COMMENT

THE MACHINERY OF LAW ADMINISTRATION IN FRANCE

GERALD L. KOCK †

For more than twenty years the classic article by Deák and Rheinstein has provided a much needed summary of the "machinery of law administration in France." [1] This period has, however, been a time of turmoil. There have been many changes, even some improvements, in the legal order. The machinery for dealing with law problems, in France as in the rest of the world, has been modified to meet the challenges of a new age.[2] But change is not new, nor has it run its full course for France. She has, in fact, only now begun a period of drastic change, a period of convalescence after a strong purgative taken to cure a sorely ill constitutional order.

President DeGaulle, during his interim premiership,[3] pursued with vigor the reform of France's law machinery which had begun with the promulgation of the first parts of the new Code of Penal Procedure.[4] In December 1958, there were issued in quick succession a series of decrees designed to make the courts more uniform throughout the country and to take account of the changes that have occurred over the years in the flow of cases that must be dealt with in the various courts. It is the purpose of this Comment to serve as a *mise à jour*, so to speak, of the Deák-Rheinstein exposition of 1936.

The judicial structure of France is perhaps most different from that to which we in the common-law system are accustomed in the existence of what amounts to two judicial systems working side by side. The picture is not that of a few specialized courts set outside the regular court structure but of a separate system of courts for trial, appeal, and review of cases which, because of the interests involved, are not within the jurisdiction of the ordinary courts. The French courts are, then, of two kinds: the ordinary, or judicial, courts and the ad-

† Teaching Associate in Law, Indiana University. J.D., 1958, University of Chicago.

1 Deák & Rheinstein, *The Machinery of Law Administration in France and Germany*, 84 U. PA. L. REV. 846 (1936).

2 Many of these changes have been treated in DAVID & DEVRIES, THE FRENCH LEGAL SYSTEM (1958).

3 June to December, 1958.

4 Promulgated in Law 57-1426 of Dec. 31, 1957, and Ordonnance 58-1296 of Dec. 23, 1958.

ministrative tribunals. Each system is complete in itself [5] and capable of deciding at all stages of litigation cases falling within its subject-matter competence. Because the courts in both systems have general jurisdiction—*i.e.*, are not limited in their functioning to only certain kinds of cases—the question of appropriate jurisdiction is often difficult to answer. Acting as arbiter of jurisdictional disputes between the two court systems there is a special court, the Conflicts Court.[6]

The following discussion will deal first with the judicial courts and then with the administrative tribunals. The Conflicts Court will be discussed with the administrative tribunals, whose jurisdiction it was created to protect. The discussion will progress in each case from the most limited or specialized courts of first instance to the court of review at the pinnacle of the pyramid.

The Judicial Courts

Courts of Limited Jurisdiction

There are a number of courts with jurisdiction limited to specific classes of cases (*tribunaux d'exception*). Much of what is brought before some of these courts would not be the subject of litigation in common-law countries, but would be left to extra-judicial negotiation or arbitration.

