THE PRELIMINARY INVESTIGATION OF CRIME IN FRANCE

PART III*

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VI. FUNCTIONS OF THE PROCUREUR, THE JUGE D'INSTRUCTION AND OTHER OFFICIALS WITH REGARD TO OFFENSES WHICH ARE CONSIDERED FLAGRANT.

In theory there is a separation between the powers and functions of the *procureur* and those of the *juge d'instruction*. Thus the *procureur* is not generally empowered to make a judicial investigation (*instruction préparatoire*) of a suspected offense. This is the special province of the *juge*, who, however, may ordinarily start such an investigation only when he has been directed to do so by the *procureur* or when the party who was injured by the offense has constituted himself *partie civile*.⁷⁵⁵ There is, however, an exception to the general principle in the situations where an offense is committed under circumstances that are considered *flagrant*.⁷⁵⁶ In such case the powers and duties of both the *procureur* and the *juge d'instruction* are enlarged.

In the case of a *crime* that is considered *flagrant* the *Code* imposes on the *procureur* duties⁷⁵⁷ which are ordinarily performed only by the *juge d'instruction*.⁷⁵⁸ Thus it is provided that the *procureur*, after notifying the *juge*, must proceed (*transport*) without delay,⁷⁵⁹ accompanied by the *greffier* of the *tribunal*,⁷⁶⁰ to the scene of the *crime*⁷⁶¹ and there investigate whether the offense has been committed.⁷⁶² Although

* The first two installments of this article, containing footnotes 1 to 754, appeared in the February and April issues of the REVIEW.

755. See *supra* p. 692.

756. See discussion of *flagrant*, *supra* p. 391. See also L. CAULLET, *op. cit. supra* note 201, at 297 *et seq.*

757. Arts. 32-40, 43 and 44. Although Articles 35, 36, 42 and 43 speak both of *crime* and *délit*, it is well settled that the application of all the articles mentioned is limited to the case of *crimes*. 3 GARRAUD, *op. cit. supra* note 1, at 246; GOYET, *op. cit. supra* note 65, at 245. When the *Code d'Instruction Criminelle* was promulgated in 1808, the *Code Pénal* had not been prepared, and the terms "*crime*" and "*délit*" did not have the precise meanings assigned to them in the latter *Code*. GOYET, *op. cit. supra* note 65, at 245. Furthermore, Article 32 by its terms covers only *flagrants délits* which involve an infamous or corporal punishment. According to the *Code Pénal* such a punishment may be imposed only for a *crime*. C. P. art. 6. The *projet* (1938) for the *Code d'Instruction Criminelle* uses the term "*crime flagrant*" in this connection.

758. 3 GARRAUD, *op. cit. supra* note 1, at 249. See *supra* pp. 692-722.

759. C. I. C. art. 32. The *juge* need not accompany the *procureur*. *Ibid.*

760. L. CAULLET, *op. cit. supra* note 201, at 315; 2 LE POITTEVIN, *op. cit. supra* note 74, at 793.

761. C. I. C. art. 32.

762. *Ibid.* As a practical matter it is frequently difficult for the *procureur* to determine in advance whether an offense is a *crime* and, if so, whether it is *flagrant*. 3 GARRAUD, *op. cit. supra* note 1, at 250.

the *Code* imposes an imperative duty on the *procureur*, in practice he visits the scene only when he considers that it will be clearly useful, and the Minister of Justice has recommended that this be done only in case of necessity in order to save expense.⁷⁶³

When the *procureur* arrives at the scene he takes statements from any persons who are present or who have information regarding the offense⁷⁶⁴ and also receives statements from such relatives, neighbors or domestic servants as may be presumed to be able to throw light on the affair.⁷⁶⁵ All the statements, which are unsworn,⁷⁶⁶ must be signed by the parties making them or, if they refuse, mention of the fact must be made in the *procès-verbal*.⁷⁶⁷ After completing his investigation the *procureur* may order that a person shall not leave the house or depart from the place.⁷⁶⁸ Any person who violates this order may be taken into custody and is also guilty of a *contravention*, which may be punished by imprisonment not to exceed ten days and a fine of 100 francs.⁷⁶⁹

It is the duty of the *procureur* to seize any weapons or any other thing employed in, prepared for or produced by the commission of the offense, also anything that may serve to establish the truth.⁷⁷⁰ A *procès-verbal*⁷⁷¹ of the seizure must be prepared, which must be signed by the suspect or mention made of his refusal to sign.⁷⁷² In case the offense is of such a character that papers or other articles in the possession of the suspect are likely to have evidentiary value, the *procureur* should visit the residence of the suspect and make a search for any such articles.⁷⁷³ If the *procureur* finds any articles which may tend to establish either the guilt or innocence of the suspect, the *procureur* must seize them.⁷⁷⁴ All seized articles must be sealed by the *procureur* or put in a container which he seals.⁷⁷⁵ All searches and seizures should be made in the presence of the suspect, if he has been arrested; but if he does not wish to attend, then in the presence of a duly authorized representative or of one or two witnesses whom the representative may appoint in his

763. 2 LE POITTEVIN, *op. cit. supra* note 74, at 793, citing *circulaires*.

764. C. I. C. art. 32.

765. C. I. C. art. 33. The *procureur* has no right to summon witnesses. GOYET, *op. cit. supra* note 65, at 246.

766. GOYET, *op. cit. supra* note 65, at 246; 2 LE POITTEVIN, *op. cit. supra* note 74, at 794.

767. C. I. C. art. 33.

768. C. I. C. art. 34.

769. *Ibid.*

770. C. I. C. art. 35.

771. See *supra* n. 417.

772. C. I. C. art. 35.

773. C. I. C. art. 36.

774. C. I. C. art. 37, as amended by the Law of Feb. 7, 1933.

775. C. I. C. art. 38, as amended by the Law of Feb. 7, 1933. The delivery of any seized document, without the authorization of the suspect or other person entitled to it, to any person not legally qualified to receive it is an offense punishable by a fine of 5000 francs and imprisonment from two months to two years. Any use of the document by such person is punishable to the same extent. *Ibid.*

stead.⁷⁷⁶ If the suspect does not name a representative, then any search or seizure should be made in the presence of two members of the family at the dwelling where the search is made.⁷⁷⁷ If the suspect is not in custody, he may be present at any search of his dwelling, but if he does not wish to be present, he may appoint a representative as stated above.⁷⁷⁸ If the suspect is present when papers or articles are seized, they should be shown to him, in order to see if he recognizes them and also to have them initialed by him.⁷⁷⁹ If he refuses, mention of the fact must be made in the *procès-verbal*.⁷⁸⁰

If the suspect is not present at the search, the *procureur* issues a *mandat d'amener* for his arrest.⁷⁸¹ When taken into custody the suspect is brought before the *procureur* who is required to interrogate him at once.⁷⁸² In such interrogation the suspect is not entitled to the guarantees accorded him by the Law of December 8, 1897,⁷⁸³ notably the right to have the presence of counsel. Except where delay would result, the *procès-verbal* of the *procureur* must be drawn up in the presence of either the *commissaire de police* of the *commune* where the offense occurred or the mayor or deputy mayor or two citizens who reside in the same *commune*.⁷⁸⁴ Each leaf of the *procès-verbal* should be signed by the *procureur* and the witnesses, except where this is impossible or there is a refusal to sign, in which case mention should be made of the fact.⁷⁸⁵ The *procureur* must without delay transmit to the *juge d'instruction* all the *procès-verbaux* and any documents, papers or implements that have been seized.⁷⁸⁶ These should be examined by the *juge*, who may continue the investigation, if in his opinion it is incomplete.⁷⁸⁷ If, however, he considers it complete he may dispose of the case, after receiving the recommendations of the *procureur*,⁷⁸⁸ in the same manner as when he personally makes the investigation.⁷⁸⁹

When the *procureur* visits the scene of the crime he may take with him, if he considers it necessary, one or two experts qualified to form

776. C. I. C. art. 39, as amended by the Law of Mar. 25, 1935.

777. *Ibid.*

778. *Ibid.*

779. *Ibid.*

780. *Ibid.*

781. C. I. C. art. 40. The fact that a *dénonciation* has been made against a suspect is not sufficient ground to justify the issuing of a *mandat d'amener* against a person having an established domicile. *Ibid.*

782. *Ibid.* The *projet* (1938) for the *Code d'Instruction Criminelle* does not give the *procureur* the right to interrogate the suspect.

