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ON PUBLIC AND PRIVATE PROSECUTION

For Germany

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M. Mérigeau, 'La Victime et le système pénal allemand' 1994 [RSC] 53.

For France

M. Delmas-Marty, *Les Grands Systèmes de politique criminelle* (Paris, 1993), 111.

On private prosecution by groups

M. Delmas-Marty in (1998) 10 APC (XXIIIème Congrès français de criminologie), esp. the introductory report by M. Delmas-Marty, 'Ni victimes, ni procureurs, qui sont-ils?', 11.

8 The balance of power between the police and the public prosecutor

ERIC MATHIAS

In every system, criminal procedure begins with a phase which, once the offence has been reported, consists of identifying its author, collecting the evidence and then officially drawing up the charges. These consecutive tasks of directing the intermediate phase of criminal procedure – from when the file is opened until it is closed – belong exclusively to the public prosecutor and the police in Germany, England and Italy. In Belgium and in France the task is also largely theirs, subject to a certain role played by the *juge d'instruction*. In most of the national procedures examined here, the public prosecutor intervenes after the end of the preparatory phase, namely at trial, and at the execution of the sentence; meanwhile, the prerogatives of the police in the early stages are subject to certain limits. Thus the question of the balance of power between the public prosecutor and the police only concerns the preparatory phase of criminal procedure.

Two introductory observations are worth making. First, not only do the public prosecutor and the police have powers that belong exclusively to them, but sometimes the same power is exercised by both of them, or by first one and then the other. Secondly, the term 'police' needs to be clearly defined. Policing will be taken to cover the whole group of activities that leads to the detection of offences and the discovery of those who committed them, and 'police' will cover those actors whose task consists essentially of carrying out investigations. This means that authorities to which the law gives the double function of both judging and carrying out investigations (in particular *juges d'instruction* in France and Belgium, who were at one time designated as *officiers de police judiciaire*) will not be directly covered in this study. This chapter is limited to the police in the narrow sense. It will be limited to those authorities whose

sole vocation in criminal proceedings is to investigate offences: in other words, policemen.

There are two main theories on the balance of power between the police and the public prosecutor and these reveal a real opposition of principles between the continental system and the English system. While assigning to the police an active part in working up the dossier, continental criminal procedures guarantee the pre-eminence of the public prosecutor throughout the entire investigation and until the time when the final conclusions are drawn. The English system, on the other hand, favours the police. As the preceding chapter made clear, the public prosecutor, which is part of the inquisitorial tradition, was incorporated into the English criminal procedure only recently and with difficulty.

Nevertheless, in each of the systems of criminal justice considered, 'we must not yield to the illusion that practices follow the legal requirements which are supposed to govern them'.[1] Reading the statutory texts must be supplemented by observing their context. Practice clearly shows the increasing power of police forces and the concomitant bureaucratic relegation[2] – to different degrees in different countries – of the public prosecutor, to such an extent as to suggest a real convergence between what is happening in different countries.

The opposition of principles

A look at the texts of statutes of criminal procedure reveals a theoretical divergence so important that it is possible to speak of different continental and English conceptions of the balance of power between the police and the public prosecutor.

THE CONTINENTAL CONCEPTION

For each stage of the preparatory phase, the codes of the continental countries in this study accept in various places the pre-eminence of the public prosecutor as the director of the proceedings.

Whilst also giving the public prosecutor certain detailed – that is to say, fragmented but nevertheless systematic – powers in the preparatory

[1] R. Lévy, *Du Suspect au coupable: le travail de police judiciaire* (Paris, 1987), 99, where the author continues: 'And the question of the relationship between the police and the public prosecutor's department is not, in our opinion, an exception to the rule.'

[2] Adjective used for the first time by K. Sessar in an article entitled: 'Ein bürokratischer Faktor im Prozess der Verbrechenskontrolle: Der Staatsanwalt' [1979] MKS 229.

phase, the French legislator of 1958, the Italian legislator of 1989 and the Belgian legislator of 1998 also initially gave legislative form to the general principle according to which the public prosecutor directs the task of investigation (article 12 of the French CPP: 'The *police judiciaire* act under the direction of the *procureur de la République*...'; article 13 of the same Code: '[the *police judiciaire*] is placed, within each appeal court area, under the supervision of the *procureur général*...'; article 327 of the Italian CPP: 'The public prosecutor directs the inquiry and has at his disposal the *polizia di stato*'; article 28*bis*, para. 1(3); and article 55, paragraph 2 of the new Belgian CIC: 'the inquiry is carried out under the direction and authority of the competent *procureur du Roi*'). Thus the codes lay down the principle in abstract terms, before stating what it actually entails at the start, during the course of and at the close of the preparatory phase of the criminal proceedings.

The start of the preparatory phase

The reporting of offences by the victim or by any citizen constitutes the most important source of information for the police. This is clearly true in England, and it is equally true of the other countries, even where the police do not enjoy total control over the investigations. The raw materials of criminal justice come not so much from pro-active intervention by the investigative authorities, but rather from the police, reacting to information received.

If in the overwhelming majority of cases the initial inquiries result from a complaint or report to the police, it does not follow that the police, once resorted to, are functionally independent or that the public prosecutor is ousted from the investigative phase.

After entrusting the general direction of the investigations to the public prosecutor, the continental legislator tried to make this effective by requiring the police to inform the public prosecutor of offences known to them. In France and Italy he must do so without delay (article 19 of the French CPP; article 347 of the Italian CPP) and in Belgium he must do so 'immediately' (*sur-le-champ*: article 29 of the revised Belgian CIC). German law also demands that the police authorities and officials advise the public prosecutor of their area without delay (*ohne Verzug*: § 163, StPO); in Germany, however, this obligation arises slightly later on, and relates not to offences reported to them, but to the results of the investigations they undertake (*Verhandlungen*).

Thus from the start of the preparatory phase, continental legal systems carefully try to safeguard the public prosecutor's function of directing the investigations, a function which he theoretically undertakes throughout the investigative phase and for all the time during which the case against the defendant is being put together.

The development of the preparatory phase

Examination of continental criminal procedures reveals that in each country the public prosecutor is conceived to be the chief agent of the preparatory phase. In the first place, the law is constructed so that, in theory, any act of investigation is susceptible of being carried out by the public prosecutor,[3] which means that no powers exercised by the police are theirs and theirs alone.[4] Continental criminal procedures – or at least those that form the subject of this study – do not place any of the acts of inquiry during the preparatory phase into the hands of the police alone. In these countries, no investigations[5] are reserved for them and they intervene either as executing a directive of the public prosecutor, or as exercising a power which they hold in common with the public prosecutor and exercise subject to his control.[6] Secondly, the law also tries to make the public prosecutor pre-eminent by giving him other powers that are his exclusively.

