better. The high police officers can call upon definite organizations within their own departments for purposes of criminal investigation. In Paris, for example, over 800 agents under the direction of a Directeur de la Police Judiciaire perform this function and are assisted by a well organized service of criminal identification and of scientific criminal investigation.

The insufficiency of the municipal police forces and the gendarmerie to perform the functions of police judiciaire brought into being in 1908 the brigades mobiles, the second group of officials on whom procureurs and juges d'instruction must rely. The brigades mobiles are a national detective force. The country is divided into 17 sections, each with a brigade assigned to it. These brigades are under the direction and control of the Department of Public Safety (*Sûreté Générale*) whose chief is directly responsible to the Minister of the Interior. The *Sûreté Générale* maintains a very important headquarters service of identification to aid its field agents.

The prosecutor is not in direct contact with the individual agent

⁵³ E. Guyon, *L'Organization de la Police en France*, pp. 39-40.

⁵⁴ Guyon, *ibid.*, p. 228.

⁵⁵ See E. Locard, *La Police*, p. 15.

of the brigade mobile. Whenever a Procureur de la République or a juge d'instruction desires the assistance of a member of these brigades he must send a request to the Procureur Général who will in turn communicate with the head of the brigade in his jurisdiction. Only in case of urgency may the procureur communicate directly with the head of the Brigade. By this means control of the individual agents is left to the head of the force.

The Procureurs and investigating magistrates have made increasing use of these brigades. In small cities and in country villages the brigades do invaluable work. Locard calls them the best part of the French police organization.⁵⁶ They have shown what it is possible to do with a specialized, well-recruited police.⁵⁷ In large cities which have their own detective forces, the brigades mobiles rarely intervene. Excellent as this force is, it is limited in numbers and acts only in the most serious offenses.

The third force in which the prosecution and juge d'instruction rely is the gendarmerie, a military force under the direction of the Minister of War. It is used as a national police force doing service particularly in rural districts and small towns. Its essential function is to maintain order and prevent crime. But the gendarmerie is also charged with assisting the Procureur de la République and the juge d'instruction in their investigations. Although this force is praised for its integrity and its devotion to duty, it is severely handicapped in the performance of the functions of criminal investigation. The gendarmerie is a military force. Its personnel is not technically trained for criminal investigation. It is also hampered by a burden of miscellaneous duties, thrown upon it by both the Minister of War and the Minister of the Interior, such as army recruiting and the carrying of messages, which have nothing to do with police work.⁵⁸

Although the officials of the police judiciaire are under the supervision of the Procureur Général, he has no effective way of enforcing obedience and maintaining satisfactory standards of co-operation with the prosecuting authorities. He may lodge a complaint with the superior officer of a negligent official or he may himself warn the man to do better in the future. The Procureur may even summon the official before the cour d'appel, but this court has power only to reprimand the delinquent official and con-

⁵⁶ Locard, *ibid.*, p. 12.

⁵⁷ Locard, *ibid.*, p. 13.

⁵⁸ See observations of Guyon, *op. cit.*, p. 169, *et seq.*

demn him to pay the expenses of the proceeding.⁵⁹ The agents of the police judiciaire are therefore as Faustin-Hélie points out, almost completely independent of the authority which cannot live without their cooperation.⁶⁰

It is possible, however, to avoid serious differences between the police and the prosecuting authorities in France. The superiors of the police and of the prosecuting authorities, the Minister of the Interior and the Minister of Justice, respectively, are in the same cabinet, which must preserve a unified political front, if it is to survive. Moreover, there is a realization in France that police and prosecutors are engaged in one job in which they must work together harmoniously if they wish to see criminals brought to justice. The respect for a superior which permeates the whole French bureaucracy makes it possible for the Procureur to exercise an authority over his agents even though his position is buttressed by no real disciplinary powers. Another incentive to cooperation with the Procureur lies in the fact that he gives his opinion at the end of the year on the calibre of the individual agent, an opinion which to some extent determines the advancement of the agent in rank and remuneration.

Both the Germans and the Italians follow the French plan of designating certain classes of administrative and police officers as officials of the police judiciaire subordinate to the prosecuting attorney.⁶¹ Their organization is subject to difficulties similar to those encountered in France. Only the small German state of Baden has created a police judiciaire envisaged by the codes of all three countries. Baden has put its police judiciaire (*Kriminalpolizei*) under the direct control of the prosecuting attorney,⁶² leaving only the uniformed force responsible to the regular police authority.