783. 2 LE POITTEVIN, *op. cit. supra* note 74, at 797, citing *Cass. Mar. 12, 1898*. The Law of Dec. 8, 1897, is discussed *supra* pp. 708-712.

784. C. I. C. art. 42.

785. *Ibid.*

786. C. I. C. art. 45.

787. C. I. C. art. 60.

788. 2 LE POITTEVIN, *op. cit. supra* note 74, at 797.

789. See *supra* pp. 726 and 727.

an opinion regarding the nature and incidents of the offense.⁷⁹⁰ In case of a violent death or a death whose cause is unknown the *procureur* will take along two medical practitioners, who will make a report on the causes of the death and the condition of the corpse.⁷⁹¹ All the experts are required to take oath before the *procureur* that they will make their report and give their opinion on their honor and conscience.⁷⁹²

The *Code* expressly provides that all the functions and powers of the *procureur* in case of a *crime* that is considered *flagrant* may be performed by *juges de paix*, officers of the *gendarmerie*, *commissaires de police* and mayors and their deputies,⁷⁹³ all of whom are assistants of the *procureur* in the *police judiciaire*.⁷⁹⁴ These officials should withdraw from the investigation when the *procureur* arrives,⁷⁹⁵ unless the *procureur* directs them to continue.⁷⁹⁶ Where a *délit* is committed in a dwelling and the head of the household requests an investigation, the *procureur* and his assistants in the *police judiciaire* should perform the same functions as are prescribed for them in the case of a *crime* that is considered *flagrant*.⁷⁹⁷

It is provided by the Law of May 20, 1863,⁷⁹⁸ that any suspect who has been arrested for a *délit*, that is *flagrant* and is punishable by imprisonment, shall be brought at once before the *procureur*, who interrogates him.⁷⁹⁹ The provisions of the Law of December 8, 1897, do not apply to this *interrogatoire*. After the *interrogatoire* the *procureur* may send the suspect for immediate trial (*citation directe*) by the *Tribunal Cor-*

790. C. I. C. art. 43.

791. C. I. C. art. 44. If any of the specially qualified persons mentioned in Articles 43 and 44, after being directed by the *procureur* to accompany him to the scene of the offense, refuse to do so, they will, unless it is absolutely impossible for them to do so, be guilty of an offense. C. P. art. 475. Articles 43 and 44 of the C. I. C. are omitted in the *projet* (1938).

792. C. I. C. art. 44.

793. C. I. C. arts. 48, 49 and 50.

794. C. I. C. arts. 48-54. The *Code* lists the following members of the *police judiciaire*: (1) rural and forest guards, (2) *commissaires de police*, (3) *inspecteurs* of the *police mobile* and of the special police, with at least five years' service, who are designated for this work by the Minister of the Interior and the Minister of Justice, (4) mayors and their deputies, (5) *procureurs de la République* and their assistants, (6) *juges de paix*, (7) officers of the *gendarmerie*, and (8) *juges d'instruction*. Art. 9. The *projet* (1938) for the *Code* omits from the list the *procureurs* and the *juges d'instruction*, and adds the following: (a) secretaries of the *commissariat de police* in the *Département* of the Seine, and (b) any officials or agents so designated by law. Art. 15. In place of the rural and forest guards are substituted the guards of the Ministry of Waters and Forests and the rural guards of the *communes*. *Ibid.* The *projet* (1938) gives, in case of a *crime flagrant*, the right to make *transports*, *perquisitions* and *saisies* and to hear witnesses to all officers of the *police judiciaire*. Arts. 17-20. See discussion of the *police judiciaire*, *supra* pp. 407-411.

795. Goyet, *op. cit. supra* note 65, at 246.

796. C. I. C. art. 51.

797. C. I. C. art. 46; 3 GARRAUD, *op. cit. supra* note 1, at 248; 2 LE POITTEVIN, *op. cit. supra* note 74, at 799.

798. 1863 BULLETIN DES LOIS (XI sér.) pt. 1, 966. The *projet* (1938) for the *Code d'Instruction Criminelle* incorporates the substance of the Law of May 20, 1863, except that the *procureur* is not given the right to interrogate the suspect. Art. 46.

799. Art. 1.

rectionnel.⁸⁰⁰ In such case the *procureur* places the suspect in detention by a *mandat de dépôt*.⁸⁰¹ The Law of May 20, 1863, does not apply to offenses by the press, to political offenses nor to any cases where the procedure is prescribed by special laws.⁸⁰² The Law also does not apply to *délits* committed by recidivists, where the punishment includes banishment,⁸⁰³ nor to *délits* by infants under 18 years of age.⁸⁰⁴

As already stated,⁸⁰⁵ the *Code* prescribes the situations in which the *juge d'instruction* may conduct his investigation. The first of these is where he is directed to proceed by the *procureur*.⁸⁰⁶ This is the ordinary case. The second is where the initiative is taken by the *partie civile*.⁸⁰⁷ The third situation is where there has been the commission of a *crime* which is considered *flagrant*. In such case the *juge d'instruction* may on his own initiative proceed to an investigation.⁸⁰⁸ He may call upon the *procureur* to be present, but he need not delay his proceeding because of the *procureur's* absence.⁸⁰⁹ If the *juge* arrives on the scene after the *procureur* has already started an investigation, the latter should withdraw and direct the *juge* to continue the investigation.⁸¹⁰ When the *juge* makes a *transport* to the scene of the *crime*, he may immediately interrogate the suspect and make confrontations, if deemed desirable.⁸¹¹ In such case the suspect is not entitled to the guarantees of the Law of December 8, 1897.⁸¹² However, if the *juge* after the *transport* is ended further interrogates the suspect, the provisions of the Law will apply.⁸¹³ Where a *délit* has been committed in a dwelling house and the head of the household demands an investigation, the *juge* may exercise the same powers as where there is a *crime* that is considered *flagrant*.⁸¹⁴

The arrest of a suspect ordinarily occurs only upon a *mandat d'amener* or a *mandat d'arrêt*.⁸¹⁵ However, the *Code* provides for the

800. *Ibid.*

801. *Ibid.* See discussion of the *mandat de dépôt* *supra* p. 700.

802. Art. 7.

803. Law of May 27, 1885, art. 11, 1885 BULLETIN DES LOIS (XII sér.) pt. 1, 1120.

804. Law of July 22, 1912, art. 15, 1912 BULLETIN DES LOIS (nouv. sér.) pt. 1, 2097.

805. See *supra* p. 692.

806. C. I. C. 47.

807. C. I. C. art. 63.

808. C. I. C. art. 59. The *projet* (1938) for the *Code d'Instruction Criminelle* authorizes the *juge d'instruction* to start an investigation on his own initiative in the case of either a *crime* or *délit* that is considered *flagrant*. Art. 59.

809. C. I. C. art. 59.

810. 2 LE POITTEVIN, *op. cit. supra* note 74, at 798.