[3] 'As for the powers of the public prosecutor, we would first wish to state that all the powers of the police . . . are – obviously – also powers of the public prosecutor. However, the powers of the public prosecutor are more extensive . . .': P. Hünerfeld, 'La Phase préparatoire du procès pénal en République fédérale d'Allemagne' [1985] RIDP 121.

[4] § 161, StPO: 'the public prosecutor can undertake investigations of any kind'. Articles 22 and 51 of the Belgian CIC: 'The *procureurs du Roi* are responsible for the inquiry . . . into any offence . . . In situations of competition between the public prosecutor and police officers . . . the public prosecutor will perform the acts assigned to the criminal police . . .'. Article 41 of the French CPP: 'The *procureur de la République* may perform . . . all acts necessary to the investigation and proceedings with regard to offences against the criminal law . . . He has all the powers attributed to the position of an officer of the *police judiciaire*.' Article 326 of the Italian CPP: 'The public prosecutor and the *polizia di stato* perform the necessary investigations . . .'.

[5] The term 'investigation' refers to the acts of inquiry though excludes the measures of coercion which form part of the exclusive prerogative of the police – for example, the French *garde à vue*. M.-L. Rassat suggests that this should be a power available to both the public prosecutor and the *police judiciaire*: M.-L. Rassat, *Propositions de réforme du Code de procédure pénale* (Paris, 1997), under article 157.

[6] It should be mentioned for completeness that in Belgium and in France the *police judiciaire* also intervene in the context of *commissions rogatoires* issued by the *juge d'instruction*.

Powers common to both the public prosecutor and to the police

During the entire development of the preparatory phase, the police may act as a body carrying out orders. They then apply the directives of the public prosecutor and direct the investigations, the final result of these being for the benefit of the prosecutor (§ 163, StPO (Germany): 'The public prosecutor can allow the inquiries to be carried out by the police authorities and officials'; article 41 of the CPP (France): 'The public prosecutor initiates the carrying out of all necessary acts . . .'; 'The *procureur du Roi* has the right to require the help of the police to carry out . . . all the acts of the *police judiciaire* necessary for the inquiry', article 28*ter*, paragraph 3 of the new CIC (Belgium)). So the order from the public prosecutor sometimes provides the impetus, and at other times amounts to delegation.

In the first situation, the public prosecutor charges the police with the task of carrying out a certain act of investigation which the police had power to do as a matter of course without prior permission; in the second situation, the public prosecutor asks the police to carry out for him an act which they are not competent to decide to do themselves – and *a fortiori* not to do on their own. This last situation arises mainly in Italy where, with the exception of certain emergency situations and offences recently committed or discovered, the public prosecutor alone (except where there is prior permission from the GIP[7]) decides on certain investigations and, in principle, carries them out himself: technical reports not susceptible to being repeated (article 359, CPP), the questioning of persons not detained and the carrying out of confrontations (article 370, CPP), inspection of people, places and things (article 244, para. 1, CPP), searches (article 370, CPP) and seizures (article 370 and 253, CPP).[8] It also arises in Germany where the legislator thought that, sudden discoveries (§ 163 I, StPO) and emergency situations aside, the public prosecutor alone should be empowered to undertake acts of investigation (usually with the permission of the examining judge); although the German legislator also decided that these acts could be entrusted the police to carry out (§ 161, StPO).

French and Belgian law does not expressly provide for the public prosecutor delegating his powers to the police – except for the public prosecutor going to the scene of the offence in cases of *crimes* or *délits* that are *flagrant* (article 51, CIC and article 68, CPP) and making technical or

[7] *Giudice per le indagini preliminari*, judge of the preliminary inquiry; see p. 355, above.

[8] But the law of 1 March 2001 has now amended the CPP to extend the powers of the police to act independently in various respects.

scientific reports or examinations (article 77, para. 1, CPP). In these countries the codes do not provide for investigations to be reserved for public prosecutors. Whether the inquiry is what is classified as an '*enquête préliminaire*' or '*enquête de flagrance*', the technical position is that the *police judiciaire* are empowered to carry out the same acts as the public prosecutor.[9]

Whether the public prosecutor performs the acts himself or delegates the acts' execution, the police play an executory role. In addition, the police can conduct investigations on their own initiative.

During the preparatory phase, the police can also act as the body that takes the initiative and makes decisions. In a number of situations, they have power to intervene of their own accord and decide for themselves to carry out some investigative step. Autonomous in the sense that they act without having to seek the prior authorisation of the public prosecutor,[10] the police still do not enjoy total freedom. Not only are these 'powers of initiative' of the police usually subject to the specific control of the public prosecutor, additional to the general duty of the police to inform the public prosecutor;[11] in addition, they presuppose the existence of the particular circumstances, such as '*flagrant délit*' or emergency. In France, there is even one case where both of these conditions are cumulatively required. By article 60 of the CPP, in the chapter entitled '*Des crimes et des délits flagrants*', the police must consult all qualified persons if there is a reason to proceed to reports or technical and scientific examinations that cannot be postponed.

In several countries, a key factor is what is called *flagrance*. This means, broadly speaking, that the offence has only just been committed, or if committed earlier, has only just been discovered. In the texts this

[9] With the exception of the acts of the police carried out under orders for questioning of the *juge d'instruction*.

[10] This is clearly illustrated in the ruling of 25 April 1989 of the Belgian *Cour de cassation*: 'Neither article 29 CIC, nor any other measure . . . precludes an officer of the *police judiciaire* carrying out his duties who acquires knowledge of *crime* or *délit* coming under his power to investigate, according to article 8 CIC, from starting and carrying out his investigation without having previously and immediately informed the *procureur du Roi* of it.'

[11] 'Without waiting until the end of their mission' in France (art. R.2, CPP), 'punctually' in Germany (§ 163 II, StPO) and 'without delay' in Italy (art. 347, CPP) or to inform him of 'the investigations pursued within the time-limit and according to the particular measures set out by him through directives' concerning the known offence in Belgium (art. 28*ter*, para. 2, new CIC). The Belgian law of 12 March 1998 indeed provides that the *procureurs du Roi* are to give the police directives concerning the way in which the investigation, or certain acts within it, must be carried out (art. 26, new CIC).

concept is directly defined (article 41, CIC; article 53, French CPP; article 382, Italian CPP) or mentioned incidentally (§ 127, StPO).

In Belgium and in France, almost all of the steps that the police can take on their own depend on the crime being *flagrant*[12] – preventing a person leaving the scene of a crime (article 61, CPP; articles 34, 49 and 50, CIC), warrant issued against the suspected person (article 40, 49 and 50, CIC), arrests (article 73, CPP; articles 49 and 50, CIC), searches and seizures (article 56, CPP; articles 36, 49 and 50, CIC). In Germany and in Italy, however, *flagrance* is only marginally relevant and justifies only a few of the steps which the police can carry out on their own initiative: arrests (§ 127, StPO; articles 380 and 381, Italian CPP), questioning (article 350(5), Italian CPP), search of persons and search of buildings (article 352(1), Italian CPP; § 104, StPO for searches of buildings carried out at night).

