Unity and diversity of the public prosecution services in Europe. A study of the Czech, Dutch, French and Polish systems
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Chapter 2
Origins of the public prosecution services in continental law systems

The origins of the public prosecution service cannot be dissociated from the history of the French royal system of the Ancien Régime and of the Napoleonic reforms that followed the French Revolution. Indeed, this institution was entirely the creature of these systems. Therefore, it is necessary to trace the main developments that took place up to 1808 and 1810 when the Code d’Instruction Criminelle and Code Pénal were issued. The purpose of this chapter is not to give a detailed overview of these old systems but to explain the components that favoured the birth and the development of the gens du roi. It was probably because solutions to legal problems and the repartition of State functions had yet to be clearly established that the need arose for the king to create a strong institution, which would help settle these issues and seize absolute power in France.

Indeed, the French medieval era consisted not only of diverse sources of law – such as customary law, canonical law, Roman law or royal law – but also of diverse judicial systems (seigniorial, municipal, ecclesiastical and royal), competing and overlapping with each other. As early as in the twelfth century, in addition to the seigniorial, municipal and ecclesiastical courts, the Crown had created different institutions for collecting royal fines, defending the rights of the Crown and eventually for the ministering of justice.

The system took the form of a judicial system with multiple levels, lower courts and courts of appeal. Royal absolutism gained ground progressively over the three centuries from the thirteenth to the

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39 Hilaire 1976, p. 31–118.
40 For the first decree concerning royal judiciaries, see Ordinance of 1190 in Jourdan 1822a.
sixteenth century, and the royal laws and judicial system became the centralised component of the French legal system, to the detriment of other systems.\footnote{41}{Hélie 1866, p. 267.}

The king gradually imposed his system of laws and institutions on the seigniorial, municipal and ecclesiastical systems (2.1). \textit{Procureurs du roi} and \textit{avocats du roi} did not appear by way of transplantation from a Roman institution or innovative statute, but after a long maturation process (2.2). They definitively played a major role in the struggle for power because they carried out essential political and judicial functions (2.4) at all levels of society and of the realm (2.3). The French Revolution put an end to royal absolutism and to the old judicial system (2.5). The \textit{procureurs du roi} and \textit{avocats du roi} became the \textit{ministère public}, a basic prototype of the modern public prosecution service (2.6), that spread all over Europe and was adapted with more or less important modifications to varying judicial and political systems.\footnote{42}{Pradel 2002, p. 372; Delmas-Marty & Spencer 2002, p. 416; Huber 1992, p. 557.}

\section*{2.1 French royal judicial system of the \textit{Ancien Régime}\footnote{43}{This chapter does not aim to provide an exhaustive description of the \textit{Ancien Régime} legal system. I will not discuss the exceptional courts and procedures because this would not add anything to the legal definition of the public ministry within the meaning of the present thesis. The French \textit{Ancien Régime} is considered as commencing with the reign of Francois I in 1515 and ending with the Revolution in 1789. However, for the purposes of this research, texts issued earlier will be considered.}}

\subsection*{2.1.1 Lower courts}

At the lowest level and within a small part of France, the \textit{prévôts} had a military role as well as financial and judicial ones. Above them, and operating within larger areas, \textit{baillis} (North France) and \textit{sénéchaux} (South France) directly represented royal sovereignty and supervised the \textit{prévôts}. They had jurisdiction over main civil and criminal cases in the first instance, and in appeals over rulings of the \textit{prévôts} and the seigniorial courts. With the development of the king’s power, their role in dispensing justice was progressively seen as a royal function. Therefore, a hierarchical appeal before a royal court, or \textit{cour souveraine}, as a form of judicial review for all types of decisions was necessary for the king to supervise the implementation of royal legislation. These royal courts were established as \textit{parlements}. Judgements made by \textit{baillis} and
sénéchaux could in turn be challenged before a parlement. Thus, some cases could be appealed twice.

2.1.2 The parlements

A special section of the curia regis (King’s council) aimed at the settlement of the multiplying judicial issues was created during the 12th century. It eventually became an institution of its own, known as parlementum or parlement. Louis VI (Saint Louis, 1214–1270) developed the parlements and their judicial functions. The first parlement had its seat in Paris and had general territorial jurisdiction over the realm until the fifteenth century. Other parlements were created in France with different territorial jurisdictions (for instance the parlement of Toulouse in 1410, the parlement of Grenoble in 1453, the parlement of Bordeaux in 1462 and the parlement of Dijon in 1476). By the end of the eighteenth century, the jurisdiction of the parlement of Paris encompassed one third of the realm.

Parlements were courts with judicial and legislative functions. Many decisions made by all types of judiciaries were challenged before this court by way of appeal. The judgements of a parlement, in the form of arrêts de règlement, were binding upon every lower court, and in this way contributed strongly to the uniformity of the French criminal law. The parlements became very powerful not only from the arrêts de règlement but also because new royal laws or regulations required registration in the parlements to be enforceable. Therefore, they had general authority over the courts in the realm and became a cornerstone of the Ancien Régime justice and political system. The public ministry played an important part in the functioning of the decision-making power of the parlement because it could launch procedures ex officio or make legal comments as a party in ongoing procedures when the interests of the Crown were affected. A specific criminal section of the parlement of Paris (the Tournelle) had exclusive jurisdiction over important criminal cases.

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44 Timbal 1957, p. 149.
45 Raynal 1964, p. 67.
46 Hélie 1866, p. 293.
48 Bluche 1960, p. 48.
49 Hélie 1866, p. 293.
2.1.2.1 Arrêts de règlement

In day-to-day practice, parlements adjudicated cases in the first or final ressort.\(^{50}\) Such cases could throw up an important legal issue in their process (for instance, issues affecting the determination of the jurisdiction of a court ratione personae or ratione materiae). In order to answer the issue, the parlement arrived at a decision with exceptional binding force, i.e. an arrêt de règlement. This type of decision was, in principle, definitive and could not be reviewed (unless the king decided otherwise) and was binding upon all courts within the territorial jurisdiction of the given parlement. The rulings could be overruled only by a royal act. In fact, these courts delivered judgements possessing the general and quasi-permanent scope of legislative acts.

2.1.2.2 The registration function

The registration function had two purposes

- to provide the king with legal advice over his regulations' drafts (such as Ordonnances and Lettres royales)
- and to provide these regulations with a binding force and ensure their publicity

In particular, an act that was not registered did not have a binding force. The parlements could refuse registration and make comments to the king, the so-called remontrances.\(^{51}\) In response to these remontrances, the king decided whether or not to modify his act by means of lettres de jussion. Judges could maintain their position, oppose the lettres and send an itératives remontrances.\(^{52}\) The last word belonged, in principle, to the king but if the parlement persisted in its opposition, the king could call the parlement for an extraordinary session, called lit de justice. There, the king explained and imposed his point of view in order to force the parlement to register the act.\(^{53}\)

In fact, whilst judges of the parlement considered it their right to make remontrances as a real legislative power, the king regarded it as a mere administrative formality. This mechanism was a source of constant tension and led to several crises, one of which was the so-

\(^{50}\) A decision is made in final ressort when further appeal in the case is not available. A court whose decision is admissible to challenge before an upper court by way of appeal is made in first ressort.

\(^{51}\) Article 5 of Title 1 of the Ordinance of 1667 in Jourdan 1829a, p. 105.