811. *Ibid.*

812. *Ibid.*

813. *Ibid.*

814. C. I. C. art. 46; GOYET, *op. cit. supra* note 65, at 284.

815. *Supra* pp. 698 and 699.

arrest without a *mandat* (*arrestation spontanée*) in two situations. In the case of a *crime* that is considered *flagrant* the suspect should be arrested forthwith by a police officer or by any private person.⁸¹⁶ In the case of a *délit*, which is punishable by imprisonment or a more severe penalty and which is considered *flagrant*, the duty is imposed on the rural and forest guards to arrest the suspect.⁸¹⁷ The Law of May 20, 1863, provides that a person arrested for a *flagrant délit*, which is punishable by imprisonment, shall be immediately brought before the *procureur*.⁸¹⁸ The result of these various provisions is that an arrest should be made by a police officer or private citizen in the case of any *crime flagrant* or any *flagrant délit* punishable by imprisonment.⁸¹⁹ A person arrested for a *délit* should be brought before the *procureur*, but if arrested for a *crime* he should be taken to either the *procureur* or an officer of the *police judiciaire* who is an assistant of the *procureur*, such as the *juge de paix* or the *commissaire de police* who is nearest to the scene of the crime.⁸²⁰ The reason for this difference is that where there is a *crime flagrant* these officers of the *police judiciaire* have the same right to investigate as the *procureur*.⁸²¹ It is an offense, punishable by *dégradation civique*,⁸²² for any official to make an illegal arrest.⁸²³ The victim of the arrest is also given the right to maintain an action for damages against the offending official.⁸²⁴

VII. ENQUÊTE OFFICIEUSE

When the *procureur* has been informed of an alleged offense by *plainte* or *dénonciation* or by the *procès-verbal* of an officer, he has a wide discretion in determining what procedure to adopt. As it often happens that the information received is not adequate to enable him to decide what course to take, for the purpose of acquiring further information he generally institutes an investigation known as the *enquête*

816. C. I. C. art. 106. The *projet* (1938) for the *Code d'Instruction Criminelle* contains the following provision regarding *arrestation spontanée*:

"In the case of a *crime flagrant*, any person is empowered to arrest the perpetrator and to take him before the nearest officer of the *police judiciaire* or before the *gendarmerie*.

"He is likewise so empowered in case of a *flagrant délit*, punishable by imprisonment for a year.

"If the maximum period of imprisonment is less than a year, there may be an arrest only by the officers or agents of the *police judiciaire*." Art. 36.

817. C. I. C. art. 16. This article does not appear in the *projet* (1938) for the *Code d'Instruction Criminelle*.

818. Art. 1.

819. 3 GARRAUD, *op. cit. supra* note 1, at 240.

820. *Id.* at 242.

821. C. I. C. art. 49; 3 GARRAUD, *op. cit. supra* note 1, at 242.

822. See *supra* p. 389.

823. C. P. art. 114; CUNÉO, DE L'ARRESTATION ET DE LA SANCTION DES ARRESTATIONS ARBITRAIRES (Thesis Paris, 1902) 112 *et seq.*

824. C. P. art. 117.

officiuse.⁸²⁵ While the *procureur* may conduct the *enquête* in person,⁸²⁶ he customarily delegates it to his assistants in the *police judiciaire*,⁸²⁷ particularly the *commissaires de police* and the officers of the *gendarmerie* in communities having no *commissaires de police*.⁸²⁸ If the investigation is to be made in another *arrondissement*, the *procureur* requests the *procureur* of such *arrondissement* to secure the information.⁸²⁹

There is a wide diversity of opinion among writers regarding the legality of the *enquête officieuse*. While it is clear that it is not expressly authorized by the *Code*,⁸³⁰ some authorities contend that it falls within the general provision of Article 22 which provides that the *procureur* "*recherche*" offenses.⁸³¹ On the other hand, it is insisted that the practice is entirely illegal.⁸³² A middle ground is taken by some writers who, while admitting that the *enquête officieuse* is not authorized by the *Code*, contend that it does not expressly or impliedly forbid the practice.⁸³³ While the *Cour de Cassation* has not specifically approved or disapproved the *enquête officieuse*, it has in some cases employed general language regarding the powers of the *procureur*, which may be construed as indicating approval.⁸³⁴ *Circulaires* from the Minister of Justice, beginning in 1817, have encouraged the practice of the *enquête officieuse*.⁸³⁵

In the *enquête officieuse* the *procureur*, acting either personally or through his subordinates, employs, if deemed necessary, all the methods

825. 2 GARRAUD, *op. cit. supra* note 1, at 627; NADAU, DES ENQUÊTES OFFICIEUSES (1913) 15; GOYET, *op. cit. supra* note 65, at 243; 2 LE POITTEVIN, *op. cit. supra* note 74, at 242. The *enquête officieuse* is also employed where the *procureur* decides, as a result of the information contained in the *procès-verbal*, to start a prosecution in the *Tribunal Correctionnel* by *citation directe*, but desires to collect further evidence to be presented at the trial. 1 LE POITTEVIN, *op. cit. supra* note 74, at 846.

826. L. CAULLET, *op. cit. supra* note 201, at 21; 2 LE POITTEVIN, *op. cit. supra* note 74, at 244.

827. L. CAULLET, *op. cit. supra* note 201, at 21; NADAU, *op. cit. supra* note 825, at 65.

828. 2 MASSABIAU, *op. cit. supra* note 120, at 166; NADAU, *op. cit. supra* note 825, at 66. Rural communities generally have no *commissaires de police*.

829. NADAU, *op. cit. supra* note 825, at 71.

830. 2 GARRAUD, *op. cit. supra* note 1, at 630; NADAU, *op. cit. supra* note 825, at 252; 2 LE POITTEVIN, *op. cit. supra* note 74, at 241.

831. L. CAULLET, *op. cit. supra* note 201, at 22; VERNET, *op. cit. supra* note 9, at 29; GOYET, *op. cit. supra* note 65, at 243. The divergence of opinion regarding the legality of the *enquête officieuse* would seem to be due to the different meanings of the word "*recherche*" contained in Article 22, which outlines the duties of the *procureur*. In this connection "*recherche*" may mean either (1) look or search for something, or (2) look into or investigate. LITTRÉ, DICTIONNAIRE DE LA LANGUE FRANÇAISE (1873); CLIFTON AND GRIMAU, NEW FRENCH-ENGLISH DICTIONARY (1923). Article 22 is omitted from the *projet* (1938) for the *Code d'Instruction Criminelle*.

832. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 24; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 85; SIFNÉOS, *op. cit. supra* note 63, at 196.

833. 2 GARRAUD, *op. cit. supra* note 1, at 630; NADAU, *op. cit. supra* note 825, at 227; PASCAL, *op. cit. supra* note 216, at 68; 2 LE POITTEVIN, *op. cit. supra* note 74, at 241 *et seq.*

834. 2 GARRAUD, *op. cit. supra* note 1, at 630n.; 2 LE POITTEVIN, *op. cit. supra* note 74, at 242 (citing cases); SIFNÉOS, *op. cit. supra* note 63, at 201.

835. 2 GARRAUD, *op. cit. supra* note 1, at 623n.; NADAU, *op. cit. supra* note 825, at 16n.; 2 LE POITTEVIN, *op. cit. supra* note 74, at 243.

of collecting evidence which the *Code* provides for the *juge d'instruction* in conducting his judicial examination.⁸³⁶ The scene of the alleged offense is visited for the purposes of observation and inquiry.⁸³⁷ Buildings are entered and searched, and objects considered to have evidentiary value are taken,⁸³⁸ provided the occupant of the building consents, and this will be ordinarily implied if he does not object.⁸³⁹ Doubt has been expressed whether this consent will be implied where the occupant does not know of his right to object.⁸⁴⁰ On the other hand, it is stated that the later decisions of the courts forbid such implication.⁸⁴¹ Experts are sometimes appointed to make appropriate investigations and to report thereon, but they should not be sworn.⁸⁴²

The suspect is frequently interrogated by inferior officers of the *police judiciaire*,⁸⁴³ who informally "invite" ⁸⁴⁴ him to appear for questioning. If the suspect does not respond to the "invitation", his presence cannot be compelled.⁸⁴⁵ Of course, if the suspect is in custody there is no need for an "invitation". When being questioned, the suspect is not informed of the nature of the charge against him, nor is he permitted to have counsel present, since the Law of December 8, 1897, does not apply to this informal interrogation.⁸⁴⁶ If the suspect declines to answer questions, he may not in theory be subjected to compulsion.⁸⁴⁷ The practice, however, is not always in accord with the theory. A study of this situation made by the present writer showed that "third-degree" methods are sometimes employed to extract confessions.⁸⁴⁸

836. NADAU, *op. cit. supra* note 825, at 75.

837. NADAU, *op. cit. supra* note 825, at 78; 2 LE POITTEVIN, *op. cit. supra* note 74, at 244.

838. 2 GARRAUD, *op. cit. supra* note 1, at 627; NADAU, *op. cit. supra* note 825, at 75; VIDAL, *op. cit. supra* note 272, at 920.