In certain countries, moreover, the police are empowered to take measures on their own initiative in an emergency. Although based on a similar argument (avoiding the loss of evidence strongly presumed to exist), the concept of emergency is theoretically broader than the idea of *flagrance* and is thus independent of when the offence was committed.[13]

The idea of emergency is not used in Belgium and only rarely referred to in France or in Italy (seizures when establishing facts in urgent situations: article 354, paras. 1 and 2, CPP; arrests in situations other than '*flagrance*': article 384, para. 2, CPP). But the German Code of criminal

[12] Subject to the power of the French police during the 'preliminary inquiry'.

[13] Only two articles of the French *Code de procédure pénale* expressly mention emergency: article 18, para. 2 (on the extension of the territorial competence of officers of the *police judiciaire*) and article 84, para. 4 (which concerns the *juge d'instruction*). The '*travaux préparatoires*' of the French *Code d'instruction criminelle* of 1808 make it abundantly clear the idea that emergency and recency (*flagrance*) have the same basis (that of avoiding the loss of evidence): 'In what circumstances is it most important that there be no hindrance (either for the public prosecutor or for police officers)? Where the offence is manifest, it is in the early stages. But suppose the offence is a hidden one. Doubtless it will have to be investigated, but as there are no traces of the offences, or, if they do exist they are already old, a delay of a few hours, and often of a few days will rarely prejudice public order' (remark of Count Berlier, reported by J.-G. Locré, in *La Législation civile, commerciale et criminelle de La France* (Paris, 1831), vol. XXV, 151). In other words, the editors thought that emergency and '*flagrance*' coincided: it is because the investigation of offences neither recently committed nor discovered is rarely urgent, that the 'powers of initiative' of the public prosecutor and of the police are limited to offences of *flagrance*. On the other hand, in its final report, *La Mise en état des affaires pénales*, the Commission justice pénale et droits de l'homme considered that emergency and recency are derived from 'different logics': Commission justice pénale et droits de l'homme, *La Mise en état des affaires pénales, Rapports* (Paris, 1991), 167.

procedure, on the other hand, uses it almost systematically to justify acts that the police can carry out on their own authority. Thus in cases of emergency, the 'assistants' of the German public prosecutors can of their own accord carry out searches (§ 105, StPO), seizures (§ 98, StPO), set up road-blocks (§ 111 II, StPO), and search accused persons and witnesses (§ 81a II and 81c V, StPO). For the last two types of act, the formula used by the legislator is special: not an emergency, strictly speaking (*Gefahr im Verzug*), but a danger of compromising the success of the investigations (*Gefährdung des Untersuchungserfolges durch Verzögerung*) arising from the need to wait for the judge.

Whether they operate as decision-makers or – *a fortiori* – act on the orders or under the delegation of the powers of the public prosecutor, the German, Belgian, French and Italian police forces do not enjoy powers exclusively their own. The public prosecutor, however, is differently placed.

Attributes exclusive to the public prosecutor

Of the public prosecutor's exclusive powers the most important, obviously, is the power to direct the police throughout the course of their investigations. But if a large number of investigative steps could in law be equally well carried out by the public prosecutor or by the police, this is not true of all the steps that have to be taken during the preliminary phase. This is because the public prosecutor enjoys powers reserved to him alone: exclusive powers, which the police cannot exercise.

Some of these powers can be carried out in all circumstances, others presuppose *flagrance* and a few require a situation of emergency.

- In many cases, the public prosecutor can exercise his particular powers 'in whatever circumstances'. This goes for 'compelled attendance' of witnesses (§ 161a I, StPO; articles 62 and 78, French CPP; article 377, Italian CPP) and of the accused (§ 163a III StPO; article 375, Italian CPP), choice of experts in Germany (§ 161a, StPO), questioning of the accused and confrontations in Italy (articles 388 and 370 of the CPP), extension of the period of police detention and 'rapid inquiries' (*enquêtes rapides*) in France (articles 63, para. 3 and 77, para. 2, CPP).
- However, some of his powers depend directly on the question of whether the offence was *flagrant:* in *flagrant* cases, the French public prosecutor can issue a warrant against the suspect (article 70, CPP); furthermore, in situations other than *flagrance* or emergency the Belgian public prosecutor is authorised to place a person in police detention and in Italy, the public prosecutor can have a suspect arrested (article 384, para. 1, CPP).
- Finally, some of the measures reserved to the public prosecutor can only be exercised if there is an emergency. Among the functions entrusted to the public prosecutor in an emergency, those that he exercises in his own discretion (with reports and technical or scientific examinations under article 77, para. 1 of the French CPP) should be distinguished from those that are controlled after the event by the judicial authority in whose name the public prosecutor has acted. Thus for telephone taps, the German public prosecutor must have his decision confirmed within three days by the judge, failing which the taps and tapes are invalid (§ 100b, StPO); in Italy, the act by which the public prosecutor orders telephone-tapping must be communicated to the GIP within twenty-four hours; the judge must confirm the operation within forty-eight hours of the decision, or the tap must stop and the information so obtained cannot be used (article 267(1) and (2), Italian CPP).

Thus in all these countries, the theoretical position is that the public prosecutor dominates the entire preliminary phase. This supremacy is also apparent when the preliminary phase comes to an end.

The formal closure of the preparatory phase

As soon as the inquiry is completed, it must be decided whether there is to be a prosecution. Assuming that an actor has been identified, either the information collected seems to show the existence of a criminal offence that is not time-barred and to which there is no obvious defence; or else the evidence shows no criminal behaviour or shows that the person who did it has a valid defence. In the first situation, a criminal prosecution *must* be instituted in the systems following the legality principle such as Germany (§ 152, StPO) and Italy (article 112 of the Constitution), and in 'discretionary' systems such as Belgium and France it *may* be instituted. Where a prosecution cannot be instituted because there is no legal basis for one, the charges against the accused are dropped.