\(^{52}\) Ellul 1956, p. 311.

called fronde des parlements, which severely affected the judicial administration during the eighteenth century. Parlements often considered legal reforms in opposition to the king and sometimes favourable to the nobility or the people (the judges were themselves nobles). The climax of the crisis came in 1771 when magistrates of the parlements went on strike in order to support their colleagues at the parlement of Bretagne against the local royal governor, who had issued a regulation for the creation of new taxes. Louis XV empowered Chancellor Maupeou with extensive powers and as a result the latter seized the opportunity to arrest and exile the reluctant magistrates and reform the justice system.\textsuperscript{54} The parlement of Paris was singled out for particular suppression and its jurisdiction was divided into ten smaller districts. Following this reform, magistrates were directly appointed by the king and lost the right to own their office (see 2.3.2 about the vénéalité des offices). However, the reform did not last and the young Louis XVI reinstated the old system after the death of Louis XV.

2.2 Birth of the prosecution service

2.2.1 Non-Roman origins of the public ministry

Certain authors have explained the public ministry as the descendant of a number of old Roman institutions such as the censeurs, the defensores civitis, the irénarques, the questeurs or the procurators caesars.\textsuperscript{55} Rassat demonstrated successfully in her PhD thesis that whilst the functional origins of the institution are found in the seventh century, it is only much later, in the fourteenth century, that the first legal statute regulating the institution was issued.\textsuperscript{56} This text, the royal ordinance issued on 23 March 1302 by Philippe le Bel, gives details of the procureur du roi, their existence and their functions.\textsuperscript{57} The public ministry did not originate in the Roman institutions because the accusatory procedure prevailed during this period. Private parties (i.e. the victims or their families) necessarily prosecuted crimes. These private complainants risked falling foul of

\textsuperscript{54} At the same time Maupeou was appointed Chancelier de France and Garde des sceaux, i.e. he performed a supervisory role over the justice system, equivalent to a Justice Minister. See Timbal 1957, p. 206; Ellul 1956, pp. 209, 345.

\textsuperscript{55} Garaud 1907, p. 162.

\textsuperscript{56} Rassat 1967, p. 7.

\textsuperscript{57} Ordinance of 1302 in Jourdan 1822. Although it is not the purpose of this research to resolve the issue, I shall mention here a discordance between the date of this text (1303) given by main authors such as Carbassee 2000, p. 51, and that given (1302) in the famous compilation of old French laws, Isambert.
the law of retaliation (lex talionis), which stipulated that criminals should receive as punishment precisely those injuries and damages they had inflicted upon their victims (an eye for an eye). A plaintiff who failed to prove the culpability of the accused in such a procedure could suffer the sentence instead of the accused. This legal theory was closer to the idea of revenge than the later notion of an institution aimed mainly at prosecution of crimes in the interest of and on behalf of society, irrespective of whether the plaintiff participates in the proceedings or not (see 2.2.2.2).

2.2.2 Functional birth of the public ministry

In order to determine the origins of the public ministry, the functions of the body should be considered and not the body itself because these functions appeared long before 1302. The public ministry was not created ex nihilo but rather, the functions of several institutions developed gradually into a ministère public. Breaking with traditional legal history, Rassat makes a distinction between procureurs du roi, which appeared first, and avocats du roi. It is also important to note the inception of the idea of public prosecution and inquisitorial criminal proceedings, which played an important role in the development of the institution.

2.2.2.1 From the saïon to the gens du roi

During the seventh century, kings entrusted servants, the so-called saïons or graffions, with some administrative functions such as the supervision of the exploitation of the realm and Crown estate, and fiscal functions such as the collection of taxes. In addition to these functions and where necessary, a saïon could find himself supervising royal cases before seigniorial courts and enforcing the judgements of these courts because many sentences carried fines.

Between the tenth and the thirteenth centuries, the power of the Crown decreased but the saïon or graffion’s functions did not disappear. These functions were taken over, because they affected the Church, by the ecclesiastic advocatus and vicedominus, later unified under the title of advocatus episcopi.58

With the reappearance of the king’s sovereignty in the thirteenth century, while ecclesiastic advocatus episcopi carried out their functions for the Church, a new royal officer, the so-called bailli, similarly did the same for the king. These baillis thus had administrative functions, i.e. the administration of the realm and the

58 Rassat 1967, p. 16.
supervision of tax collection. In addition, when a case tried by a seigniorial or ecclesiastical court personally interested the king, a *bailli* would act for him as a plaintiff or defendant. It seems that *baillis* were also replaced by *procureurs du roi* in the execution of several of their functions.\(^{59}\) Although the true reason for this is not very clear, the possibilities include an increasing workload for *baillis*, the *baillis*’ refusal to perform investigations and the impossibility of being a judge in cases coming under their jurisdiction whilst also representing the Crown as a party. Indeed, *baillis* had the jurisdiction to represent the king and to adjudicate (see 2.1.1).

These *procureurs du roi*, mainly empowered with administrative functions, should not be confused with the *procureur* of individuals, who was only an *auxiliaire de justice* tasked with drafting the documents required for judicial proceedings. These private or common *procureurs* were an established class of legal professionals but did not have the functions of a *procureur du roi*. Nevertheless, a number of *procureurs du roi* ended up performing some of the functions of common *procureurs* to increase their income.

Within the seigniorial justice system, *procureurs fiscal*, also known as *fiscal*, were empowered with functions similar to *procureurs du roi*. In turn, the ecclesiastical system possessed the *promoteur d’Eglise*. Originally, *promoteurs d’Eglise* and *procureurs fiscal* respectively administered seigniorial and ecclesiastical estates. Progressively, with the development of royal power across the realm, they also became the deputies of the *procureurs généraux du roi* in the non-royal jurisdictions.\(^{60}\)

*Procureurs du roi* could administer the Crown estate, supervise procedures concerning royal issues, carry out criminal sentences and institute criminal prosecutions in the name of the Crown. This last task was necessary because the sentence could result in a fine paid to the Crown. However, *procureurs du roi* were not allowed to submit verbal opinions at trials. This right was granted to them later. The specific judicial function of pleading in hearings belonged to *avocats*, who had already been in existence for many years. When the intervention of the king in a verbal proceeding was necessary, *procureurs du roi* would instruct private *avocats* to handle the hearing. Gradually, these private *avocats* became *avocats du roi*

\(^{59}\) It is not clear whether the title of *procureur du roi* was created *ex nihilo* or whether existing private *procureur* were entrusted with a part of the *baillis*’ functions. Rassat seems to favour the former explanation.

\(^{60}\) Two legal theories oppose this understanding of the issue, see 2.3.3.3.
with the Crown as their exclusive client. Therefore initially, the *procureurs du roi* mainly had administrative functions, with the judicial functions arising only where necessary. Only the *avocats* and later the *avocats du roi* had exclusively judicial functions.

The *procureurs du roi* and *avocats du roi* gathered in the *compagnie des gens du roi* (Crown officer’s society). In order to perform their functions, *procureurs du roi* and *avocats du roi* had to swear the same oath as other magistrates (such as *sénéchaux* or *baillis*). The following is an extract of this original oath

...for so long as they (the *procureurs du roi* and the *avocats du roi*) retain their functions or remain in charge of the administration granted to them, they swear to deliver fair judgement to any man, grand or lowly, foreigner or local, of any social class and on any subject whatever their nationality or their identity. They swear to perform these functions in preserving and serving diligently the local uses and approved customs. They swear to fairly preserve and serve our rights (the rights of the Crown), without reduction or impediment and without prejudice to the rights of others.

(Author’s translation)\(^61\)

They exclusively represented and assisted the king. Purely from the standpoint of the interests of the Crown, the officers of the Crown came to the defence of society and, to a limited extent, the prosecution of crimes in the public interest (see 2.4). A certain idea of a uniform criminal policy emerged. According to the oath, the *gens du roi* were duty bound to protect society since they had fairly and diligently to carry out their duties to the people and to the royal laws and local customs. The embodiment of the institution as specifically upholding the law and safeguarding the public interest evolved from the political need to enhance the Crown’s power over the French realm.