The Baden solution for the problem of obtaining cooperation between police and prosecutor has been suggested in other countries.⁶³ But the difficulty is that separation of the detective force from the rest of the police is not practical. Both the patrol and the detective force must be in intimate contact with each other; the work

⁵⁹ Arts. 279-281, C. I. C.

⁶⁰ Faustin-Hélie, *op. cit.*, Vol. III, p. 45.

⁶¹ For Germany see Art. 152, G. V. G., and comment thereon in Löwe-Rosenberg, *op. cit.*, p. 1199, *et seq.* For Italy see Arts. 219, 220, 221, C. P. P.

⁶² Schlanbush, *Staatsanwaltschaft und Kriminalpolizei*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 52 (1932) pp. 621-632, at pp. 623-624.

⁶³ See remarks of Casabianca, *Revue Penitentiaire*, Vol. 44 (1920) p. 30. Compare, E. Locard, *op. cit.*, pp. 27-30.

of one supplements that of the other, and they are vitally interdependent in the performance of their functions. Recognizing the inadvisability of dividing the police, some reformers suggest that the whole police be turned over to the prosecuting authorities.⁶⁴ Others, recognizing the factual predominance of the police in the preliminary procedure, make the opposite suggestion, that the prosecution hierarchy be incorporated in the police.⁶⁵ This proposal has received severe criticism. It was pointed out that judicial authorities are not the instruments of the police, that the prosecuting attorney when he represents the accusation is acting as a servant of the court and in a judicial capacity. He cannot be an agent of the police at the same time.⁶⁶

Finally, many who recognize the shortcomings of the present organization believe that the separation of the police from prosecutors is essentially sound.⁶⁷ These reformers suggest that steps should be taken to bring the prosecuting authorities into personal touch with the individual agents who make the actual investigations. It is recommended that the prosecuting attorney be trained in criminal investigations so that he would be better able to direct the operations of the investigators in the individual case. By keeping the prosecuting attorney independent while providing for greater cooperation, these writers hope to obtain the benefit of critical, unbiased legal advice from the one whose job it is to represent the accusation at the trial.

Although the problem of securing efficient cooperation between prosecuting authorities and police has not received an altogether satisfactory solution in European countries, they have at least set up a conception of a group of police officials specially designated by law to assist the prosecuting attorney in the exercise of his functions. In America also, it is understood that prosecutors must have police cooperation. But we have no such conception as in Europe of a police judiciaire to assist the prosecuting attorney in the exercise of his functions. The police are usually subject to the mayor

⁶⁴ See comment of Dr. Lobe in *Verhandlungen des 35. Deutsche Juristentag*, Vol. II, pp. 572-573. Compare Chardon, *op. cit.*, pp. 206-208.

⁶⁵ See G. Crusen, *Staatsanwaltschaft und Kriminalpolizei*, *Deutsche Richterzeitung*, Vol. 24, 1932, pp. 16-18.

⁶⁶ See for example, D. Chrzescinski, *Gegenwart und Zukunft der Staatsanwaltschaft* 32 *Deutsche Juristenzeitung* (1927) pp. 1294-1299; Dr. Schmidt, *Deutsche Richterzeitung*, Vol. 23, 1931, pp. 363-365.

⁶⁷ Dr. May, *Staatsanwaltschaft und Kriminalpolizei*, Vol. 52, *Zeitschrift für die Gesamte Strafrechtswissenschaft* (1932) pp. 612-621. Schlanbusch, *loc. cit.*, Dr. A. Bohme, *Neue Wege des Kriminalpolizei*, *Archiv für Kriminologie*, Vol. 89, (1931) pp. 129-138.

and the prosecuting attorney, though a state official, is locally elected. If the mayor and the prosecuting attorney are of the same political party, cooperation may be expected. But even this is not altogether certain. In Chicago, for example, when States Attorney Crowe and Mayor Thompson quarrelled, though they belonged to the same political party, one of the first things that Mayor Thompson did was to withdraw from Crowe's office the members of the police who had been detailed to assist him, and Crowe was compelled to hire private detectives to carry on his duties. Such a situation is inconceivable in Europe. Although the prosecuting attorney is subject to the Minister of Justice and the police to the Minister of Interior, the two Ministers are members of the same cabinet. If their departments did not cooperate, their cabinet could hardly stand politically.