Although as already mentioned the police in Germany, Belgium, France and Italy do not have any powers that are exclusively their own, they can intervene – sometimes even on their own initiative – during the preparatory phase. They have no such powers at the close of the inquiry. Indeed, in these countries, the role of the police theoretically ends

when the investigation closes. In these countries, whether the charges should be pressed or dropped does not in any way involve the police, and the decision belongs to the public prosecutor alone. Note, however, that Belgian law has now introduced an important qualification to this. Recognising what was already an unofficial practice, the revised CIC now allows the police to take no further action over certain offences that are 'harmless' – in particular, certain infringements of traffic regulations – on giving the offender a warning.[14]

However, although it is true that (subject to what has just been said about Belgium) none of the continental countries in this study give the police the power to drop charges, the public prosecutor does not necessarily have total control over the matter. Although the public prosecutor can, in each of these States, take the initiative in doing this, the final decision to do so does not always belong to him. In Germany, Belgium and France, the public prosecutor does enjoy a total monopoly of deciding there is evidence to proceed; whatever the nature of the offence, the power to drop charges is entirely his; but in Belgium and in France, this is subject to the possibility of an *instruction* being opened, in which case only the *juge d'instruction* can terminate proceedings by issuing an *ordonnance de non-lieu*, and in Italy the decision to drop charges is always taken by a judge (GIP), to whom the public prosecutor has to make a formal application.

In theory, continental police forces have no greater power to institute a criminal prosecution than they do to drop one: as between the public prosecutor and the police, the public prosecutor enjoys a monopoly.[15]

THE ENGLISH CONCEPTION

The English idea differs radically from the continental one in that the opening and the development of the preparatory phase are entirely and exclusively handed over to the police. Investigations are carried out by the police using their own summary powers or when executing a warrant, issued usually by a magistrate. However, since the Prosecution of Offences Act 1985 came into force, the end of this preparatory phase in England is now broadly similar to what supposedly happens in the other European countries, since the police now share certain prerogatives with the Crown Prosecution Service.

[14] Art. 28*bis*, para. 1(2), CIC.

[15] § 152, StPO; arts. 405, para. 1, 424, para. 1 and 554, para. 1, Italian CPP; art. 22, CIC; art. 40, French CPP.

Exclusive attributes of the police

The English police alone[16] are empowered to conduct investigations allowing them to collect evidence and to put together a file for criminal prosecution. The carrying out of these various acts of the preparatory phase is exclusively handed over to them (except for intimate searches of people suspected of possessing drugs, which must be carried out by a nurse or doctor).[17]

When the English police use their powers to carry out investigations and to take coercive measures, the prior *decision* to proceed in such a way is not always taken by the police alone, because certain measures presuppose the issue of a warrant. But if the police must sometimes get authorisation of this sort from a magistrate, there is no question of their having to consult the CPS.

Unlike the continental systems, English criminal procedure does not limit the powers of the police to act on their own initiative in situations of emergency and *flagrance*.[18] For most purposes, what matters is that the offence should fall into the legal category of an arrestable offence,[19] and that the police officer should have reasonable grounds for believing that the person whom he is investigating has committed it – whether recently, or some time before. Section 24(6) of the Police and Criminal Evidence Act (PACE) 1984 provides: 'Where a constable has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without warrant anyone whom he has reasonable grounds for suspecting to be guilty of the offence.' The various summary powers of the police to enter premises in order to arrest suspects, and to search premises after suspects have been arrested, are all built around the existence of the power to arrest. In general, for the police to act the law requires both the offence to be an 'arrestable' one and for them to have 'reasonable suspicion'. But the law on police powers is fragmented, and the police are sometimes entitled to take coercive measures where less exacting conditions are present.[20]

[16] In ordinary cases; certain specialised types of investigation are done by other agencies, such as Customs and Excise and the Health and Safety Executive.

[17] PACE 1984, s. 54(4) and (17).

[18] Except to some extent with arrest: PACE 1984, s. 24, provides that the police can arrest any person who is committing, or who is about to commit an arrestable offence without a warrant.

[19] The term is defined at length in PACE 1984, s. 24. Broadly speaking, it is any offence that potentially carries at least five years' imprisonment.

[20] By statute, specific powers of arrest have been attached to a number of offences that are not serious enough to fall within the definition of 'arrestable offence' under PACE

Besides the steps which they can take on their own initiative, the English police can also carry out certain acts following the issue of a warrant. A warrant enables them to arrest suspects, and to search property, in certain cases where their summary powers do not apply. The police also act under warrant every time they tap a telephone or install a microphone at the suspect's home; the first measure must be authorised by the secretary of state[21] (in principle), and the second by a 'commissioner' appointed by the home secretary.[22]

If building up the case with a view to a prosecution is exclusively the task of the police, the next stage involves both the police and the Crown Prosecution Service.

Powers common to both the police and to the Crown Prosecution Service

Unlike the police in the other countries in our study, the English police possess the very important power of evaluating the results of the inquiry and of initiating a criminal prosecution[23] if appropriate. However, since 1985 the gap between the continental and the English systems has narrowed, because since the creation of the Crown Prosecution Service the police no longer have exclusive control over this.

Before 1985, the police were not only in control of the investigations, but through the chief officer they were also in control of the final decision to institute or drop proceedings.[24] With the Prosecution of Offences Act 1985, English procedure acquired an additional stage which in some ways provides what might be called a 'double degree in the evaluation of a prosecution': at the 'first degree', the chief officer retains the exclusive power to drop the charges; but if he decides to prosecute, his decision is then examined by the Crown prosecutor who, by reconsidering the evidence collected during the inquiry ('evidential sufficiency': section 4 of the Code for Crown Prosecutors) and whether the prosecution serves

1984, s. 24. Under PACE 1984, s. 25, the police can lawfully arrest a person for *any* offence where one of a range of 'general arrest conditions' is present.

21 Interception of Communication Act 1985, a rule retained when this Act was superseded by the Regulation of Investigatory Powers Act 2000.

22 Police Act 1997, Part III.

23 Moreover, every citizen has the power to initiate proceedings (POA 1985, s. 6).

24 An important qualification to this is that in England certain classes of crime were, and still are, investigated not by the police but by specialised agencies such as Customs and Excise and the Inland Revenue. Where these bodies investigate, they also prosecute. The list of specialised agencies was extended by the Criminal Justice Act 1987, which created the Serious Fraud Office.

the public interest (section 6), has total freedom at the 'second stage', to terminate the prosecution initiated by the police. In other words, the Crown Prosecution Service can only drop the charges when the police have decided to institute a prosecution. Thus the power of the Crown Prosecution Service depends on the prior decision of the police. This power is only a conditional one, but once the case reaches their hands, the Crown Prosecution Service have the exclusive power to drop the charges.

This method of ending the preparatory phase by deciding to drop the charges indicates a certain rapprochement between England and continental Europe: the English police undeniably play the main role at the end of the inquiry (whereas legal systems on the Continent theoretically deny them any say in the matter), but the intervention of the Crown Prosecution Service, even though conditional, is by no means just a formality.