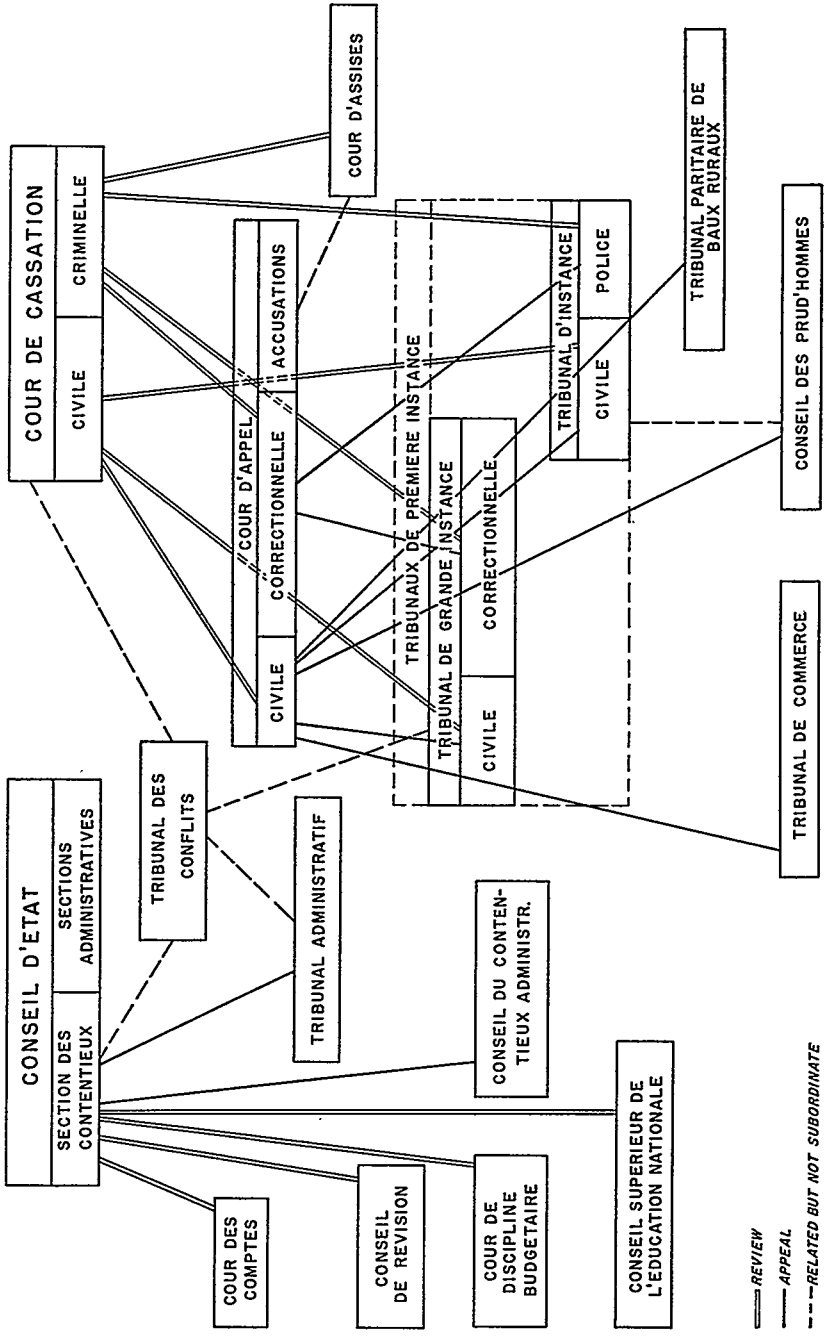
The industrial councils (*conseils des prud'hommes*) serve as courts for the purpose of determining disputes between employers and their employees with regard to wages, working hours, and like matters. They also serve as arbitration or conciliation agents for the settlement of disputes in trade and industry. A *conseil* is set up at the request of the municipal council of the community where one is to be established after approval by a majority of the councils of other communes [7] that are to be within its jurisdiction and by the general council of the department.[8] Its members are elected by the interest groups they repre-

[5] The judicial courts are in a way subject to the administrative system since no civil court can make a binding determination of its own competence *vis à vis* administrative jurisdiction, Laws of 1790 and 1794, whereas the Council of State (*Conseil d'état*), the highest tribunal of the administrative system, does decide what is properly within the jurisdiction of the administrative courts.

[6] See text accompanying notes 95-107 *infra*.

[7] A centralized state, France is divided for administrative purposes into ninety *départments* (not counting three in Algeria) which are again divided into 311 *arrondisements*. Within the *arrondisements* are the towns and villages (*communes*, of which there are 38,000), each with its own mayor and municipal council. When used with reference to Paris, Lyon, and Marseilles, *arrondisement* means a subdivision of the city roughly equivalent to a ward in an American city.

[8] Decree 58-1292 of Dec. 22, 1958. The initiating commune proposes the geographical bounds of authority of the *conseil*. No *maximum* limitation is fixed upon the permissible extent of jurisdiction of an industrial council, but it is provided that no city may contain more than one.