By the end of the sixteenth century, with the adoption in May 1586 of an ordinance for the public ministry, the birth of the institution seems to have been achieved in its main features. The criminal ordinance of 1670 on the organisation of the criminal justice system also completed, importantly, the functions of the public ministry.\(^62\) The principle, but only the principle, of a public body active in criminal proceedings as a party supporting public interests, was born.\(^63\) However, this body must be distinguished from the institution as it is

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\(^{61}\) Carbasse 2000, p. 51.

\(^{62}\) Jourdan 1829b.

\(^{63}\) Hilaire 1976, p. 121.
understood today, which was only truly established by the Napoleonic reforms. The Ancien Régime's institution was only a rough analogue of the institution established by those reforms.

2.2.2.2 The concept of public prosecution and the inquisitoire procedure

The birth of the public ministry should not be assimilated with the origin of the right of a public body to prosecute ex officio a person accused of having committed a crime by a private person. Indeed, it is beyond doubt that crimes may endanger order and the foundations of any society. Therefore, a system is necessary which provides anyone with authority in that society, especially judges, with the right to prosecute a criminal ex officio. However, a criminal process was always held on behalf of a private party, whether as victim or private complainant. The Crown was also considered a private party.

Criminal proceedings were already mainly the preserve of private parties before the beginning of the Ancien Régime. Several existing institutions were aimed at the resolution of disputes and at repairing losses suffered by victims of crime. For instance, there was the duel judiciaire or trial by combat, where two parties in dispute fought in single combat, and the victor was proclaimed as right. The victim, their family or a complainant (a private person), could also bring a complaint to the judges and accuse someone of a crime. The judge would then hear the parties and apply various systems of adjudication, such as trial by ordeal (the guilt or innocence of the accused being determined by subjecting him or her to a painful task). Once the judgement was passed, the judge applied the law of retaliation (lex talionis see above 2.2.1). The complainant was obliged to continue prosecution until judgement was delivered, as already stated. This legal theory was closer to the idea of revenge than that of justice or public interest, therefore, it explains to a certain extent the need for establishing public prosecutions. However, someone accused of a flagrant crime could be prosecuted and sentenced by a judge without a victim’s or a complainant's complaint because the judge was, somehow, a direct witness to the crime.

Later, the notion developed that the law of retaliation was morally unacceptable because crimes remained unpunished if the victim refused to risk retaliation, had died without family or no complainant

\[64\] Carbasse 2000, p. 30.
brought an accusation. Justice had to prevail for the sake of the nation. Therefore, the need gradually appeared for a prosecution in the absence of a victim. Pope Innocent III (1160–1216) was the first leader to decide that ecclesiastical criminal proceedings could be instituted *ex officio* in the absence of a private complainant against non-flagrant crimes for which a longer investigation had been carried out. During the era of the Church Inquisition, the *promoteur d'Eglise* was empowered to assist officials in the discovery of and inquiry into crimes. Later, the same *promoteur* would be granted the right to institute criminal prosecutions *ex officio* and to supervise investigations. Inspired by the ecclesiastical *inquisitoire* procedure, royal criminal justice would gradually abandon its accusatorial procedure. The right to institute a criminal prosecution (*action publique*) and to investigate crimes in the absence of private parties would be granted to judges in case of grave felonies (see for a definition of crimes during the *Ancien Régime* 2.4.2.1). If this right, at least in principle, was not yet recognised in the corps of the *procureurs du roi*, a representative thereof would however, always participate in the proceedings once the interests of the Crown were affected.

In fact, all of these factors together explain the development of the public ministry over the centuries. The institution was already in place on the formation of special magistrates (*procureurs du roi* and *avocats du roi*), with the right to institute prosecutions and carry these out as parties to the criminal process, with or without a victim, private complainant or denunciator, and on behalf of the king – the representative of God and society.

2.3 Organisation of the public ministry of the *Ancien Régime*

2.3.1 Structure of the public ministry of the *Ancien Régime*

According to Merlin, who described the French *Ancien Régime* as it neared its end, the public ministry consisted of a corps of magistrates watching over the interests of the Crown and society, present in every court and tribunal.\(^{65}\) Offices or *parquets* consisted of royal officers or magistrates endowed with the public ministry’s functions.\(^{66}\) The *parquet* included different types of magistrates

\(^{65}\) Merlin 1828, p. 212.

\(^{66}\) *Parquet* literally means ‘floor’. Authors give different reasons for the use of this word for prosecution service office. It was said that the members of the public ministry used to discuss cases one step beneath the judge’s seat, thus on the floor.
present at every functional and geographical stage of the justice system. They were

- procureurs généraux and avocats généraux, who were present before the parlements\(^67\)
- procureurs du roi and avocats du roi, who were present before the bailliage and sénéchaussée courts
- substituts du procureur général and du procureur du roi (deputies), who were respectively present before the parlements and the bailliage and sénéchaussée courts
- and the king, who could also be represented before the seigniorial jurisdictions by a procureur fiscal and before the ecclesiastical courts by a promoteur

2.3.2 The recruitment of gens du roi, rewards of office and subordination to the king

Although the position of judge was always more powerful, the position of the gens du roi was a very important and sought-after position.\(^68\) In fact initially, the recruitment and remuneration of procureurs and avocats were different. The recruitment procedure varied, for example, from direct appointment by the baillis and sénéchaux, appointment by the king or by co-opting election. Eventually, the procedure became similar for both types of servant, who came to be regarded as undifferentiated magistrates.

The procedure was known as heredity or purchase of office (principle of vénalité des offices), which in practice amounted to co-option. Magistrates held their office and could sell it or transmit it to their descendants. The transmission of the office also consisted of the transmission of the function attached to the office. Beforehand, a formal inquest was undertaken into the personality of the purchaser as regards his capacity, solvency, age and integrity. The professional abilities of the applicant were appraised by his future
peers (it was very exceptional that an applicant failed to be appointed because of the outcome of an inquest). After transmission of an office (e.g. of a procureur général or avocat général), the king issued a so-called lettre de provision necessary for the candidate in order to carry out his functions. The purchaser would also take the oath and eventually be officially established in his position.

With time, it became more difficult, even impossible, to be appointed as a royal officer of the public ministry in parlements if the candidate was not the heir of a famille de robe (family of legal profession). Moreover, the prices of offices varied according to the importance of the city; it became almost impossible for a non-heir candidate to access the Parisian magistracy at the parlement of Paris. At the end of the Ancien Régime, the judicial institutions and the public ministry were composed of the members of a few large families, such as the Joly de Fleury family, from which three procureurs généraux and two avocats généraux at the parlement of Paris were appointed. Thus, besides heredity, only people of great and rich families could afford a magistrate’s office. Performing the functions of a magistrate during the Ancien Régime was not really a source of capital. The offices were not only very expensive but would only confer on the officeholder a small annual salary (gages).

The position of deputies was initially slightly different because they were appointed directly by the procureur général or by the chancellor on the motion of the procureur général or on the recommendation of a very important person. Eventually, deputies also became officeholders. It is striking to observe that people entrusted with important positions such as procureur du roi or avocat du roi did not reach these positions by virtue of their knowledge of the law; although originally only the best lawyers were appointed as representatives of the Crown.