At the end of this discussion, it is clear that the public prosecutor theoretically assumes the main role in the preparatory phase in the continental systems, whereas in England this falls to the police. What the statutory texts say about the distribution of power between the public prosecutor and the police nevertheless accords ill with legal reality: 'There is a rapprochement in practice which goes against the texts.'[25]

Converging practices

Whether they describe the police as the 'true administrators of the inquiry',[26] or describe the 'factual domination'[27] of the police in the preparatory phase and insist on their 'fairly wide autonomy',[28] or call the public prosecutor the 'authority that registers'[29] or 'receives'[30] and

25 M. Delmas-Marty, 'Towards a European model of the criminal trial', in M. Delmas-Marty (ed.), *The criminal process and human rights: towards a European consciousness* (Dordrecht, Boston and London, 1995), 191.

26 H. Jung, 'Vers un nouveau modèle du procès pénal? Réflexions sur les rapports "La mise en état des affaires pénales"' [1991] RSC 526.

27 W. Bottke, *'Polizeiliche Ermittlungsarbeit und Legalitätsprinzip'* [1990] *Meyer GS* 37. H.-H. Kühne, reported by Hünerfeld, *La Phase préparatoire*, 126.

28 M. Delmas-Marty, *Les Grands Systèmes de politique criminelle* (Paris, 1992), 95.

29 E. Blankenburg, 'Die Staatsanwaltschaft im System der Strafverfolgung' [1978] ZRP 263, quoted by K.-H. Gössel, 'Überlegungen über die Stellung der Staatsanwaltschaft im rechtsstaatlichen Strafverfahren und über ihr Verhältnis zur Polizei' [1980] GA 325, at 347.

30 C. Janssen, 'Police et ministère public: du malaise à la réflexion et aux propositions de réforme' [1992] *Déviance et société* 117, at 140.

questions whether it can be used,[31] many authors on both sides of the Channel notice a gap between theory and reality as regards the theoretically important position of the public prosecutor and the theoretically limited position of the police. In the context of the preparation of the file, the public prosecutor only partially occupies the stage, which in theory he should dominate. The police, on the other hand, play their full role, and sometimes even improvise extra parts as well.

This practical redistribution of the roles – this shifting of powers and the inflated importance of the police that results – appears at each stage of the preparatory phase and concerns the majority of offences. In Belgium and in France, this practical redistribution of roles is not confined to the relationship between the public prosecutor and the police, but also concerns the relationship between the *juge d'instruction* and the police in the context of the *commissions rogatoires* which the *juge* issues.[32]

This 'malaise'[33] conceals obvious dangers. Over and above these, the bureaucratic relegation of the public prosecutor – the causes of which are examined below – raises the question of at least a common principle, if not a common model of criminal procedure, in all the countries in this study.

THE SHIFT IN POWERS

From the opening until the close of the preparatory phase, the police dominate the scene. This is due to a combination of two factors: the failure of the police in their duty to inform the public prosecutor and his passivity during the investigations.

The partial ineffectiveness of the powers of the public prosecutor (insufficient information)

At the opening of the preparatory phase of the prosecution, usually as soon as the police learn of the commission of an offence, the public prosecutor is supposed to be informed without delay. Although obligatory, this prescription appears to be ignored in the majority of cases, either because the police omit to inform the public prosecutor or do so at a very late stage.

[31] J. R. Spencer, *Jackson's Machinery of justice* (8th edn, Cambridge, 1989), 230.
[32] See especially J. Pierre, 'Le Métier de juge d'instruction' [1988] (July–August) *Etudes*, 45.
[33] Janssen, 'Police et ministère public', 117.

When the police fail to inform the public prosecutor of an offence, this amounts to unofficially dropping the charges: without telling the public prosecutor, the police, instead of the public prosecutor, close the file and intrude in a field which the continental legal systems have reserved for him. This unofficial case-dropping can take an active or a passive form.

The 'active' form amounts to the dropping of charges in the strict sense of the word. The police exceed their powers and directly infringe those powers reserved by the texts for the public prosecutor – by dissuading the person from reporting the offence or by failing to record his report. Though often hidden because it is ultimately illegal, practitioners now recognise[34] this behaviour and even, in some cases, openly accept it.[35] Indeed, in Belgium, as already mentioned, it has now been legalised to some extent. On the other hand, this practice is not carried out in Italy, where policemen would run the risk of being reported under article 361 of the CP ('omessa denuncia di reato da parte del pubblico ufficiale').

With 'passive' dropping of cases, it is the public prosecutor who announces that the case is dropped (or in Italy requests the court to do so). However, what has taken place is essentially something that has been done (or not done) by the police. If the police investigations remain fruitless, the public prosecutor will rubber-stamp this by dropping the case because the author of the offence is unknown.[36] Once the inquiry is concluded, the police inform the public prosecutor and transfer the file to him, but 'the road is already marked out'.[37]

As already mentioned, if the police do not simply omit to inform the public prosecutor, they often tell him late.[38] The information is only

[34] R. Robert and C. Faugeron, *Les Forces cachées de la justice* (Paris, 1980), 64; P. Robert, *La Question pénale* (Geneva, 1984), 213; J. Pradel and L.-G. Leigh, 'Examen de droit comparé' [1988] RDPC 234; J. Meyer, Acts of the Colloquium of Triberg, 7 and 8 December 1989, 63, 145 and 146.
[35] J. Häcker, Acts of the Colloquium of Triberg, above, note 34, 188: 'When a person decides to lodge a complaint against the author of a minor offence and the police believe that the charges will probably be dropped, the police inform the complainant and invite him to reconsider the question.'
[36] This is the official reason given to justify the overwhelming majority of cases where the public prosecutor has dropped the charges.
[37] H. Jung, 'Le Rôle du ministère public en procédure pénale allemande' [1983] RSC 223, at 230.
[38] By comparing the date on the police report and the date of its transmission to the prosecutor, research in Belgium showed that 45 per cent of prosecutions are sent on

immediately passed on – generally by telephone – when it concerns an offence which, even if not serious, is at least sensational (on a subjective evaluation). In other words, offences of minor, medium or sometimes even major criminality[39] only get brought to the attention of the public prosecutor after a fairly lengthy delay, the end of which usually coincides with the end of the inquiry. The result is that in Germany, Belgium and France, the public prosecutor is faced with a concluded inquiry. Thus the duty of the police to inform the public prosecutor of an offence known to them degenerates into an obligation to communicate the results of the inquiry. In France, this empirical drift has even been accepted by the authorities. In the *Courrier de la chancellerie* it was stated some years ago that 'The services of investigation will from now on inform the public prosecutor immediately of elucidated cases . . . with the aim of ensuring that they are dealt with in due time.'[40] In so far as it prevents the public prosecutor himself from carrying out the investigations or of delegating this task to the police, the practice of giving information *in extremis* – and only when they cannot avoid it except by unlawfully dropping the charges – arguably makes the public prosecutor's power of direction an illusionary one.

When the public prosecutor receives no information about the case, he necessarily does not intervene during the course of the preparatory phase. Even where informed earlier, the public prosecutor nevertheless often acts as a passive observer in the building of the case.