PRINCIPAL CHANNELS FOR LITIGATION IN FRANCE
COUR DE CASSATION
CIVILE
CRIMINELLE
COUR D'ASSISES
COUR D'APPEL
CIVILE
CORRECTIONNELLE
ACCUSATIONS
TRIBUNAUX DE PREMIERE INSTANCE
TRIBUNAL DE GRANDE INSTANCE
CIVILE
CORRECTIONNELLE
TRIBUNAL D'INSTANCE
CIVILE
POLICE
TRIBUNAL PARITAIRE DE BAUX RURAUX
CONSEIL DES PRUD'HOMMES
TRIBUNAL DE COMMERCE
CONSEIL D'ETAT
SECTION DES CONTENTIEUX
SECTIONS ADMINISTRATIVES
TRIBUNAL DES CONFLITS
TRIBUNAL ADMINISTRATIF
CONSEIL DU CONTENTIEUX ADMINISTR.
COUR DES COMPTES
CONSEIL DE REVISION
COUR DE DISCIPLINE BUDGETAIRE
CONSEIL SUPERIEUR DE L'EDUCATION NATIONALE
REVIEW
APPEAL
RELATED BUT NOT SUBORDINATE

sent. They need not be lawyers and they do not become members of the judiciary by virtue of their election. There are at least four members in each council—two representing employers and two representing employees. Decisions are rendered by a simple majority vote. Should a tie result, the dispute is heard again by the council, this time presided over by a judge of the civil court with jurisdiction over minor litigation,[9] who has the deciding vote. If the dispute involves more than the amount for which the *tribunal d'instance* is court of last resort,[10] appeal may be taken by either party to the local court of appeal; [11] otherwise appeal is unavailable. In any case a petition for review of the decision on the ground that the council exceeded its powers[12] may be taken before the Court of Cassation.[13] In localities where no industrial council has been established that jurisdiction may be exercised by the local court having jurisdiction over minor litigation.

There are commercial courts (*tribunaux de commerce*) with jurisdiction over litigation involving sales, manufacture, distribution and transportation of goods within limits set by decree of the government. These courts sit for the *arrondisement* [14] from which members, chosen from among the local businessmen, are elected. Decisions must be rendered by at least three judges, one of whom must be a regular judge [15] of the court. Members, except presidents are elected for two-year terms; presidents, for three-year terms.[16] Decisions of a commercial court are final if the amount involved is not more than 150,000 francs,[17] subject to a limited review by the Court of Cassation.[18] Cases involving larger sums may be appealed to the court of appeal for the jurisdiction. If no commercial court has been established in a district, that jurisdiction is exercised by the local trial court having primary jurisdiction.[19]

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9 *Tribunal d'instance.* See text accompanying notes 39-46 *infra.*

10 See note 42 *infra* and accompanying text.

11 See text accompanying notes 57-60 *infra.*

12 *Pour excès de pouvoir.* This challenge is not one simply of exceeding one's jurisdiction. Any act not supportable in law can be so attacked.

13 See text accompanying notes 61-66 *infra.*

14 See note 7 *supra.*

15 *Juge titulaire* as opposed to *juge suppléant* (alternate).

16 The new provisions for the election of members of the commercial courts are in Decree 59-94 of Jan. 3, 1959. One can see developing in these provisions a sort of sub-civil service; presidents can be selected only from persons who have been judges for three years and no one can be elected as a judge who has not been an alternate for three years. See also Decree 59-348, art. 2 of Feb. 27, 1959, which provides that the number of judges each court shall have is to be fixed by decree.

17 Approximately $300. Decree 58-1283, art. 5 of Dec. 22, 1958. The decision is final as to all cross-claims even if the total in litigation exceeds this figure. Also, the parties may agree that the decision will be final no matter how much is involved. CODE DE COMMERCE art. 639 (Fr. 51st ed. Dalloz 1955).

18 See note 12 *supra.*

19 Decree 58-1283, art. 1 of Dec. 22, 1958.

Equalization tribunals (*tribunaux paritaires de baux ruraux*) have been created to assure the fairness of rents in the rural districts.[20] They consist of an equal number of landlords and tenants and are presided over by the judge of the lowest civil court.[21] The recorder of the lowest civil court serves as secretary of the rents tribunal. The procedure used is that of the court from which the president and secretary are drawn. Decisions are final within the limits of the final decisions of the *tribunal d'instance*;[22] beyond that amount, or if the amount is indeterminate, appeal may be had to the court of appeal.

The courts having the jurisdiction formerly exercised by the justices of the peace are not courts of general jurisdiction, but because they are now considered as one of the new courts of first instance they will be dealt with below.[23] There are, in addition, juvenile courts[24] and military courts for each of the three armed services.[25]

Courts of General Jurisdiction—Trial Courts

There are three courts of general jurisdiction within the regular judicial system—the courts of primary jurisdiction (*tribunaux de grande instance*), courts of appeal (*cours d'appel*), and a court of review (the *Cour de cassation*).