However, with the royal centralism that developed over the centuries, the Chancellor of France, as the Crown’s assistant and adviser on justice issues, became a very important figure. As the first officer of the Crown supervising the department of justice, and he played a considerable role in the appointment process of

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69 Carbasse 2000, p. 144.
70 Ellul 1956, p. 327.
71 Carbasse 2000, p. 154.
72 The judges obtained some additional revenue from judicial fees – the so-called épices paid by the parties.
73 Carbasse 2000, p. 184.
magistrates and, therefore, of members of the public ministry.\textsuperscript{74} This role evolved throughout the various eras of the Ancien Régime, for example the fronde crisis.\textsuperscript{75}

The officers of the public ministry were accountable to the king and in practice, to his chancellor.\textsuperscript{76} In addition to the oath common to all magistrates, procureurs du roi and avocats du roi would swear a special oath to strictly follow the orders of their king, who preserved strict authority over his officers and could push a reluctant procureur to resign in the event of a breach of duty. Nevertheless, the functions of the institution were so vital to the Crown that very few cases of dismissal are known.\textsuperscript{77} In principle, gens du roi were bound to comply with royal orders in their political functions and in their judicial functions (see 2.4.1). Indeed, although very rare in practice, the king could take the place of one of his gens who did not carry out his orders.

2.3.3 Position of the gens du roi in the judicial system

The king considered the public ministry to be his eyes and ears in the realm. While gens du roi were subordinate to the Crown (the source of all powers), the institution was in some respects independent from the judges, the people and ultimately from the king. Contrary to assumptions about this epoch, the independence and the quality of the magistracy were fairly good. This was perhaps because the magistrates were almost impossible to remove and also due to their position as necessary intermediaries between the people, the Crown and the judges. In addition, the familles de robe maintained a tradition of excellence.\textsuperscript{78} The king’s officers developed their own conception of justice, which could diverge from that of the king’s because they held a powerful and prestigious position, especially in Paris where most political life took place.

2.3.3.1 Relations with the king

Even though they were, in principle, subordinate to the Crown, procureurs and avocats also functioned as part of the magistrates’

\textsuperscript{74} (The use of the third person masculine pronoun throughout refers to men and women alike); Ellul 1956, p. 238.

\textsuperscript{75} See on the fronde crisis 2.1.2.2.

\textsuperscript{76} Merlin: ‘Répertoire universel et raisonné de jurisprudence’ [1825–1828] Tarlier, n.20, 224.

\textsuperscript{77} During the 16th century, however, religious war led to the dismissal of Protestant prosecutors; see in Rousselet 1957, p. 195; Carbasse 2000, p. 147.

\textsuperscript{78} Ellul 1956, p. 328.
corps, as did the judges. A certain concept of solidarity between magistrates and members of the parquet operated as a safeguard against excessive subordination. The king feared this and with good reason, as demonstrated during the fronde, which resulted in a strike by the judiciary. Because of this solidarity and the relative permanence of their tenure, the gens du roi gained a certain independence from the Crown. In particular, the patrimonial character and the vénalité des offices remained features of the public ministry, providing these magistrates with a certain independence that undermined the authority of the king and his chancellor.

This independence could be observed in the registration procedure procureurs du roi and avocats du roi followed for new royal laws (see 2.1.2.2). It was the duty of the procureur to formally request such registration. On the one hand, they could not refuse to request the registration because they acted as simple intermediaries between the Crown and the court. On the other hand, they were able to submit a verbal opinion – generally, from the avocat général – that could be contrary to the royal opinion. There is, unfortunately, very little trace of such submissions. This opinion was heard during the audience of registration, following which the parlement could address remontrances to the Crown. There is no doubt that the public ministry used this right to influence both judges and ministers.

For example, in 1776 the Minister of Finance, Turgot, convinced the king to suppress the corvées. Turgot proposed to replace the corvées with a tax levied on the owners’ estates, i.e. the lords. The people’s complaints against the corvée were reported to the procureur général (Guillaume François Louis Joly de Fleury), who, however, issued a written opinion in favour of the maintenance of the corvées. The parlement of Paris decided not to register the royal regulation following the opinion of the procureur général. Eventually, on 12 March 1776, Louis XVI called a session of the lit de justice. Following the written opinion of the procureur général at the hearing, the avocat général (Antoine-Louis Séguier) submitted a famous plea against the royal regulation. Nevertheless, the parlement registered the regulation, but the pleas and the opinion so impressed the king that Turgot was dismissed a few weeks later and

79 Carbasse 2000, p. 205.
80 Corvées were services compulsory for anyone who did not enjoy privilege (i.e. was not from the nobility), requiring them to work for free for local lords.
81 For instance, wardens complained that they could not watch over prisoners because they had to do their corvée for the lord of the district.
the corvées were eventually restored.\textsuperscript{82} Today, it has been demonstrated that Joly de Fleury, Séguyer and the judges of the 
parlement were owners of estates. They were naturally opposed to a reform that would directly hinder their private interests.\textsuperscript{83} Whilst 
procureurs definitively had the duty to obey the king (after the decision of the 
parlement the procureur général did the work necessary for the registration of the regulation irrespective of his opinion), they remained free to develop their own point of view contrary to that of the royal ministers.

2.3.3.2 Relations with the judges

Procureurs, avocats and their deputies were not accountable to judges and were thus also independent in this sense. Of course, there was no legal mechanism to organise a clear separation between the functions of judge and procureur, and in a way, being one or the other was more a question of politics than of legal requirements. Ambitious procureurs could rise through the social tiers to become judges, giving way to some external pressures and balancing their independence. Nothing prevented a procureur from being appointed president of a parlement or conseiller. It was even possible to carry out both functions simultaneously.\textsuperscript{84}

With regard to criminal proceedings, judges were more important than gens du roi. The role of procureurs or avocats as parties to criminal proceedings was not as precisely established as today and the separation of functions between judges and procureurs was rather blurred. There was actually no monopoly over public prosecution held by the public ministry (see 2.4.2.1) and it was said that tout juge est officier du ministère public (every judge is an officer of the public ministry). As long as the interests of the Crown were not involved, the public ministry had two main rights in criminal proceedings: to deliver an opinion on the case and to hear an appeal. However, it could only participate as a joined party, not as a main party. The submission of an opinion by the public ministry in a case was a pure formality without any binding force on the judge. Not only could the judge perform his duties if a procureur did not deliver an opinion in a case, but if the Crown representative refused to give an opinion or if the court did not appreciate this opinion, a judge could take over the functions of the public ministry and submit

\textsuperscript{82} Carbasse 2000, p. 208.
\textsuperscript{83} Bisson 1961, p. 66.
\textsuperscript{84} Carbasse 2000, p. 153.
an opinion in the name of the procureur.\footnote{Rassat 1967, p. 29.} Moreover, the public ministry could not assist in the courts’ deliberations unless they were authorised to do so by the president of the court.\footnote{Article 2 of Title 24 of the 1670 Ordinance.} With regard to appeal proceedings, the power of the appellate court to increase a sentence was independent of whether the public ministry had lodged the appeal \textit{a minima} or not.\footnote{By way of an appeal \textit{a minima}, the public ministry would ask the appellate court to increase a sentence.}

If procureurs had a weak position in the criminal process, they enjoyed an important and respected social and political position. They had few pressures to fear and could afford to be independent, performing useful functions in court. Their opinions, characterised by a sense of justice and a broad knowledge of law, were esteemed by judges, who could not in any case exercise all the necessary judicial functions and thus needed the opinions of a procureur.