839. 2 GARRAUD, *op. cit. supra* note 1, at 629; 2 LE POITTEVIN, *op. cit. supra* note 74, at 245.

840. Thus it has been stated that there is such implication, although the author strongly asserts that there should not be. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 449 and 450. To the same effect is NADAU, *op. cit. supra* note 825, at 101.

841. SIFNÉOS, *op. cit. supra* note 63, at 205. To the same effect is a recent decision of the *Cour de Cassation*, discussed in the *REVUE DE SCIENCE CRIMINELLE* (1936) 259.

842. 1 GARRAUD, *op. cit. supra* note 1, at 603; NADAU, *op. cit. supra* note 825, 110; 2 LE POITTEVIN, *op. cit. supra* note 74, at 245.

843. GOYET, *op. cit. supra* note 65, at 243. This is not regarded "as an official *interrogatoire*, but simply as informal questioning." BRÉGAULT ET ALBANEL, *op. cit. supra* note 546, at 80. However, any statements by the suspect are written down in a report which is sent to the *procureur*. 2 GARRAUD, *op. cit. supra* note 1, at 217.

844. The form of invitation is set forth in 2 AREXY, *TRAITÉ DE POLICE* (1925) 1095.

845. 2 GARRAUD, *op. cit. supra* note 1, at 628; 2 LE POITTEVIN, *op. cit. supra* note 74, at 245.

846. 3 GARRAUD, *op. cit. supra* note 1, at 432; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 412.

847. BRÉGAULT ET ALBANEL, *op. cit. supra* note 546, at 79.

848. Keedy, *The Third Degree and Legal Interrogation of Suspects* (1937) 85 U. OF PA. L. REV. 761.

"Inferior officials of the police, imbued with the idea that a prosecution can be properly commenced only with a confession, or reduced to seeking by this kind of proof a method for justifying an arrest made with the aid of an informer, which can not be admitted, forget that torture has been abolished for more than a century and seek to

The hearing of witnesses is an ordinary feature of the *enquête officieuse*. No formal process may be issued to secure the presence of the witnesses, and their attendance cannot be compelled; they are simply "invited" to appear.⁸⁴⁹ It has been aptly pointed out, however, both with regard to suspects and witnesses, that, being generally unaware of their legal right not to appear, they usually respond to the "invitation".⁸⁵⁰ The witnesses should not be sworn,⁸⁵¹ but the fact that an oath is administered has no legal effect whatever.⁸⁵²

The *enquête officieuse* is usually justified on the following grounds: (1) that it is necessary, as it is only by such an investigation that the *procureur* can determine what disposition to make of the case;⁸⁵³ (2) that a saving of time and expense results from the fact that, as a result of the investigation, the *procureur* frequently decides either not to prosecute (*classement sans suite*) or to refer the case (*citation directe*) to the *Tribunal Correctionnel* for prompt trial;⁸⁵⁴ and (3) that if there were no *enquête officieuse*, it would be necessary to have many more *juges d'instruction* than at present.⁸⁵⁵

Other grounds for justifying the *enquête officieuse* are (1) that it gives an opportunity to an innocent suspect to exculpate himself without a formal investigation by the *juge d'instruction*,⁸⁵⁶ and (2) that a com-

acquire by brutality that which their own gross ignorance of all psychology prevents their seeking by insinuation. Sometimes the suspect is given a slap on the face at each refusal to admit his guilt, at other times he is beaten unmercifully and even knocked to the floor, with some instances of which I am acquainted, and finally, which is the worst, he is sometimes illegally held in custody and tortured by hunger, until the moment when a meal, abundantly washed down by alcohol, following upon a prolonged fast, appears to be the most likely method of loosing his tongue." LOCARD, *op. cit. supra* note 275, at 14. Dr. Locard, in a letter to the writer under date of July 16, 1936, stated that, while confessions have been formerly obtained by illegal methods, the practice is now extremely rare.

"I know, indeed, that it is sometimes effective for the *police judiciaire* to interrogate, for fifteen consecutive hours, a person who is without any assistance, without any protection; but torture was also effective. Such methods are unworthy of a free and civilized people." LEPAULLE, *op. cit. supra* note 324, at 64.

"Undoubtedly, maltreatment is not admitted [by the police], but it is frequently seen that the officers boast of having continued their cruel and unfair interrogation for hours, relaying each other, exhausting the suspected man, depriving him of sleep, subjecting him to a moral coercion absolutely not permissible." 10 *ENCYCLOPÉDIE FRANÇAISE* (1935) 10.36.5.

849. 2 GARRAUD, *op. cit. supra* note 74, at 627; NADAU, *op. cit. supra* note 825, at 121.

850. SIFNÉOS, *op. cit. supra* note 63, at 206.

851. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 80; 2 GARRAUD, *op. cit. supra* note 1, at 627; GOYET, *op. cit. supra* note 65, at 243; 2 LE POITTEVIN, *op. cit. supra* note 74, at 244.

852. 2 GARRAUD, *op. cit. supra* note 1, at 627 (citing decisions); VIDAL, *op. cit. supra* note 272, at 921. The statements of the witnesses need not be signed. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 80.

853. VERNET, *op. cit. supra* note 9, at 88; CUCHE, *op. cit. supra* note 217, at 261; 2 LE POITTEVIN, *op. cit. supra* note 74, at 242.

854. 2 GARRAUD, *op. cit. supra* note 1, at 633; VIDAL, *op. cit. supra* note 272, at 921; CUCHE, *op. cit. supra* note 217, at 262.

855. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 88; 2 GARRAUD, *op. cit. supra* note 1, at 634; VERNET, *op. cit. supra* note 9, at 89.

856. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 79.

missaire de police or an officer of the *gendarmerie*, because of his familiarity with local conditions, is more likely to arrive at the truth than the *juge d'instruction* with his more formal inquiry.⁸⁵⁷

Strong opposition to the *enquête officieuse* has been expressed on the grounds that it places arbitrary power in the hands of subordinate officials⁸⁵⁸ and that it results in an evasion of the Law of December 8, 1897, which guarantees to the suspect the right to receive notice of the charge against him and to have counsel when undergoing examination.⁸⁵⁹ Some critics, while admitting the propriety and value of the *enquête officieuse* for the purpose of supplying information to the *procureur* so that he may decide what action to take in each case, strongly oppose its use in so far as it supplants at a later stage the more impartial investigation by the *juge d'instruction*.⁸⁶⁰ It has been stated that the *juge d'instruction* very frequently accepts the results of the *enquête officieuse* without making any independent investigation.⁸⁶¹

While the primary purpose of the *enquête officieuse* is to furnish information to the *procureur* so as to enable him to decide what disposition to make of the case, the evidence procured by the inquiry is entered in the *dossier*, which will be considered in case there are any further proceedings. If the case is referred to the *juge d'instruction*, he will in this way be informed of the persons who may properly be called as witnesses.⁸⁶² If there is a trial in the *Tribunal Correctionnel*, the information obtained by the *enquête officieuse* may, after the defendant and his counsel have been given an opportunity to inspect the *dossier*, be considered as evidence.⁸⁶³ If the trial is in the *Cour d'Assises*, the information may, in the discretion of the *President*, be presented to the jurors for their consideration.⁸⁶⁴

857. 2 MASSABIAU, *op. cit. supra* note 120, at 152.

858. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 24; SIFNÉOS, *op. cit. supra* note 63, at 224; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 530.

859. "You arrest me in the street and conduct me before the *commissaire*. Agitated by this unexpected arrest, I appear without delay before this official even more upset than if I arrived before the *juge*. However, the *commissaire de police* questions me, has my statements written down, collects the declarations of witnesses, proceeds to confrontations, and transmits to the *parquet* all the papers which record these proceedings. He has not been compelled to notify me that I had the right not to answer, and he has not had to submit to the surveillance of my counsel." MORIZOT-THIBAUT, *op. cit. supra* note 20, at 412.

860. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 529; VERNET, *op. cit. supra* note 9, at 88.

861. M. Emile Kahn, discussing his report on "*Organisation de la Police*" before the *Société Générale des Prisons et de Législation Criminelle* in *REVUE PÉNITENTIAIRE ET DE DROIT PÉNAL* (1920) 131. To the same effect is MORIZOT-THIBAUT, *op. cit. supra* note 20, at 527.

862. NADAU, *op. cit. supra* note 825, at 290.

863. 2 GARRAUD, *op. cit. supra* note 1, at 632; VIDAL, *op. cit. supra* note 272, at 921; CUCHE, *op. cit. supra* note 217, at 262.

864. C. I. C. arts. 268 and 269; 2 GARRAUD, *op. cit. supra* note 1, at 631; NADAU, *op. cit. supra* note 825, at 288; VIDAL, *op. cit. supra* note 272, at 921.

VIII. FUNCTIONS OF THE PRÉFETS

The *projet* for the *Code d'Instruction Criminelle* listed among the officers of the *police judiciaire*⁸⁶⁵ the *préfet de police* at Paris and also the *préfets*⁸⁶⁶ of the *départements*, but the latter officials were empowered to act only with regard to *crimes* affecting internally or externally the safety of the State.⁸⁶⁷ As members of the *police judiciaire* the *préfets* would have been under the control of the *procureur général*.⁸⁶⁸ At the session of the *Conseil d'État* of August 26, 1808, Napoleon expressed the opinion that the *préfets* should not be subject to such control and also that their powers should extend to all *crimes*.⁸⁶⁹ He then directed that an article be drafted to carry out these modifications.⁸⁷⁰ Accordingly, the following draft was prepared as a separate article: "The *préfets* of the *départements* and the *préfet de police* at Paris may conduct personally, or may require the officers of the *police judiciaire*, each within the authorized scope of his powers, to conduct all the proceedings necessary to establish the commission of *crimes*, *délits* and *contraventions*, and to deliver the offenders to the courts empowered to punish them." This was adopted as Article 10 of the *Code*.⁸⁷¹ It is important to note that while the draft of the article in the *projet* in terms limited the powers of the departmental *préfets* to the investigation of *crimes*, and Napoleon's recommendations were limited to the same class of offenses, the article as adopted also includes *délits* and *contraventions*. Further, although Napoleon emphasized the desirability of the *préfet* possessing these powers of the *police judiciaire* in cases where an immediate investigation was necessary and loss of efficiency would occur if the investigation was not made forthwith,⁸⁷² the draft adopted contains no such limitation.

Article 10, as interpreted by the *Cour de Cassation*, gave the *préfets*, who are administrative officers, nearly all the powers of investigation possessed by the *procureur* and the *juge d'instruction*,⁸⁷³ including the right of the *juge* to make searches and seizures in dwellings or

865. The *police judiciaire* is discussed *supra* p. 407.

866. The *préfet* is the chief administrative officer of a *département*. CAPITANT, *op. cit. supra* note 35, at 383. See *supra* p. 392.

867. 25 LOCRÉ, *op. cit. supra* note 5, at 102.

868. C. I. C. art. 279.

869. 25 LOCRÉ, *op. cit. supra* note 5, at 205 and 206. A caveat must be entered as to the precise meaning of *crime* as used here by Napoleon and as employed in the original draft above referred to. The classification of offenses into *crime*, *délit* and *contravention* did not become settled until the drafting of the *Code Pénal* in 1810. 1 ROUX, *op. cit. supra* note 43, at 93. "*Crime*" had previously been defined so as to include all offenses. 1 DE FERRIERE, *DICTIONNAIRE DE DROIT ET DE PRATIQUE* (2d ed. 1779) 401. The term was probably so used in the present instance.

870. 25 LOCRÉ, *op. cit. supra* note 5, at 206.

871. *Id.* at 68 and 214.

872. *Id.* at 205.

873. 2 GARRAUD, *op. cit. supra* note 1, at 560; 4 LE POITTEVIN, *op. cit. supra* note 74, at 151 (citing decisions).

elsewhere, to seize correspondence in the mails, to issue *mandats* for the arrest and detention of suspects, to interrogate suspects⁸⁷⁴ and excluding only the right, possessed by the *juge d'instruction*, to issue official orders at the close of his investigation.⁸⁷⁵ The *préfets* were even permitted to exercise the power, not possessed by either the *juge* or the *procureur*, of acting before a suspected offense was committed by making "preventive" arrests.⁸⁷⁶ Although Article 10 by its terms permits the *préfet* to "require" the officers of the *police judiciaire* to act for him "each within the authorized scope of his powers", it was early decided by the *Cour de Cassation* that all the powers of the *préfet* under the article passed to any officer of the *police judiciaire* directed to act for him.⁸⁷⁷

In practice the powers, granted to the *préfets* by the construction given Article 10, were exercised almost exclusively in Paris⁸⁷⁸ and were mostly employed in dealing with types of non-political offenses where promptness and secrecy of action were especially required, such as frauds, counterfeiting, operating gambling houses and traffic in women and drugs.⁸⁷⁹ However, in the case of political offenses, the *préfets* of the *départements* as well as the *préfet de police* in Paris made use from time to time of the extensive powers just discussed.⁸⁸⁰

Article 10, as judicially construed, became increasingly the subject of adverse criticism on both theoretical and practical grounds. Thus it was opposed because it violated the fundamental principle of the separation of powers, stated to be at the basis of the French Constitution, in that it conferred judicial powers on an official of the executive department.⁸⁸¹ On the practical side the most common objection was

874. CUCHE, *op. cit. supra* note 217, at 253; Brêthe de la Gressaye, *La Liberté Individuelle et le Procès Criminel* in LES GARANTIES DES LIBERTÉS INDIVIDUELLES (1933) 69, 84.

875. 2 GARRAUD, *op. cit. supra* note 1, at 561n.

876. SIFNÉOS, *op. cit. supra* note 63, at 148 (citing decision of the *Cour de Cassation*); ULMANN, *op. cit. supra* note 254, at 31.

877. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 43, § 1484; SIFNÉOS, *op. cit. supra* note 63, at 158. The *préfets* were not given the right to delegate their powers to their administrative subordinates, such as the *sous-préfets*. 2 GARRAUD, *op. cit. supra* note 1, at 574; GOYET, *op. cit. supra* note 65, at 202.

878. GUYON, *op. cit. supra* note 251, at 254; AMELINE, *Ce qu'il faut connaître de la Police et de ses Mystères* (2d ed. 1926) 107; GARRAUD ET LABORDE-LACOSTE, *op. cit. supra* note 491, at 204.

879. MAGNOL, *op. cit. supra* note 431, at 3n.; Brêthe de la Gressaye, *supra* note 874, at 85; BINET, *LA PROTECTION DE LA LIBERTÉ INDIVIDUELLE CONTRE LES ARRESTATIONS ET DÉTENTIONS ARBITRAIRES* (1936) 53.

880. 2 GARRAUD, *op. cit. supra* note 1, at 570; BINET, *op. cit. supra* note 879, at 53. M. Lépine, *préfet* at Paris for almost twenty years, minimized the extent to which use was made of Article 10 and stated the following: "The *préfet* acts only in cases of emergency in order to prevent the culprit from escaping justice, or in cases where there is risk that the evidence of the offense will disappear if the opportunity of getting it is permitted to go by." LÉPINE, *MES SOUVENIRS* (1929) 165.

881. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 45, § 1485; 5 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* (2d ed. 1925) 38, 42. "Every party, while in the opposition, has criticized this anomaly which violates the principle of the separation of powers; but by a natural propensity of the French mind, they have all hastened to preserve it when

that, under the article as it had been construed, the *préfets* could and did use despotic powers, on which there were no legal restraints such as the law placed upon the *procureur* and the *juge d'instruction*.⁸⁸² As a result, the guarantees of personal liberty⁸⁸³ and of the inviolability of the dwelling,⁸⁸⁴ secured as against the judicial officers of the government after long and strenuous struggles, could be and were violated by the executive arm.⁸⁸⁵ Again it has been said that the *préfets* used Article 10 as an improper but effective weapon against the political enemies of the party or officials in power.⁸⁸⁶ Still another basis of opposition to the article was found in its debilitating effect upon the prosecuting department, chiefly the *parquet* of the Seine in Paris, where the interference by the *préfet de police* was strongly felt. The reports of offenses prepared by *commissaires de police*, the subordinates of the *procureur* in the *police judiciaire*, were caused by the

they succeed to governmental power." MORIZOT-THIBAUT, *op. cit. supra* note 20, at 38. "There was a flagrant violation of the principle of the separation of powers, so often invoked in France since Montesquieu and which the Constituent Assembly had intended to prevail under all circumstances." Leloir, annotation to the Law of Feb. 7, 1933, in DALLOZ, RECUEIL PÉRIODIQUE, 1933 IV. 66.

882. See SIFNÉOS, *op. cit. supra* note 63, at 159.

883. For example, when interrogated by order of the *préfet*, a suspect had no right to have counsel or any third person present. The Law of Dec. 8, 1897 was not applicable. 2 GARRAUD, *op. cit. supra* note 1, at 571; GUYON, *op. cit. supra* note 251, at 254; MAGNOL, *op. cit. supra* note 431, at 5. The contrary view is expressed in 2 ROUX, *op. cit. supra* note 43, at 33.

884. "The power of making arrests, of making searches and seizures in private dwellings, of seizing, even in the mail, the correspondence of individuals—all this was excessive." Leloir, *loc. cit. supra* note 881. "It is astonishing to find this article still in our codes. Its abrogation has always been one of the dogmas of the republican program and all parties ought to agree to its immediate repeal. It constitutes the absolute negation of the principle of the separation of powers; it can be in practice the most despotic and dangerous instrument. It destroys all the safeguards instituted in the penal laws; it permits the administrative authority to arrest and maintain in prison for several days any individual who is suspected by the Government, as well as to make searches and seizures and even interrogations." Report of M. Busson-Billault, Senator, in JOURNAL OFFICIEL, SÉNAT, DOC. PARL. (1921) *annexe* no. 256, p. 586.

885. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 44, § 1485; VIDAL, *op. cit. supra* note 272, at 891. "These excessive attributes of the *préfets* are disquieting for individual liberty, the inviolability of the dwelling and the privacy of correspondence. In political matters the action of the *préfets* supplants that of the judicial department for making arrests and seizures of doubtful legality which a *juge d'instruction* would decline to order." LABORDE, *op. cit. supra* note 132, at 620. "Under the second Empire numerous arbitrary acts committed by virtue of this article have been cited; it is only just to say that ones so grave are not committed today, but there is always the latent peril, especially since an individual, placed under a *mandat de dépôt* by the *préfet de police*, has no legal means at his disposal to force his being brought to trial. It has been said, in speaking of this article, that the *lettre de cachet* still exists in France, since the *préfet de police* can with impunity have an individual imprisoned any time he pleases. The only difference between the older incarceration by *lettre de cachet* and incarceration under Article 10 is that the latter must be buttressed by a legally punishable infraction. But this charge need not be bona fide, so that there is always the possibility of inventing one." GUYON, *op. cit. supra* note 251, at 255. To the same effect are HALÉVY, LA DÉCADENCE DE LA LIBERTÉ (1931) 158; ULMANN, *op. cit. supra* note 254, at 31.

886. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 38; GUYON, *op. cit. supra* note 251, at 256; Brêthe de la Gressaye, *supra* note 874, at 84. The *préfets* ought not to use their exceptional powers in political cases. LÉPINE, *op. cit. supra* note 880, at 166.

préfet de police to be sent to him rather than to the *procureur*. At the *préfecture* the reports were sorted and those offenses which the *préfet* desired to have prosecuted were referred to the *procureur* with instructions to that effect. The reports in the other cases would be "filed", thus accomplishing an informal *classement sans suite*⁸⁸⁷ without reference to the *procureur*.⁸⁸⁸ Although the writers generally denied that the *préfets* had any right to continue their own investigation and to exercise coercive measures, such as arrest and detention, after the *procureur* or the *juge d'instruction* had taken charge of the particular case,⁸⁸⁹ in practice the *préfets* did not refrain from continuing their activities concurrently with those of these officials,⁸⁹⁰ evidently with the approval of the courts.⁸⁹¹

Although Article 10 and its construction were much criticized, at the same time support for the extraordinary powers of the *préfets* was not lacking. The *préfets* themselves on numerous occasions urged the necessity of preserving these powers,⁸⁹² and this view was supported by some writers and public officials.⁸⁹³ The principal reason advanced for retaining the powers of the *préfets*, particularly the *préfet de police* of Paris, was the fact that these officials acted more promptly and efficiently than the *procureur* and the *juge d'instruction*.⁸⁹⁴

887. See discussion of *classement sans suite*, *supra* p. 421.

888. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 39; 2 GARRAUD, *op. cit. supra* note 1, at 569; LABORDE, *op. cit. supra* note 132, at 620. The repeal of Article 10 has been urged on the ground that the peculiar conditions existing at the time the *Code* was drafted, when after the Revolution the Government was new and the judicial authority was weak and a veritable horde of criminals was overrunning the country, no longer justify such a measure. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 44, § 1485; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 38.

889. 2 GARRAUD, *op. cit. supra* note 1, at 573, 574; LABORDE, *op. cit. supra* note 132, at 622; GOYET, *op. cit. supra* note 65, at 202; 4 LE POITTEVIN, *op. cit. supra* note 74, at 151 (citing a *circulaire* of the Minister of Justice, dated March 26, 1854).

890. A *circulaire* of the Minister of the Interior, dated Aug. 4, 1906, urged the *préfets* to refrain from such a practice without, however, stating it to be illegal. CUCHE, *op. cit. supra* note 217, at 253.

891. GARRAUD ET LABORDE-LACOSTE, *op. cit. supra* note 491, at 203, 204.

892. LÉPINE, *op. cit. supra* note 880, at 166; GUYON, *op. cit. supra* note 251, at 254; BINET, *op. cit. supra* note 879, at 52.

893. CUCHE, *op. cit. supra* note 217, at 252; HALÉVY, *op. cit. supra* note 885, at 192; Bréthe de la Gressaye, *supra* note 874, at 109. "There is the law, but there is also the duty of governing—the necessity of preserving the public order. These are two ideas which the Republic must reconcile." M. David, Senator, in JOURNAL OFFICIEL SÉNAT, DÉB. PARL. (June 22, 1922) 903.

894. 2 GARRAUD, *op. cit. supra* note 1, at 569; LESTELLE, *op. cit. supra* note 24, at 39. "In order to be able to combat effectively the numerous criminals in Paris, it is of importance that the supreme authority possess effective weapons. The police often has need of being prompt—it cannot always be encumbered by judicial formalities. Thanks to Article 10 the *préfet de police* can order searches which are executed at once. This prompt execution is often the condition necessary to success. It is by virtue of Article 10 that raids in suspected quarters are made which often bring about the discovery of criminals." GUYON, *op. cit. supra* note 251, at 254. To the same effect is LESTELLE, *op. cit. supra* note 24, at 39.