The courts of the first instance (*tribunaux de première instance*) are a new creation of the Fifth Republic.[26] They consist of two categories—the court of primary jurisdiction (*tribunal de grande instance*), having the jurisdiction and makeup of the former district courts (which courts were also called *tribunaux de première instance* or, more commonly, *tribunaux civils*), and a court having jurisdiction over minor litigation (*tribunal d'instance*), replacing the old cantonal courts and justices of the peace.[27]

The court of primary jurisdiction (*tribunal de grande instance*) has both civil and criminal jurisdiction.[28] The court consists of at

20 Decree 58-1293 of Dec. 22, 1958.

21 *Tribunal d'instance.*

22 See notes 40-43 *infra* and accompanying text.

23 See notes 39-46 *infra* and accompanying text.

24 *Tribunaux pour enfants et adolescents.* Ordonnance 58-1274 of Dec. 22, 1958.

25 There is, in theory, a single system of permanent armed forces tribunals, but they are composed of personnel of the service to which the accused belongs. Law of March 9, 1928, as amended by Decree of Sept. 22, 1953.

26 Ordonnance 58-1273, and Decrees 58-1281, -1284, all of Dec. 22, 1958.

27 In most of France, *juges de paix*; in the departments of Bas-Rhin, Haut-Rhin and Moselle, *tribunaux cantonaux.*

28 This represents the concept of "unity of jurisdiction" that is emphasized in the texts on French law and that leads in practice to an interesting and litigation-saving result. Since, in theory at least, it is the same court that hears all kinds of cases, it is possible in France to file in a criminal prosecution a civil claim for damage done by the accused to any claimant in the course of committing the crime.

least three judges [29] and sits in separate chambers, or divisions.[30] When a chamber is sitting to hear a civil case it is referred to as the *tribunal civil*; the criminal chamber is usually called the *tribunal correctionnelle*. The civil chambers have original jurisdiction over all civil litigation that is not limited to a special court or restricted to the administrative tribunals.[31] Their decisions (*jugements*) are final, subject to review by the Court of Cassation,[32] in cases involving personal rights of a value of not more than 150,000 francs [33] and real property producing an annual income of no more than 30,000 francs.[34] All other decisions are subject to an appeal of right to a court of appeal. The criminal chamber has trial jurisdiction over misdemeanors (*délits*).[35] Appeals from its decisions in criminal cases are taken to the local court of appeal.

Each court has attached to it a record office manned by a recorder [36] with, perhaps, one or more assistants.[37] The recorder, or an assistant, must be present at the hearings and sign the record and all judgments and orders. There is also at least one bailiff [38] whose job it is to effect service of necessary papers and to assist the president of the chamber in the performance of his duty to maintain order in the conduct of the trial.

The court established for the trial of minor cases (*tribunal d'instance*), though it does not have general jurisdiction, is also a court of first instance.[39] This is the only court in France that consists of only one judge. He has jurisdiction within his territory to hear minor civil

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[29] There must be three before the court can decide cases. In the past, because some courts had little business, there were courts (*tribunaux rattachés*) with only one regularly assigned judge (*juge résident*); for a term of court, additional judges had to be brought in from a neighboring court (*tribunal de rattachement*). This practice will not continue. The number of courts has been reduced, and all must have three assigned judges.

[30] As regards the number and geographic distribution of the *tribunaux de grande instance*, see note 57 *infra*.

[31] See text accompanying notes 7-22 *supra* and 83-84 *infra*.

[32] See text accompanying notes 64-67 *infra*.

[33] Approximately $300.

[34] Approximately $60.

[35] Offenses are of three classes: felonies and misdemeanors, in the exclusive power of parliament (CONST. art. 34 (1958)), and *contraventions*, established by decree. For *contraventions* punishment may not exceed two months imprisonment and fine of 200,000 francs. Misdemeanors may be penalized by fine in excess of 200,000 francs and by imprisonment for up to five years; such penalty is said to be "correctional." Felonies are offenses punishable by "afflictive" or "degrading"—as opposed to "correctional"—penalties: death, deportation, more than five years imprisonment. PENAL CODE PÉNAL arts. 1, 6-9 (Fr. 52d ed. Dalloz 1955).

[36] *Greffier*. The office is a *greffe*.