2.3.3.3 Subordination and sharing of responsibility between representatives of the public ministry

Until the end of the Ancien Régime, it seems difficult to conclude that the public ministry could become the unified and hierarchical institution we know today. Two theories provide different views on this issue. Rassat considers there to be no general unity of the public ministry; subordination could not really exist between avocats du roi and procureurs.\footnote{Rassat 1967, p. 55; and contra Lefèvre 1912, p. 93.} It seems that subordination was unlikely, if not impossible, because avocats mainly acted in civil proceedings by way of verbal submissions. On the other hand, procureurs had administrative functions and when they held judicial functions, they acted in writing.

For Lefèvre, the functional subordination between the members of the public ministry varied according to the hierarchy extent among members of the institution and according to the distinction between procureurs and avocats du roi. Gens du roi were subordinate to the king and to their direct superior. Nevertheless, this subordination was relative because of the quasi-irrevocability that magistrates enjoyed as owners of their office. The procureur général was, in principle, the chief of the public ministry within the parquet of a parlement because

- he represented the Crown before parlement
• the avocat général was subordinate to him
• he supervised deputies in the parquet of the parlement
• he supervised the procureurs du roi before the bailliage and sénéchaussée courts
• and he supervised the procureurs fiscaux before the seigniorial jurisdictions even though the latter were not royal officers

There was no hierarchical link between procureurs du roi themselves and the gens du roi and procureurs fiscaux who were also subordinate to their lords. Every gens du roi was a deputy of the procureur général. In parlements, the procureur général had deputies to replace him when he could not attend the audience. They acted in his name and in his place and had theoretically less independence than procureurs in other courts. At trial, procureurs had, in principle, to submit written opinions in accordance with their superiors’ instructions and in accordance with the legal views of the Crown (in practice, of the chancellor).

The avocats du roi and their deputies were organised in the same way as procureurs and their deputies. Before the parlement, the avocat général was dependent on the procureur général. In lower courts, the procureur du roi was the chief of the parquet. He supervised his deputies, of course, but also had disciplinary rights over the avocats du roi, who were in theory heavily subordinated to him. He could dismiss an avocat du roi who breached his duty by committing errors. In fact, avocats always exercised their functions in the name of a procureur because procureurs were the true representatives of the Crown. In principle, a procureur du roi could take over the functions of an avocat du roi at trial at any time. Every legal act of procedure made by an avocat du roi required the signature of a procureur du roi.

However, as has already been noted, the two types of magistrates had different origins and functions (see 2.2). For this reason, avocats du roi progressively developed a certain autonomy in their functions and had specific tasks that, in principle, could not be overridden by procureurs. In this respect, they gained independence for several reasons.

89 Here there are also two opposing points of view among scholars – for Rassat, there was no subordinate relationship between procureurs généraux and procureurs fiscaux, see Rassat 1967, p. 55; while, for an opposing view, see Carbasse 2000, p. 120.
90 Lefèvre 1912.
• avocats du roi could receive orders directly from the king, thus overriding the authority of the procureurs du roi
• avocats du roi and procureurs du roi were held jointly and separately responsible for the exercise of their duties
• infringements to the right of procureurs du roi to sign every legal act were tolerated
• and there were legal limitations to the right of a procureur to dismiss the avocats du roi

Of course, avocats du roi and procureurs du roi used to work with and not against each other. Therefore, they always tried to reach a common opinion in specific cases. It also happened that procureurs asked for the advice of avocats in certain matters. Similarly, procureurs progressively admitted that, according to the circumstances of the case during the hearing, the opinion of an advocate could differ from the written opinion of the prosecutor. In the event that there was a difference of opinion between a procureur and an avocat, the latter remained independent and could plead his own opinion at the hearing. This practice is the origin of the principle la plume est serve, mais la parole est libre (the pen is servient but the word is free), which is a feature of every prosecution service in civil law countries today.

Magistrates could also be held criminally liable for their offences. However, only royal courts had jurisdiction over the penal responsibility of magistrates. The procedure was more rigorous than usual for certain crimes (e.g. lèse majesté) because the exceptional position of magistrates was considered to be an aggravating circumstance.

2.4 Tasks and functions of the public ministry during the Ancien Régime

2.4.1 Defence of the interests of the king

No text truly deals with the early functions of the institution in any depth. Although several royal ordinances and decrees enumerated the rights and obligations of gens du roi, they did not provide a clear and sharp definition of these functions. The tasks of the public ministry used to be very diverse and very broad. At its outset, its main task was to secure the welfare of the Crown by any means possible. Once established, the monarchy was absolute and the

91 Articles 10 and 11 of Title 1 of the 1670 Ordinance.
source of all powers. The task of the public ministry was above all to maintain and even extend this power. As Henrion de Pansey wrote

Through these magistrates (those of the public ministry), the King could see and hear everything, was everywhere. He would supervise the enforcement of laws, the conduct of judges, and the actions of every citizen; He would participate in the law-making process with regard to public safety regulations and would enforce these regulations; eventually he would attend the meetings of every corps and corporations of the State. (Author’s translation)

Gens du roi used to supervise and manage the Crown property and estates. The institution could commence proceedings against anyone who had undermined the Crown’s interests. It meant, for instance, that a farmer reluctant to pay his taxes or his rent to the Crown could be brought to court by a procureur. In pending proceedings instituted by another party, the public ministry could also intervene at any time and act as a joined party in order to secure the rights of the Crown, if necessary.

The notion of royal property and estates was very broad and could consist of regulations carrying taxes levied on the exploitation of land, as well as regulations concerning the production of goods by the citizens. Because of the broad definition of the interests of the Crown, the parquet had an important role to play in the extension of the realm. Indeed, decisions of lords and ecclesiastical institutions could be challenged if they conflicted with royal interests. By this means, the Crown weakened the position of those who opposed its power. As soon as a royal regulation, especially one involving tax, was undermined in a local dispute, the public ministry challenged the lord or ecclesiastic’s jurisdiction to hear the case. Everything that involved the Crown was considered as a cas royal and would have to be exclusively dealt with by a royal court. The public ministry increased the list of those royal cases considerably and progressively limited the jurisdiction of other systems.

A struggle for the power to make rules, e.g. to create taxes, and the power to enforce them took place between the king and other

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93 De Pansey 1818, p. 187. The distinction between corps and corporation is rather slight but nonetheless important in this context. A corps was a group with a legal existence and a function in the state organisation, while a corporation was also a group with legal competence but not necessarily connected to the state organisation.
94 Carbasse 2000, p. 55.
important lords and clergymen of the Ancien Régime. The wide repartition of the procureurs du roi and the avocats du roi across the realm made the public ministry the ideal tool for a monarchical absolutism seeking to gain ever more power over the lords and the clergy, and had very little to do with the welfare of the people. The purpose of the public ministry in the early days of the Ancien Régime was, and remained above all, political.

During the fourteenth century, the people considered the gens du roi as abusive because they were very powerful and only represented the interests of the Crown. However, procureurs du roi had to enforce the law in order to protect the royal interests, and the purpose of law was not only to serve the interests of the Crown but also the interests of society. The idea emerged that the king was the representative of society before the courts, and it followed that his interests converged at a certain point with the interests of the people. The public ministry’s functions also came to the defence and the protection of public welfare – criminal justice is one of the best examples of this. Indeed, the prosecution of grave felonies was not only a matter for the victim but also a matter for the king as representative of God's justice on earth and consequently of society. The growth of the economy and, last but by no means least, the collection of taxes depended on a realm where crime was combated.