The eclipse of the public prosecutor with regard to the exercise of common powers

'Unlike the police, public prosecutors [*magistrats*] have essentially sedentary duties.' This remark, which Antonin Besson[41] made just a few months before the entry into force of the French CPP in 1958, aptly describes the present situation. The practical domination of the police is also due to a certain passivity on the part of the public prosecutor during the course of the preparatory phase.

to the *procureur du Roi* within eight days, 40 per cent between the ninth and the thirty-first day, 10 per cent during the second month and 5 per cent even later: Janssen, 'Police et ministère public', 135.

39 Lévy, *Du Suspect au coupable*, 102.

40 Quoted by R. Lévy, 'Vers une redéfinition des rapports police-justice' [1993] CSI 89, at 93 and 94.

41 A. Besson 'La Police judiciaire et le Code de procédure pénale' [1958] *Dalloz* (chron.) 131.

First, it has long been noted that the public prosecutor rarely appears at the scene of the offence:[42] 'We do not make decisions on what goes in the file; the police send it to us completed.'[43] Such direct interventions are so rare that article 41 of the French CPP, which says 'the public prosecutor does, or orders to be done, all the acts necessary for the investigation and prosecution of offences against the criminal law', states the true position in reverse. If it said 'the public prosecutor *orders the carrying out or carries out* all the acts necessary for the investigation and prosecution of offences against the criminal law', this would accurately reflect what usually happens in continental practice.[44]

In England, matters are a little different in that members of the Crown Prosecution Service cannot themselves carry out investigations. Nevertheless, the Crown prosecutor in England is still able to push the matter along, as he can ask for an additional inquiry (in the same way as the public prosecutor in the other countries). As Parliament in 1985 did not give the Crown prosecutor the power to make the police carry out the additional investigations which he required, the practice developed of dropping the charges whenever the police refused to comply. The radical possibility of dropping charges certainly enables the Crown Prosecution Service to pressure the police and thwart resistance. However, the investigations still fall within the competence of the police,[45] the Crown Prosecution Service remains a stranger to the actual development of the inquiry and is dependent on the work of the police. There is also the problem that the weapon possessed by the Crown Prosecution Service of dropping the case because of police non-co-operation is sometimes

42 For Germany, Gössel, 'Überlegungen' 347; for Belgium, Janssen, 'Police et ministère public', 132; for France, Lévy, 'Vers une redéfinition', 93, and Laplatte who already deplored it as early as 1951: 'En marge du projet de Code d'instruction criminelle' [1951] RSC 148; see also the report by Juy-Birmann (above, p. 65), 'In theory, the public prosecutor must go to the scene of crime to hear witnesses, collect evidence, etc. In practice, he delegates this task to the police and only goes on site for cases which could stir up public opinion'.

43 Report by Juy-Birmann, see p. 65, above.

44 Although not as rare as direct interventions at the place of the offence, requests for a supplementary inquiry by the public prosecutor are nevertheless infrequent. In Belgium, the *procureur du Roi* takes a decision concerning a file created on the initiative of the police in 40 per cent of cases (reported by Janssen, 'Police et ministère public', 136); in Germany, 'the control of the public prosecutor over the police with regard to prosecutions as provided for in the law is hardly ever exercised': Jung, 'Le Rôle du ministère public', 230.

45 However, under the Criminal Procedure and Investigations Act 1996, the prosecution can summon any witness who refuses to give information, and require him to answer questions on oath before a justice of the peace.

disproportionate to the end to be achieved. Because of this, it has been said that some Crown prosecutors are unwilling to wield it, and so give way before the opposition of the police.[46]

On the Continent, the passivity of the public prosecutor is also evident in the special checks which he is empowered by the texts to carry out during the course of the preparatory phase. For example, in France, article 41 of the CPP provides: 'The public prosecutor checks measures of police detention.'[47] Before the reform of 24 August 1993, the public prosecutor was rarely even told of the placing of a suspect in police detention before being asked to authorise the extension of this measure. The 1993 reform brought the police under an obligation to inform the public prosecutor as soon as possible (failing to do so leads to an automatic closure of the case[48]), but in recent years, actual physical checking by the public prosecutor seems to be no more common than it was before (perhaps in part because the person in police detention can now see a lawyer as soon as twenty hours have passed).

The omissions and delays of the police in their duty to inform, and the abstentions of the public prosecutor during the course of the inquiry, confer on the police a factual domination over the development of the preparatory phase of criminal procedure, and a certain autonomy.

POLICE AUTONOMY (CAUSES AND CONSEQUENCES)

In England, the autonomy of the police from the Crown Prosecution Service is confirmed by statute. One can speak here of *legal autonomy*. On the Continent, on the other hand, the texts declare the police to be functionally dependent. The public prosecutor directs the police throughout the whole preparatory phase (see above). In practice, it has been observed that this dependence was more theoretical than real and that the police *de facto* enjoyed real autonomy.

This factual autonomy is in part derived from what could be described as the split responsibility for the police: police officers (except for the *police judiciaire* for the public prosecutor in Belgium and of the sections

[46] See the *Report of the Royal Commission on Criminal Justice*, Cm 2263 (1993), p. 25, para. 25.

[47] 'La procureur de la République contrôle les mesures de garde à vue.'

[48] In a ruling of 24 November 1998, a criminal court considered a delay in informing the public prosecutor of eight hours and fifteen minutes was too long (D. 1999, *Information rapides*, 39) and ordered a systematic dropping of the charges: 'any unjustified delay . . . necessarily consists of an attack on the interests of the person in custody'.

of the *polizia di stato* in Italy) are simultaneously under the functional authority of the public prosecutor, who directs their investigations during the course of the inquiry, and under the administrative authority of the Ministries of the Interior, of Defence or of Finance, on which their careers depend. Nevertheless, this hierarchical duality does not make the police into a two-headed body, because career preoccupations – administrative subordination – naturally sometimes take priority over questions of procedure. All this is demonstrated in practice in some countries by the absence of any police units specially assigned to the public prosecutor, and by the very weak, even insignificant, influence that he has over the development of the careers of members of the police forces.

In Germany, the public prosecutor can give orders to the police auxiliaries, but to their hierarchical superiors he can only make requests (§ 161, StPO). As a consequence, the direction of the inquiry, as far as manpower is involved, depends largely on senior police officers: 'The police can prevent the completion of an inquiry. I set down the numbers involved in each department, which can slow down an inquiry.'[49]

In Belgium, the officers of the *police judiciaire* admittedly depend directly on the *procureur du Roi*, but his role has been weakened in the last decades to the benefit of the *police communale* and of the *gendarmerie*, which are dependent on the Ministry of the Interior.[50] The law of 5 August 1992 on the police, moreover, enshrined this relative decline as it transformed the *police judiciaire* into 'a police force like any other'.[51] In Belgium, however, there has been a recent attempt to reverse this trend. In 1998 the law was changed. Now, not only can the *procureur du Roi* designate the police force responsible for carrying out the inquiry (article 28*ter*, para. 4(1) of the revised CIC), but 'when the police force does not have sufficient staff or the appropriate means' to do so, he can also inform the *procureur général* of the situation, who can then 'submit the file to the *collège des procureurs généraux* who will take the appropriate measures' (article 28*ter*, para. 3(3) of the new CIC).