Repeated efforts were made in Parliament for the repeal of Article 10.⁸⁹⁵ In 1879 a commission appointed to revise the *Code d'Instruction Criminelle* recommended the repeal of the article,⁸⁹⁶ but the Government modified the *projet* by recommending an amendment of the article so as to limit its application to the *préfet de police* in Paris.⁸⁹⁷ The Senate in 1882 voted favorably on this amendment with the further limitation that it would apply only in the case of a *flagrant délit*.⁸⁹⁸ In 1884 the Chamber of Deputies voted for the repeal of the article.⁸⁹⁹ The Senate voted to repeal the article in 1909,⁹⁰⁰ and the Chamber of Deputies voted for its repeal in 1918.⁹⁰¹ In 1922 the Minister of Justice, M. Barthou, stated in the Senate that the Government was ready to accept the repeal of Article 10, adding, "If the present Government thinks that Article 10 of the *Code d'Instruction Criminelle* may be abrogated, it is because it has the profound and carefully weighed conviction that there will remain for it in the *Code d'Instruction Criminelle* the means of coping with the exigencies which have been pointed out. . . . Certainly it would be strange for France to be the only nation of the civilized world which had to have, for the protection of the Government, a provision as extraordinary as Article 10".⁹⁰² The Senate accordingly voted for the repeal of the article,⁹⁰³ but there was no action by the Chamber of Deputies.

In 1933 the efforts of over a half century culminated in the repeal of Article 10.⁹⁰⁴ It was not long, however, before demands for its restoration to the *Code* were heard, based mainly on the same grounds as had been formerly advanced against its repeal,⁹⁰⁵ to which added weight was given by evidence that the Government had been seriously hindered in dealing with the fatal riots of Feb. 6, 1934, because the

895. "It seems that the political parties are divided between two contrary sentiments—they would like to suppress it [Article 10] for fear their adversaries will use it against them, but they would also like to preserve it, in order to be able, when opportunity arrives, to use it against their opponents." VERNET, *op. cit. supra* note 9, at 26. To the same effect is LESTELLE, *op. cit. supra* note 24, at 30.

896. GABOLDE, COMMENTAIRE DE LA LOI DU 7 FÉVRIER 1933 SUR LES GARANTIES DE LA LIBERTÉ INDIVIDUELLE (1933) 18.

897. *Ibid.*

898. *Ibid.*

899. JOURNAL OFFICIEL, CHAMBRE, DÉB. PARL. (Nov. 4, 1884) 2205.

900. JOURNAL OFFICIEL, SÉNAT, DÉB. PARL. (Feb. 9, 1909) 96.

901. JOURNAL OFFICIEL, CHAMBRE, DÉB. PARL. (July 16, 1919) 3515.

902. JOURNAL OFFICIEL, SÉNAT, DÉB. PARL. (June 22, 1922) 900.

903. JOURNAL OFFICIEL, SÉNAT, DÉB. PARL. (June 23, 1922) 898.

904. Law of Feb. 7, 1933, art. 1, JOURNAL OFFICIEL (Feb. 9, 1933) 1354. This law also amended Article 120 of the *Code Pénal* so that any warden of a prison or place of detention of any kind who received a prisoner without a warrant or judgment, except in cases of extradition or expulsion from the country, or who unlawfully detained such a prisoner would be guilty of an offense punishable by imprisonment of six months to two years and a fine of 16 to 200 francs. GABOLDE, *op. cit. supra* note 896, at 20.

905. LESTELLE, *op. cit. supra* note 24, at 87 et seq.

préfet de police lacked the powers previously conferred by Article 10.⁹⁰⁶ It was emphatically pointed out that serious delay in the investigation of offenses resulted from the repeal of the article,⁹⁰⁷ and little objection was made to proposals for its reenactment.⁹⁰⁸ The Government by the Minister of Justice and the Minister of the Interior introduced in the Senate on May 15, 1934 the following bill:

"The *préfets* of the *départements* and the *préfet de police* in Paris may, if there is an urgent⁹⁰⁹ situation, conduct personally, or may require the officers of the *police judiciaire*, each within the authorized scope of his powers, to conduct all the proceedings necessary to establish the commission of *crimes* and *délits* against the internal or external safety of the State,⁹¹⁰ and to deliver the offenders to the courts empowered to punish them.

"Any *préfet* who shall have exercised the powers conferred on him by the preceding paragraph must inform the *procureur* and transmit the evidence within twenty-four hours to the *procureur* who will then take charge of the investigation."⁹¹¹

906. Letter of Mar. 6, 1935, from *Ligue Française pour la Défense des Droits de l'Homme et du Citoyen* to members of the Chamber of Deputies. The writer obtained a copy of this letter from the *Ligue*.

907. "At the present time, with the repeal of Article 10, it is impossible for the police to proceed to a sudden and unexpected seizure, for example, in cases of espionage. The *parquet* must first be notified, which then causes the opening of a formal investigation by a *juge d'instruction* preparatory to which there must be the assembling of certain papers, their examination, their sending back and forth; then certain orders must be given and certain inspections made of the scenes connected with the offense. All this takes time, to such an extent that the *juge* almost always arrives too late." M. Boivin-Champeaux, Senator, speaking in the Senate debate of Dec. 21, 1934. JOURNAL OFFICIEL, SÉNAT, DÉB. PARL. (1934) 1481. "The government thought that the suppression of the judicial powers of the *préfets* had frequently rendered difficult the discovery of certain offenses, which could have been discovered only by sudden measures, such as an unexpected visit to the suspected places. Extraordinary and urgent circumstances may in fact require immediate action for the safeguarding of the public order and the very safety of the State, notably at the frontiers or in a center of agitation. Undoubtedly a *juge d'instruction* can be rapidly named but that necessitates an order of the *procureur*, which may be given only upon strong presumption of the commission of a *crime* or *délit*. The *préfets* are better informed than the *magistrats*, because they have better police officers than the latter; they are also by reason of this fact better equipped to act and to do so more quickly—their action can be instantaneous." MAGNOL, *op. cit. supra* note 431, at 2n.

908. Brunschvicg, *La Liberté Individuelle au Sénat*, 35 LES CAHIERS DES DROITS DE L'HOMME (1935) 108, 109; ULMANN, *op. cit. supra* note 254, at 31n. "The reestablishment of Article 10, too evidently dictated by considerations of political opportunism, can be approved only provisionally and to the extent that circumstances justify it." LESTELLE, *op. cit. supra* note 24, at 186.

909. The *préfets* will be the sole judges as to whether there is an urgency. LESTELLE, *op. cit. supra* note 24, at 112.

910. "Offenses against the external safety of the State are taking up arms by a Frenchman against France, maintaining communications with foreign powers in order to facilitate war against France, delivering state secrets or military plans to agents of a foreign government, hiding enemy spies and all infractions of law of the kind which chiefly occur during war. Offenses against the internal safety of the State are attempts against the form of the government, conspiracy, inciting to civil war, levying armed troops without the order or permission of the lawful authority, destroying public buildings and organizing armed bands." LESTELLE, *op. cit. supra* note 24, at 112.

911. The powers of the *préfets* are now clearly "subsidiary" to those of the *juge d'instruction* and the *procureur*. MAGNOL, *op. cit. supra* note 431, at 5.

"Any officer of the *police judiciaire* authorized by the *préfet* acting under the above provisions and any public official notified of a seizure under the same provisions must without delay notify the *procureur de la République*." ⁹¹²

It will be noted that the new article is almost identical with the article in the original *projet* of 1804 which Napoleon caused to be expanded. ⁹¹³ It is a curious fact that the article, as amended, did not empower the *préfets* to act in the large class of cases, such as frauds and traffic in women and drugs, regarding which it was declared, both before and after 1933, that the prompt and energetic action of the *préfets* was necessary. ⁹¹⁴ The *projet* (1938) for a new *Code d'Instruction Criminelle*, however, contains an article which extends the power of the *préfets* so as to include the following offenses: possession and sale of drugs, operation of gambling houses and the white slave traffic. ⁹¹⁵

A decree of July 1, 1939, provides that in case of a national emergency, including war, the *préfets* shall exercise the extensive powers, which have been discussed, with regard to *crimes*, *délits* and *contraventions* of every kind and shall have three days, instead of twenty-four hours, in which to transmit the case, with a report of the evidence, to the *procureur*. ⁹¹⁶ Under this decree the *préfets* have broader powers than they ever had before.