2.4.2 The defence of the interests of society by a public ministry

The Crown was indeed the source of all powers, and thus the source of all laws. However, this was by the will of God. Being the representative of God on earth, the king also needed to safeguard the welfare of the people that God had placed under his protection. It meant that on the one hand laws should aim to protect the people against any abuses and, on the other, that these laws should be respected and enforced. By the end of the eighteenth century, the public ministry had two main purposes: the protection of the interests of the Crown and the protection of society’s interests. The protection of society was achieved by means of judicial functions (i.e. the intervention of the public ministry in civil and criminal proceedings) and supervisory powers (i.e. the supervision of everything that involved ordre public (public safety) and sûreté (public security)).

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95 Hélie 1866, p. 302.
96 De Ferrière 1769, p. 208.
2.4.2.1 Institution of and participation in judicial proceedings

Civil proceedings in the Ancien Régime mainly involved hearings. Verbal submissions were paramount and civil cases were therefore often dealt with by an avocat rather than a procureur. Accordingly, where the interests of the Crown were at issue, the avocat du roi would intervene.

With regard to criminal proceedings, no statute clearly established the definitions of criminal offences until the 1670 Ordinance, and even this only provided a list of offences without describing the acts constituting these offences. Crimes were divided into two categories – petty crimes subject only to monetary penalties and grand crimes carrying defamatory, afflictive or capital sentences (e.g. theft, physical aggression or royal cases). 97 For petty crimes, arbitration between parties took place, whereas grand crimes were prosecuted before a court. The 1670 Ordinance was the first regulation that established with a certain precision the role of the public ministry in a prosecution.

In Paris, a victim could complain to a lieutenant criminel or to the police, while in other jurisdictions, a victim could complain to a local judge. 98 In the absence of a victim, a denunciation could be made to a procureur du roi or a procureur fiscal. Only a lieutenant criminel or a judge had, in principle, the right to order an investigation. 99 The public ministry would then join the case and provide support to the victim.

In the absence of a victim, the public ministry could institute proceedings only on receiving the complaint of a denunciator. 100 In the absence of both a denunciator and a victim, procureurs had the right to institute the procedure ex officio, but they rarely did so and, in practice, the judge remained the true initiator of the criminal trial. 101 It is important to note that a procureur had no power to prevent a judge from instituting proceedings. 102

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97 Articles 11 and 12 of Title 1 of the 1670 Ordinance provide that royal cases consisted of, for example, treason and sedition, sacrilege and profanity, rebellion against orders or agents of justice, illicit bearing of arms, riot, illegal assembly and public violence, counterfeiting of money, crimes by officers of State, crimes by soldiers, etc.
98 The lieutenant criminel was the second highest officer of the baillage of Paris, the so-called Châtelet, and presided over all sessions of the criminal section.
99 Articles 1, 2, 3, 4 and 5 of Title 3 of the 1670 Ordinance.
100 Article 6 of Title 3 of the 1670 Ordinance.
101 Article 8 of Title 3 of the 1670 Ordinance; Rassat 1967, p. 28.
102 Rassat 1967, p. 28.
The public ministry had a few functions during the preliminary investigation but these were very limited because the victim conducted the investigations and, in the absence of a victim, the lieutenant criminel or another officer ordered by the judge investigated and interrogated the suspect. The judge remained the main actor – he was not bound by the opinion of the procureur. Documents and materials for the case, however, had to be communicated to the procureur du roi (as witness depositions). They supplied the opinion demanded by the Crown’s interest or the interest of justice. These opinions amounted in practice to requests for a witness hearing or specific investigations.

Once the preliminary investigation was completed, the competent procureur submitted his final written réquisitoire and the avocat delivered the verbal submission during the hearing. The procureur had the right to challenge the decisions of the lower courts by way of appeal before the parlement. If the accused was sentenced to death or corporal punishment, the case was automatically and invariably remanded to the parlement for a rehearing.

2.4.2.2 Judicial supervisory functions

2.4.2.2.1 Supervision of courts

When exercising their judicial competence, royal, seigniorial and ecclesiastical courts were all subject to the supervision of procureurs généraux. This function was performed by way of appeal against every decision and by way of remontrance.

On appeal, the parquet challenged decisions made by royal and non-royal judiciaries as soon as it considered that a royal law had been wrongly applied to a case. This appeal was an appel de faux jugement (review of wrong judgement). The decisions of the ecclesiastical judiciaries concerning disciplinary actions against clergymen or religious orders, for instance, could be challenged by way of appel comme d’abus. In principle, an upper royal court was
compétent to hear these appeals, unless the case involved clergymen over whom only the upper ecclesiastical courts had jurisdiction.

Remontrances were a powerful supervisory tool used by the public ministry when a legal question needed to be resolved in pending proceedings, a judicial dysfunction had occurred, or if a law required amendment. Indeed, the implementation of royal regulations often gave rise to misinterpretation and conflicts of competence. Frequently a lower court did not perform its duty correctly or at all – in these cases disputes could remain unresolved. This happened because in the absence of clear jurisdicitional delimitation it could be difficult to determine which of the seigniorial, ecclesiastical or royal courts was competent to try certain criminal acts, and overlaps were common within the same district. However, a judge could also use this legal imprecision to evade his duty to judge. The procureur would then carry out an exact analysis of the problem and address the parlement with a list of arguments or remontrances based on legal grounds. The parlement would eventually take a decision called arrêt sur remontrances, which had general binding force in the district or the province affected. This kind of decision could even take the form of an arrêt de règlement (see 2.1.2.1). Although the public ministry remained the representative of the Crown, it was also les yeux constamment ouverts du parlement (the ever-open eyes of the parlement). This situation could leave procureurs in an uncomfortable position, especially during the fronde des parlements. Despite this, procureurs often found the best solution was to position themselves between the interpretation of the law as provided by the parlement and the interpretation provided by the Crown.

2.4.2.2.2 Supervision of parlements

By way of remontrances, procureurs généraux also supervised the magistrates of the parlement during special periodic meetings called mercuriales. The purpose of these was to remind magistrates of their duties. In theory, the Crown could supervise judicial power. This procedure was also used to modify the opinion of the parlement concerning the interpretation of specific laws. In actuality, the disciplinary role of the mercuriales would eventually relax and the remontrances remain only as an interpretative form of review.

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110 Carbasse 2000, p. 103.
111 See on the fronde crisis 2.1.2.2.
Indeed, by the end of the Ancien Régime, the Crown held little supervisory power over the judges, who had gained a strong and powerful position and were almost irremovable. If the judges felt the Crown to be too threatening, the former could resign from their functions, thus weakening the power of the Crown.

2.4.2.3 General supervisory functions

Above all, the public ministry of the Ancien Régime was a body of political supervision. Because of their presence across the country, the gens du roi were a fantastic intelligence service expanding the power of the Crown everywhere. They were aware of almost everything occurring in the cities or in the realm. Therefore, the public ministry was in charge of the so-called haute police (high police), i.e. the protection of the ordre public (public safety) and sûreté (public security).112

Outside the scope of the criminal justice system, other matters were very diverse and covered almost everything affecting the safety and convenience of society, such as economic regulations or labour regulations. Prosecutors took care to ensure that everyone correctly enforced the law. They could intervene at any time to denounce regulations, customs or laws wrongly raised or interpreted according to the royal rule of law, by any private or public body. Prosecutors could also institute proceedings before local courts in order to regulate issues concerning the haute police.113 The supervisory function of the public ministry also led to the defence of some specifically vulnerable groups and institutions such as orphans, widows, minors and hospitals.

In addition, when a reform was carried out, procureurs généraux, with the aid of their deputies throughout the realm, would directly follow how such a reform worked and was perceived by the people. Once this information was gathered, the general prosecutor would inform the parlement and the chancellor of the outcome of the report, thus allowing them to make the best decision. Information concerning the enforcement of the law could also be gained by way of investigations carried out ex officio by procureurs. Furthermore, even without investigations, people could address the local parquet with positive and negative comments about everything that affected their day-to-day lives and problems.