In France, the police are placed under the administrative command of the Ministry of Defence (in the case of the *gendarmerie*) and of the Home Office (in the case of the *police nationale*). Both are jealous of their

[49] Police superintendent in Saarbrücken, cited in Juy-Birmann report, see p. 45, above.

[50] In the place of officers of the police of the *gendarmerie* and of the *police communale*, the public prosecutor (in an appeal court) can only be given a simple warning (art. 279, CIC).

[51] C. De Vroom, 'Quelques réflexions sur la loi du 5 août 1992 sur la fonction de police' [1994] RDPC 174.

authority,[52] and judicial power sometimes finds it difficult to assert itself. The classic example was when a *juge d'instruction* from the court of Créteil was illegally refused assistance by the head of the *police judiciaire* in carrying out a search at the home of the mayor of Paris in the course of an investigation into corruption and misuse of public property.[53]

Consequently, an Official Committee on the administration of justice, presided over by Pierre Truche,[54] recently denounced this material dependence of the *police judiciaire* on the executive power[55] and, as remedies to the situation, proposed that the *magistrats de l'ordre judiciaire* 'placed by the side of the heads of the police, *gendarmerie* and customs respectively' should be responsible for the controlling of the work of the *police judiciaire*, and also that the issuing of disciplinary sanctions should be reserved to the *Chambre d'accusation*.[56]

In Italy, even after the new Code came into force the police remained under the authority of the Ministries of the Interior, of Defence or of Finance. However, the risk of direct interference from the executive has been considerably reduced, protective measures being taken to strengthen the functional authority of the public prosecutor. First, special sections of the police (*sezioni di polizia giudiziaria*) have been created, the members of which are placed under the exclusive authority of the public prosecutor and cannot be taken off their task by the executive without the public prosecutor's prior permission. Secondly, the public prosecutor can influence the careers of the policemen. Today, however, the danger in this country is more insidious: it is difficult to stop the executive appointing personnel to the police who are ill prepared for what the law requires them to do.

The initial power of the police, and weak or non-existent direction and control by the public prosecutor, are important. They cast a doubt on the principle which is common to all the procedures studied, namely that the file should be prepared under some external guarantee.

[52] Lévy, 'Vers une redéfinition', 94; see also D. Boccon-Gibod, 'Les Relations entre la police judiciare et la justice en Europe', in *Actes de la Rencontre internationale 'Justice, police judiciaire et Europe'* (Lyon, 1991), 28.

[53] Cass. Crim., 26 February 1997, [1997] *Dalloz* 297, with note by J. Pradel; [1997] JCP 22865, with note by H. Matsopoulou.

[54] Later *premier président* of the *Cour de cassation*.

[55] 'This control exercised by others and not by the *magistrats* sustains the suspicion that justice is dependent on the political power . . . Can a State governed by the rule of law exclude justice from certain areas, or rather exclude it precisely when others may think its intervention indispensable': Commission de réflexion sur la justice, *Rapport au Président de la République* (Paris, 1997), 40.

[56] *Ibid.*, 41 and 42.

In continental procedures, the texts enshrine the power of the public prosecutor to direct the whole of the preparatory phase of the case. In England, the Crown prosecutor takes control of the proceedings at the end of this initial phase. In either case, the intervention of the public prosecutor in the early stages of the case is based on the idea that prior to the eventual trial, the investigation and evaluation of evidence for possible criminal proceedings are such a decisive stage that their legality must be scrupulously guaranteed. This task belongs to the public prosecutor. In each of the countries with which this study is concerned, the present-day powers of the public prosecutor are indeed based, *inter alia*, on the fact that this guarantees procedural legality. It is because of his vocation to prevent arbitrariness that the public prosecutor directs and closes the inquiry on the Continent, and in England reconsiders the decision of the police to prosecute. Everywhere, indeed, the public prosecutor has been created, or his powers modified, in response to the need to introduce or strengthen guarantees of impartiality of the preparatory phase and the need to avoid arbitrariness.[57]

In Germany, from the start of the nineteenth century the confusion of judicial functions in the hands of the *Inquirent*[58] became intolerable. Not only does the creation of a public prosecutor allow the functions of investigation and judgment to be separated, but the public prosecutor, as 'guardian of the law' (*Wächter des Gesetzes*), should also act to ensure that no culprit escapes sentence and no innocent person is prosecuted.[59]

In France, in the mid-1950s, various authors and practitioners denounced the abusive behaviour of some policemen and recommended a

[57] In 2000, this notion was publicly endorsed by the Committee of Ministers of the Council of Europe. Paragraph 21 of their *Recommendation to Member States on the role of public prosecution in the criminal justice system* (2000), 19, says: 'In general, public prosecutors should scrutininse the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.'

[58] In most of the German states, criminal procedure took the following form: a judge (the *Inquirent*) began the prosecution, then himself went on to carry out investigative acts. When the *Inquirent* thought he had collected enough evidence, he transmitted the dossier to the court, a Bench of several judges, which decided on the guilt of the accused. Its judgment was based on the report of a judge-reporter, which was based directly on the conclusions of the *Inquirent*. In others words, the separation between investigation and judgment was illusory, and the *Inquirent* was simultaneously investigator, prosecutor and judge.

[59] Article 6 of the Prussian law of 17 July 1846, which was the precursor of paragraph 160 of the current StPO.

'clean-up' by strengthening the control given to the public prosecutor.[60] The *Code de procédure pénale* of 1958 put these suggestions into practice. The law of 4 January 1993 later reinforced this idea. In the terms of article 19-1 of the CPP: 'the assessment by the chief public prosecutor of the suitability of officers of the *police judiciaire* is taken into consideration in all decisions relating to promotion'.[61] This reform was influenced by the work of the Commission justice pénale et droits de l'homme, which proposed in its final report that 'public prosecutors contribute, by way of the advice they give, to the decisions on the promotion of the officers of the *police judiciaire*'.[62]

In England, Parliament in 1985 thought that the tasks of investigation and decision to prosecute were incompatible by nature and could in no way be combined in the same authority. The remedy was the creation of the Crown Prosecution Service, benefiting from the necessary degree of detachment[63] at the time of deciding whether or not to prosecute. In Italy, the 'metamorphosis' of the public prosecutor that resulted from the new CPP in 1989 was also carried out with a view to strengthening the rights of the defence. Thus it contains a duty to warn persons liable to be implicated in a procedural step (article 369) and a duty to make a written record of the investigations carried out in order to make it easier for the defence to exercise their rights and for the court to exercise its powers of control (article 373). In Belgium the writers and practitioners who were in favour of 'a stronger control by the *magistrature* over the police' in order to 'extend democratic guarantees'[64] have had their prayers answered by the legislature in the reforms of 1998.[65] In France, too, there has recently been an attempt to strengthen the position of the public prosecutor. The reforms enacted in 2000 include a provision that requires the *procureur de la République*, when instructing the police to carry out a preliminary investigation, to fix a time-limit, and also to require the police to give the *procureur* a progress report after the investigation has been running for six months.[66] There is also a further

[60] Prominent among the critics was Antonin Besson: see the articles listed in the bibliography at the end of this chapter.