[37] *Commis greffier*.

[38] *Huissier*.

[39] Decree 58-1284, arts. 1-30 of Dec. 22, 1958.

litigation involving not more than 300,000 francs[40] and to try persons charged with petty offenses against police regulations.[41] Decisions in civil cases involving no more than 100,000 or 150,000 francs,[42] depending upon the type of case, and convictions resulting in imprisonment for up to five days or fine of 6,000 francs, or both, are final, subject to review by the Court of Cassation. Appeals from decisions that are not final may be taken to the local court of appeal.[43]

The *tribunal d'instance* rides circuit, an innovation in French law.[44] It sits in several places within most jurisdictions and maintains a record office and recorder in each place where it sits.[45] In addition to his judicial duties the judge has several assigned non-judicial capacities inherited from the former justice of the peace who was conceived of as a general peacemaker and conciliator for the neighborhood within which he lived.[46]

The third regular court in the ordinary judicial system is the assizes court (*cour d'assises*).[47] This court, constituted periodically for the trial of felonies, is the only court in the French system that sits with a jury. The court itself is composed of three judges, one of whom, the president, is from the court of appeal. The other two judges are from the court of appeal or from the court of primary jurisdiction within the same district. The court usually sits for one two-week term during each quarter of the year.[48] While it is established for the trial of per-

[40] Approximately $600. A special provision for claims of several persons joined because based on a common right extends jurisdiction to 500,000 francs (approximately $1,000). Decree 58-1284, art. 15 of Dec. 22, 1958.

[41] *Contraventions de simple police* (usually called *contraventions*) are offenses punishable by no more than two months' imprisonment or fine of 200,000 francs or both. CODE OF PENAL PROCEDURE art. 521. See also note 35 *supra*.

[42] Approximately $200 and $300 respectively. Decree 58-1284, arts. 2, 4 of Dec. 22, 1958.

[43] Appeals from the former *juges de paix* used to be taken to the equivalent of the *tribunal de grande instance*. It is still possible for the Council of State to require by decree that cases within a very limited category be appealed to the *tribunal de grande instance* rather than to the *cour d'appel*. Decree of 58-1284, art. 35 of Dec. 22, 1958.

[44] The *tribunal d'instance* supplants the old *juge de paix*. There was one of the latter in each community as a rule, but the new courts will be less numerous. *Tribunaux d'instance* will hold court in most of the places where there were formerly *juges de paix*.

[45] Ordonnance 58-1273, art. 6 of Dec. 22, 1958. Regarding the total number and regional allocation of these courts, see note 57 *infra*.

[46] The judge, for example, within his jurisdiction presides over family councils and inventories the estates of deceased persons and of persons who are unaccountably absent for a long time.

[47] CODE OF PENAL PROCEDURE art. 231. The *cour d'assises* does not have general jurisdiction, but it is a regularly meeting court and is manned by the regular judiciary.

[48] For the provisions dealing with the composition of the court and the duration of its terms, see CODE OF PENAL PROCEDURE arts. 236-37, 240-53. For the number and geographic distribution of the assizes, see note 57 *infra*.

sons charged with felonies, its jurisdiction is at the same time more and less broad than that description would indicate. The assizes court may assume jurisdiction over only those cases that have been referred to it by the indicting chamber of the local court of appeal or that have been remanded to it by the Court of Cassation.[49] Once the court has received a case, however, whether by reference or remand, it must proceed to complete the trial and decree an appropriate penalty, or an acquittal, even if it decides that the offense charged is not a felony and should not have been sent to an assizes court for trial in the first place.

The jury that forms a part of the assizes court is quite unlike the jury known to common-law countries. The French jury sits more in the capacity of lay judges than as fact finders. There are nine jurors,[50] and if the courtroom is so constructed as to permit it they sit at the bench with the judges. The jurors deliberate and vote with the judges on both the question of guilt and the appropriate penalty.[51] A finding of guilty must be supported by at least eight of the possible twelve votes.[52] Other questions are decided by a simple majority. There is no appeal from the decree [53] of an assizes court, a rule said to be left from the day when the French jury was more like our own.[54] A petition for review of the decision may be pressed before the Court of Cassation, however.

Appeal and Review

There is in France no single court at the summit of the judicial system with jurisdiction to hear appeals from and to review decisions of lower courts.[55] French law recognizes one *appeal* as a matter of right, except for small cases and decisions of the assizes courts. This appeal brings the whole record before the appellate court and amounts

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[49] The French is *renvoi* in either event.