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112 Carbasse 2000, p. 105.
113 Merlin 1828, p. 216.
Procureurs du roi also regularly visited jails and collected information related to the enforcement of sentences, as well as prisoners' complaints.\(^{114}\) The reports from these visits provided an accurate idea of the state of criminality and had to be sent to the general prosecutor of each district every six months.\(^{115}\) These reports made the main legal reforms, such as the 1670 Ordinance, possible and effective.\(^{116}\)

### 2.5 Important developments in the French judicial system through the Revolution until the Napoleonic reforms

The French Revolution brought about many changes in the judicial system. Some of these did not last beyond the first years of the 19\(^{th}\) century but many were definitive.\(^{117}\) Important developments include

- the suppression of the vénalité des offices; other means of recruitment, such as the appointment and election of magistrates, replaced the ownership of offices
- the barring of judges from deciding cases submitted to them by way of general and regulatory provisions\(^{118}\)
- most importantly, the theory of separation of powers, one of the leitmotifs of the révolutionnaires, was established in Article 16 of the Declaration for the Protection of Human Rights on 26 August 1789.\(^{119}\)

The law issued on 16 and 24 August 1790 established several basic institutions that still characterise the current judicial organisation, such as\(^{120}\)

- at the local level (cantons), justices of the peace (juges de paix) for civil matters and the communal corps (corps municipaux) in penal matters

\(^{114}\) Article 35 of Title 13 of the 1670 Ordinance.

\(^{115}\) Article 20 of Title 10 of the 1670 Ordinance.

\(^{116}\) Carbasse 2000, p. 98.


\(^{118}\) Article 5 of the Code Civil: ‘judges are forbidden to decide cases submitted to them by way of general and regulatory provisions’; translation provided at http://www.legifrance.gouv.fr/html/index.html.

\(^{119}\) ‘Any society in which the guarantee of rights is not ensured, nor a separation of powers worked out, has no constitution’. (Author’s translation).

at the district level (districts), first instance judges (juges de première instance) competent in all matters unless the law provided otherwise. These judges were also competent in appeals lodged against decisions made by justices of the peace, communal corps and first instance judges of other jurisdictions.

The 1790 legislation also referred to the Montesquieu theory of separation of powers and prohibited judges from interfering in any way with the actions of the administration. Such interference was considered an abuse of powers. This act also established:

- the principle that every defendant should be able to challenge the judgement that convicted him (double degré de juridiction)
- the principle that justice is equal for all citizens (égalité de tous les citoyens devant la justice)

A Tribunal de cassation was also established. It later became the Cour de cassation. With the 1799 coup (coup d'État du 18 brumaire an VIII – 9 November 1799), Napoleon took power and carried out important legal reforms, such as the creation of Tribunaux d'appel, which became the Cours d'appel, and the creation of a Conseil d'État to advise the government on administrative matters. The law issued on 20 April 1810 sur l'organisation de l'ordre judiciaire et l'administration de la justice, based the judicial system on a hierarchical organisation. In addition, criminal laws were brought together in 1808 into a Code d'Instruction Criminelle and in 1810 into a Code Pénal. These codes subcategorised criminal offences into three categories:

- contraventions (petty crimes) carrying penalties or fines of up to fifteen francs or five days deprivation of liberty

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121 This separation of administrative and judicial functions would be one of the reasons for the eventual creation of two separate judicial systems (ordres de juridictions administratif et judiciaire) with two separate systems of courts and laws, see Vincent, Guinchard, Montagnier & Varinard 2003, p. 90.
122 Article 13 of Title 1: ‘Judicial functions are distinct and remain forever separate from administrative functions; judge may not, on pain of forfeiture, interfere in any way whatever in the activities of administrative officials nor subject them to judicial proceedings concerning their functions’; translation from Merryman 1996, p. 111.
123 By this time, the Tribunal de cassation was an organ entirely dependent on the Corps législatif body empowered with the legislative function. The Cour de Cassation was established as independent from the legislative body in 1837.
124 Copies of these codes may be found at <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes.htm>.
ORIGINS OF THE PUBLIC PROSECUTION SERVICES IN CONTINENTAL LAW SYSTEMS

- délits (misdemeanours) provided by the Forest Code and all offences carrying penalties between five days and five years deprivation of liberty, and fines of more than fifteen francs
- and crimes (felonies) carrying penalties that are afflicting ou infamante (such as death, transportation, imprisonment, iron collar, etc)

The courts and their jurisdictions were
- Tribunal de police judging contraventions
- Tribunal correctionnel judging délits
- and Cour d’assises judging crimes

2.6 The public ministry through the Revolution up to the Napoleonic reforms

2.6.1 A State institution

The law issued on 16 and 24 August 1790 separated the public ministry into two organs
- the commissaires du roi, supervising the exact application of the law, were appointed for life by the king
- the accusateurs publics appointed by the people were empowered with the right to support accusation before the courts in criminal cases. However, this body could not institute a criminal prosecution

The 1790 Act set out that the members of the public ministry were the representatives of the executive before the courts. The legislators here misinterpreted the nature and the functions of the public ministry. During the Ancien Régime, the king was the supreme sovereign and the gens du roi the representative of this sovereign power.

They were to remain as such but sovereign power devolved to the nation as Article 3 of the 1789 Human Rights Declaration provided that the principle of all sovereignty lies in the nation (see 3.1.2). As a

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125 There is no upper limit to fines because they remain unascertained for certain crimes. For instance, for the crime of forgery, the maximum fine is equal to a quarter of the unlawful gain obtained by way of forgery. During the first half of the 19th century, criminal prosecutions consisted primarily of criminal offences related to forests (such as theft of wood). A comparison could be drawn with today’s traffic violations, see Bruschi 2002, p. 76.
126 Article 1 of Title 8 (Author’s translation).
consequence, the public ministry should have become the representative of the nation but not of the executive.

During the reign of terror (1792–1794), the public ministry became an oppressive institution under the influence of political leaders. It carried out prosecution without real process (out of 25,000 political dissidents, 17,000 were executed);\(^{127}\) *commissaires du roi* were suppressed in 1792 during the Convention and recreated by the Constitution of 5 Fructidor An III (22 August 1795). Article 63 of the 1799 Constitution (*Constitution de l'an VIII*) brought the two functions of the *parquet* together in the institution called *commissaire du gouvernement*. The law of 7 Pluviose An VIII (27 January 1801) detailed the unity of the *parquet* and established the secrecy of criminal investigations and the publicity of trials.

From then on, the public ministry remained unified and established as a judicial body hierarchically organised under the authority of the executive power. During this epoch, officers of the public ministry gained their ambiguous status as civil servants on the one hand and magistrates on the other. Indeed, prosecutors and judges were recruited and appointed in the same way, in a sense, they were both magistrates and members of the judiciary. Therefore, during a career as a magistrate, a prosecutor could carry out the function of a judge and vice versa. Magistrates had the same education and took the same oath. However, unlike judges, prosecutors were bound by specific disciplinary rules. They were not independent but strictly dependent on the authority of the Minister of Justice who had the discretionary power to recall them. They were also under the supervision of their superiors. Judges were impartial, whereas prosecutors were party to the criminal process, supporting the accusation.