IX. CHAMBRE D'ACCUSATION

The *chambre d'accusation* ⁹¹⁷ is a section of the *Cour d'Appel*. ⁹¹⁸ This *chambre* is composed of three judges, including a President, selected from the other *chambres* of the *Cour d'Appel*. ⁹¹⁹ These judges act as members of the *chambre d'accusation* in addition to their other duties. A member of the *ministère public* ⁹²⁰ and the *greffier* must be present at each session of the *chambre*, ⁹²¹ which meets either on the call of the *procureur général* or without such call at least once a week. ⁹²²

The *chambre d'accusation* has three functions. When a *juge d'instruction*, at the end of his investigation, is of the opinion that a

912. Law of Mar. 25, 1935, art. 6, JOURNAL OFFICIEL (Mar. 26, 1935) 3428.

913. See *supra* p. 925.

914. See *supra* p. 926.

915. Art. 14.

916. Art. 1, JOURNAL OFFICIEL (July 2, 1939) 8345.

917. The full title is *chambre des mises en accusation*. This *chambre* is the successor to the jury of accusation, similar to the English grand jury, instituted by the Law of Sept. 16-22, 1791. 3 GARRAUD, *op. cit. supra* note 1, at 331. The history of this *chambre* is set forth at length in FÉQUANT, *DE LA CHAMBRE DES MISES EN ACCUSATION* (Thesis Paris, 1901) 9 *et seq.*

918. See *supra* pp. 395 *et seq.*

919. 1 LE POITTEVIN, *op. cit. supra* note 74, at 718. In Paris, however, the *chambre d'accusation* has a permanent and independent status. *Id.* at 719.

920. The *procureur général* attached to the *Cour d'Appel* or one of his assistants.

921. 3 GARRAUD, *op. cit. supra* note 1, at 334.

922. C. I. C. art. 218, as amended by the Law of July 17, 1856.

crime has been committed and that there is sufficient evidence to justify further proceedings against the suspect, he refers the case⁹²³ to the *chambre*, which determines whether the case shall be brought to trial and, if so, in what court, depending upon whether it agrees with the findings of the *juge d'instruction*. Another function of the *chambre* is the hearing of appeals from the *ordonnances* of the *juge d'instruction*.⁹²⁴ It also exercises a general supervision over all the proceedings of the preliminary investigation⁹²⁵ and in this capacity may start a new investigation⁹²⁶ or may take over an investigation already started by a *juge d'instruction*.⁹²⁷

When a case has been referred to the *chambre* by the *juge d'instruction*,⁹²⁸ the first duty of the *chambre* is to determine if it is competent to proceed. For example, it will not be competent if the case falls within the jurisdiction of a special court, such as a court-martial, or if the case is not within the territorial jurisdiction of this *Cour d'Appel*.⁹²⁹ The *chambre* then determines whether or not the investigation made by the *juge d'instruction* is complete. If not, it orders a supplemental investigation.⁹³⁰ The *chambre* further decides whether a prosecution is barred for some reason, such as *res judicata*, prescription or amnesty.⁹³¹

The proceedings of the *chambre* are secret.⁹³² Neither the suspect nor the *partie civile* is permitted to be present at any time, but they may present written arguments to the *chambre*.⁹³³ The *procureur général* or one of his assistants may present arguments, generally written, on behalf of the prosecution, but should retire before the *juges* begin to deliberate,⁹³⁴ as the *Code* provides that the *juges* shall not consult anyone during their deliberations.⁹³⁵

The *chambre* does not hear any witnesses, but bases its deliberations and findings entirely upon the written report of the case (*dossier*)

923. See *supra* p. 727.

924. C. I. C. art. 135.

925. 3 GARRAUD, *op. cit. supra* note 1, at 347.

926. The *chambre* may appoint either one of its members or a *juge d'instruction* to conduct the investigation. C. I. C. arts. 235-240.

927. 3 GARRAUD, *op. cit. supra* note 1, at 347.

928. Notice must be given to the suspect and the *partie civile* twenty-four hours before the case is referred to the *chambre*. C. I. C. art. 116, as amended by the Law of Mar. 25, 1935.

929. FÉQUANT, *op. cit. supra* note 917, at 70; 1 LE POITTEVIN, *op. cit. supra* note 74, at 721.

930. FÉQUANT, *op. cit. supra* note 917, at 94; 3 GARRAUD, *op. cit. supra* note 1, at 349.

931. FÉQUANT, *op. cit. supra* note 917, at 72.

932. 3 GARRAUD, *op. cit. supra* note 1, at 335.

933. C. I. C. art. 217. In order to assist the suspect and the *partie civile* in the preparation of their arguments they are permitted to inspect the record of the case. FÉQUANT, *op. cit. supra* note 917, at 149.

934. FÉQUANT, *op. cit. supra* note 917, at 147; 3 GARRAUD, *op. cit. supra* note 1, at 342.

935. C. I. C. art. 225.

and the arguments made by the *procureur général* or his assistant and those submitted by the suspect and the *partie civile*.⁹³⁶ The *greffier* reads the *dossier* and the written arguments to the *juges*,⁹³⁷ whose function is to review the findings made by the *juge d'instruction* at the end of his investigation.⁹³⁸

A decision of the *chambre d'accusation* is known as an *arrêt* and is determined by a vote of the majority.⁹³⁹ If the *juges* determine either that an offense was not committed or that the evidence is not sufficient to warrant the trial of the suspect, they will order that he be immediately set at liberty.⁹⁴⁰ In such case the suspect may not be again proceeded against upon the same charge unless additional incriminatory evidence is later discovered.⁹⁴¹ If the *juges* conclude that there is sufficient evidence of a *contravention*, the suspect will be sent to trial by the *Tribunal de Simple Police*; if sufficient evidence of a *délit*, by the *Tribunal Correctionnel*.⁹⁴² In case they conclude that a *crime* has been committed by the suspect, they will order that he be brought to trial before the *Cour d'Assises*,⁹⁴³ which is competent to try only such persons as are sent to it by the *chambre d'accusation*.⁹⁴⁴

Following the decision of the *chambre* to send the suspect before the *Cour d'Assises*, the *procureur général* is required to prepare the formal accusation, known as the *acte d'accusation*, which must specify the following: (1) the offense charged, (2) the criminal act with a statement of all the circumstances, which may aggravate or reduce the punishment and (3) the name and description of the accused.⁹⁴⁵

Appeals to the *chambre d'accusation* from the *ordonnances* of the *juge d'instruction* may be taken by the *procureur*, the suspect and the *partie civile*. The *procureur* may appeal from any *ordonnance*, while the suspect may appeal only from an *ordonnance* fixing bail.⁹⁴⁶ The *partie civile* is given the right to appeal from *ordonnances* setting the suspect at liberty or releasing him on bail and from any other *ordonnances* unfavorable to his civil claim.⁹⁴⁷

936. 3 GARRAUD, *op. cit. supra* note 1, at 336.

937. C. I. C. art. 222.

938. 3 GARRAUD, *op. cit. supra* note 1, at 336.

939. *Id.* at 343.

940. C. I. C. art. 229, as amended by the Law of July 17, 1856.

941. C. I. C. art. 246.

942. C. I. C. art. 230, as amended by the Law of July 17, 1856.

943. C. I. C. art. 231, as amended by the Law of July 17, 1856.

944. 3 GARRAUD, *op. cit. supra* note 1, at 346.

945. C. I. C. art. 241.

946. C. I. C. art. 135.

947. *Ibid.*