[61] 'La notation par le procureur général de l'officier de police judiciaire habilité est prise en compte pour toute décision d'avancement.'

[62] *La Mise en état des affaires pénales, Rapports*, 166.

[63] See chapter 7, p. 418, above.

[64] G. Demanet (*procureur général* at the Court of Appeal at Mons), 'Quelques problèmes pratiques générés par la loi du 5 août sur la fonction de le police' [1994] RDPC 140 at 158.

[65] See in particular the revised CIC, arts. 26, 28*bis* and 28*ter*.

[66] Art. 75-1, CPP.

provision, which says that an officer of the *police judiciaire* who is running an inquiry into a *crime* or a *délit* must advise the *procureur de la République* as soon as there is any person identified in respect of whom the evidence suggests that he has committed or attempted to commit the offence.[67]

In theory, this guarantee is expressed by the status of the public prosecutor (in Belgium, France and Italy, public prosecutors have '*le statut du magistrat*') or in the texts of statutes on procedure (as in Germany, where the public prosecutor must conduct the investigations with the aim of seeking out evidence of both guilt and innocence (§ 160 II, StPO); and in England, where by section 4 of the Code for Crown Prosecutors the Crown prosecutor must certify that there is evidential sufficiency: 'A prosecution should not be started or continued unless the Crown Prosecutor is satisfied that there is admissible, substantial and reliable evidence . . .') But in practice the guarantees are sometimes undermined. In response to the prospect of the *juge d'instruction* being abolished in Belgium and in France, Françoise Tulkens[68] expressed a fear of the public prosecutor being 'overrun' by the police. On one possible view of the matter, this seems to have been largely realised in the countries studied here.

Current practice can hardly be criticised simply because it assigns the main role in the preparatory phase to the police who are on site. Although the public prosecutor theoretically controls the whole inquiry, this is something that he could hardly do by carrying out all the investigations on site himself. However, the practice also stems from a control the weaknesses of which have already been demonstrated above. Admittedly, the fact that this control has been loosened on the Continent, and that it lacks vigour in England, does not necessarily mean that there has been an unavoidable degradation of the preparatory phase of criminal proceedings: 'Why should the preservation of individual liberties be the prerogative of judges and prosecutors and not the constant concern of all members of the administration?'[69] Nevertheless, the danger must not be underestimated. Meeting in Berne in April 1988

[67] Art. 75-2, CPP.

[68] F. Tulkens, 'Criminal procedure: main comparable features of the national systems', in M. Delmas-Marty (ed.), *The criminal process and human rights: towards a European consciousness* (Dordrecht, Boston and London, 1995), 5.

[69] R. Merle and A. Vitu, *Traité de droit criminel* (Paris, 1967), 842. In England, the home secretary has promulgated a Code of Practice 1997 in accordance with section 23 of the Criminal Procedure and Investigations Act 1996. The Code provides that 'in conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether this points towards or away from the suspect' (art. 3(4)).

to discuss the theme of 'Judicial organisation and criminal procedure', members of the Association internationale de droit pénal took this into consideration in their plan of action: 'It is on the quality of the work of the various bodies of inquiry that the quality of criminal procedure for the most part depends... It is necessary for these bodies to operate under the direction and the control of an authority of prosecution or of judgment.'[70] In all the procedures considered here, the activities of the police are necessarily directed towards arresting the author or authors of the reported offence. This objective is clear and obviously does not excuse the police from having to respect legality;[71] in particular, they must release wrongly suspected persons. But where a series of elements come together (behaviour of the suspect who appears embarrassed during interview, unfavourable presumptions (such as lack of alibi), suspicion justified by experience (such as false alibi), desire for efficiency, popular pressure, and so on) the aim of arresting *the* suspect can turn into the aim of arresting *a* suspect, and suspicion, founded on a postulate rather than on fact, sets a mechanism of guilt in motion which it can be difficult to stop. As one author said, 'The logic of the police is a logic of prosecution... their mission is to find the guilty, not the innocent.'[72]

This inclination of the police has found its symbolic expression in a number of English cases such as the Guildford Four, the Birmingham Six, the West Midlands Serious Crime Squad scandal and Broadwater Farm; it is, however, not particular to any particular system under which the police prepare the file (compare the case of the *Irlandais de Vincennes*[73] in France; or more recently the *Schuller-Maréchal* case, in which the criminal division of the *Cour de cassation* found that the 'trap' set by the police was set with a view to take the suspect in for questioning and was a 'machination designed to show he had acted improperly, which tainted the search for and the ascertainment of the truth and constituted an attack on the principle of fairness in evidence'[74]).

[70] [1989] RIDP 215. This was adopted in Vienna in 1989.

[71] Though it goes without saying, the French Commission de réflexion sur la justice suggests that this duty should be cast in law: 'The process of appointing officers of the *police judiciaire* should include the taking of an oath before the court... requiring them to respect the Code of Criminal Procedure and human rights when carrying out their investigations' (Commission de réflexion sur la justice, *Rapport* (1997), 41).

[72] J.-L. Sauron, *Droits pénal, bilan critique* (Paris, 1990), 43.

[73] A case in which the French police falsely accused some Irish suspects of terrorist activities. The police case came apart in the hands of a vigilant *juge d'instruction*, the suspects were released and eventually some of the police officers involved were prosecuted. See I. Fontaine, *L'Affaire des Irlandais de Vincennes* (Paris, 1997).

[74] Cass. Crim., 27 February 1996, [1996] *Dalloz* 346, with note by C. Guéry; [1996] JCP 22629, with note by M.-L. Rassat.

At the close of this study, it is clear that the police have a large degree of autonomy in developing the case and that the public prosecutor, designed as a controlling body, risks becoming merely an authenticating authority. These national procedures, whose links to the inquisitorial or accusatorial model seem to be a question of the past and the nature of which seems to foreshadow a common 'contradictory' model, will surely have to face before long the question of how effective the public prosecutor really is in controlling the legality of the preparatory phase of criminal procedure.

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