### 2.6.2 A hierarchical and pyramidal institution

The *commissaire du gouvernement* became the *procureur général* and the law of 7 Pluviose An VIII (27 January 1801) established *substituts du commissaire du gouvernement* in each district (the so-called *arrondissements*) as deputies of the *commissaires* who were appointed and removed at the discretion of the executive. These officers later became *Procureurs de la République* and the heads of the *parquet* in every *Tribunal correctionnel* and *Cour d'assises*. The substitutes were entirely dependent on their *commissaire*. In each *Tribunal de police*, the functions of the public ministry were entrusted

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\(^{127}\) Carbasse 2000, p. 232.
to police commissars defined as auxiliaires (assistants) of the *Procureurs de la République*. The institution thus consisted of three levels, headed by two offices, the general prosecutors and the chief district prosecutors.

According to the principle of hierarchy, a superior had the right to supervise and conduct judicial actions carried out by his deputies in proceedings and to order them to act in particular ways. Each member of the public ministry was subordinate to, and dependent on, his immediate superior and compelled to carry out his orders, while the whole institution was under the authority of the executive. Article 27 CIC provided that the *procureur du roi* was obliged to inform the general prosecutor forthwith about the knowledge of all *dépêches* and to carry out his instructions affecting all further actions.\(^{128}\)

The CIC also established that general prosecutors and chief district prosecutors could be substituted by deputies who were also public prosecutors. The general principle of substitution would stem from this situation.

### 2.6.3 A function in the criminal process

The CIC organised the rights and obligations of the *parquet* in the criminal process. Article 1 CIC provided that

> Action for the execution of penalties is only provided to those civil servants established by law.\(^{129}\)

Concretely, the public ministry had no monopoly as yet over prosecutions and it shared the right to institute prosecutions with other administrations – such as Customs or the Water and Forests Administration – and the victim of the offence. However, in practice these administrations only had the right to prosecute specific crimes provided by statutes, and they gradually left the settlement of disputes to ‘negotiation’ rather than prosecution. Although the victims of criminal offences could still directly summon the accused before the *Tribunal correctionnel* (Article 64 CIC) or pass on a complaint to the investigating judge (Article 63 CIC), in practice they often preferred to rely on the professionalism, competence and power of the public prosecutors.

The CIC organised the phases of the criminal process into the investigation carried out by an investigating judge and the indictment

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128 Cases concerning *crimes* were directly forwarded to the investigating judge under the supervision of the general prosecutor. The general prosecutor had the jurisdiction to prosecute *crimes* before the *Cour d'assises*.

129 Author’s translation.
carried out by a prosecutor and other complainants. The public prosecutor had no power of investigation and no discretion to decide whether or not a criminal act brought to his knowledge by a victim or by any other means should be prosecuted. A strict principle of legality underpins the code. Criminal offences in the jurisdiction of a Tribunal correctionnel could be brought to the knowledge of a public prosecutor by way of plainte, dénonciation or procès-verbal. The prosecutor could then directly summon the suspect before the court or remit the case by warrant to an investigating judge. If the offence had the characteristics of a felony (crime), a judicial investigation had to be instituted. The general prosecutor then prosecuted the felony before the Cour d'assises.

However, if such an offence was committed in flagrant délit, the CIC provided the chief district prosecutor with investigative powers to be exercised before informing the investigating judge. In applying these powers, the prosecutor could visit the scene of a crime, make all necessary observations and interviews and issue a warrant to arrest a suspect for interview (mandat d'amener). During the nineteenth and twentieth centuries the position of the prosecutors in criminal investigations increased considerably to the detriment of the investigating judges. The right to dismiss a case and the opportunity principle were not provided by the code. However, in 1817 the Minister of Justice advised public prosecutors to prosecute only criminal offences that endangered the ordre public. Indeed, for all kinds of reasons, especially economic, it was impossible to prosecute all crimes. Several reforms during the nineteenth century – such as the right, in 1863, for prosecutors to act in case of flagrant délit in place of investigating judges – strengthened the right to dismiss a case.

Most importantly, the CIC provided that the rights to investigate crimes, to gather evidence and to bring suspects to court were exercised by several officers such as the chief of the police, the investigating judge, the gendarmerie officers and the procureur du roi and his deputies (Article 8 CIC). Officers empowered with this right also had the right to summon the police and thus, to instruct the police. Furthermore, the CIC required that anyone with knowledge of a crime should inform the procureur du roi forthwith. In the absence of an informer, the chief prosecutor drew up the report. Clearly, the

130 For a definition of the opportunity principle in the current French system see 3.4.2.2.
CIC placed the public ministry and, above all, the chief district prosecutor, at the cornerstone of the criminal justice system: between the people, the police force, the courts and the government.

Finally, the CIC also organised the right of the public ministry to challenge orders of investigative judges by way of opposition appeal and the judgement of courts by way of appeal and cassation appeal.

2.7 Epilogue

In the eyes of some authors, the institution of the public ministry was entirely brought down by the Revolution.\textsuperscript{132} For others, the institution remained, but its functions were distributed among different bodies.\textsuperscript{133} It is certainly true that with the end of the absolute monarchy and the implementation of the separation of powers, the \textit{gens du roi} disappeared as a political organ. Even though the Estates-General’s drafts or \textit{cahiers des états généraux} handed over in 1789 by leaders of the different Estates did not specifically reproach the members of the public ministry of the \textit{Ancien Régime}, it was not possible for the revolutionaries to permit such a powerful institution, involved in every stage of the State decision-making process, to survive.\textsuperscript{134}

In practice, the \textit{procureurs du roi} and \textit{avocats du roi} of the \textit{Ancien Régime} were not appointed by the Crown and were almost irremovable. Moreover, the institution did not have a true hierarchical and pyramidal organisation. Post-Revolution developments in principles of justice resulted in a clear organisation consisting of public prosecutors appointed by and fully dependent on the executive. Functions were also clarified or concretely described in codes of law. The role of the public ministry in civil proceedings remained more or less identical. As regards its role in criminal prosecution, the Revolution did not really suppress the public ministry as a function because it did not really exist.\textsuperscript{135} Prosecutors had almost no role in prosecution, and even if they could prosecute \textit{ex officio}, there was virtually no statute of substantive criminal law

\textsuperscript{132} E.g. Esmein 1969, p. 429.
\textsuperscript{133} E.g. Hélie 1866, p. 439.
\textsuperscript{134} Estates-General were general assemblies ordered by the king (often at the outset of a crisis) and consisting of representatives of the three groups of French society, i.e., the First Estate (the clergy), the Second Estate (the nobility) and the Third Estate (in theory, all of the commoners, in practice, the bourgeoisie); Bruschi 2002, p. 73; Robert & Oberdorff 1995, p. 5.
\textsuperscript{135} Rassat 1967, p. 33.
upon which to ground a prosecution. Victims and judges were the main actors in the criminal process. With the Napoleonic reforms, the situation changed to one where the public ministry had a dominant position in the prosecution process. Because of its general jurisdiction to prosecute all criminal acts, public prosecutors rapidly gained more importance than the other prosecution institutions provided for by the CIC. Of course the institution adapted to social and political changes during the nineteenth and twentieth centuries, but the most important features remained the same. One example of the changes that will come to light in the country comparisons later in this study is the constant trend towards an increase in the number of cases handled by public prosecutors and an increase of investigative powers to the benefit of the parquet in prosecution policies. The powers of the investigating judge progressively diminished to the benefit of prosecutors. Indeed, it is striking to see that among the recipient countries of the French prosecution prototype, the institution of the investigative judge was hardly – or in some cases not – transplanted and often disappeared over the years.136

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136 It does not exist in Poland or the Czech Republic. In the Netherlands, a rechter-commissaris only has jurisdiction to decide specific issues in ongoing cases. Moreover, the initiative to involve a rechter-commissaris in a case lies with the broad discretionary power of the PPS.