[50] CODE OF PENAL PROCEDURE art. 296. There were twelve from the time the English jury was copied (1791) until 1941; six from 1941 to 1945; seven from 1945 to 1958.

[51] This arrangement has been given the name *échèvinage,* though the label is not wholly accurate.

[52] CODE OF PENAL PROCEDURE art. 359. Since there are only three judges this means, of course, that a conviction must be supported by a majority of the jurors.

[53] *Arrêt.* CODE OF PENAL PROCEDURE art. 365.

[54] The French adopted both the grand and petit juries from England in 1791. In 1808 the grand jury was discontinued, but the trial jury was maintained until 1932 when the present system was adopted. For an interesting discussion of the French, English, and Scottish juries see Brethe de la Gressaye's note 13 to book VI of MONTESQUIEUX, DE L'ESPRIT DES LOIS (1950).

[55] This is true only for the regular judicial system. In the administrative court system the *Conseil d'état* does do both. See text accompanying note 86 *infra.*

to a hearing *de novo*.[56] In the event that the trial court is reversed the appellate court enters a final judgment. A case is never remanded for a new trial or for other further action by the trial court.

A *reviewing* court, on the other hand, has no authority to consider questions of fact or evidence. The record is closed, and all that remains is whether or not the questions of law discussed in the petition for review were correctly decided below. The reviewing court, if it grants a hearing and decides in favor of the petitioner, can only remand the case for a correct treatment below. A reviewing court never finally decides the case. That is done after remand.

The courts of appeal (*cours d'appel*) hear appeals from the lower courts within their jurisdiction and decide on remand cases in which the Court of Cassation has reversed the decision of another court of appeal.[57] The court consists of a president of the court, a president for each chamber and other judges as required to complete the court.[58] Judges who do not preside over a chamber are called councillors.

The court is divided into at least four chambers. There must be a chamber to hear criminal appeals from the courts of first instance (*chambre correctionnelle*) and another to serve as an indicting chamber.[59] In 1958 a social chamber was created to hear specialized civil cases.[60] And there must, of course, be one or more civil chambers to hear civil appeals from the lower courts. When the court is hearing a case that has been remanded to it by the Court of Cassation it must

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[56] This appeal of right, as we might call it, is called by the French a double degree of jurisdiction (*double degré de juridiction*), indicating that they conceive of it as a right to a second trial before different judges, not, as we usually think of an appeal, simply an examination of specific alleged errors.

[57] CODE OF PENAL PROCEDURE arts. 496-520; Ordonnance 58-1273, and Decrees 58-1281, -1284, -1286 of Dec. 22, 1958.

There are twenty-seven courts of appeal each having jurisdiction over from one to seven departments. Each department has at least one *tribunal de grande instance* (in the principal city) but may have as many as seven, depending on total population, distribution of population, and difficulty of communication within the department. Thirty-nine departments have two; seventeen have three; one has four; and one has seven. There are 172 courts in all. There is at least one *tribunal d'instance* in each *arrondisement*, but there are in all 455 of these courts since fifty *arrondisements* have several. Assizes are held in each department. In departments where a court of appeal has its seat the assize court usually sits in the same city as does the court of appeal. The geographical distribution of the courts is important to litigants because of venue requirements. The privilege is waived if not timely raised, but a defendant usually may demand that he be pursued only in the courts of the area where he is domiciled, or has committed an offense, or is to perform his contract.

[58] There must be at least two.

[59] The indicting chamber (*chambre d'accusations*) hears appeals from the orders of investigating magistrates (*juges d'instruction*), decides on extradition questions, exercises disciplinary control over the judicial police, and on the basis of the record made by the investigating magistrate decides whether trial for a felony is appropriate. It is the decree (*arrêt de renvoi*) transferring his case to the assizes court that changes one subject to charges (*l'inculpé*) into an accused (*l'accusé*).

[60] The new social chamber hears appeals from cases involving social security, labor contracts, and the application of social welfare laws.

sit in solemn session (*audience solennelle, "en robes rouges"*), for which at least four judges and a president must sit. Decrees (*arrêts*) of the court of appeal are final adjudications and supplant the decision of the trial court. They are subject to review by the Court of Cassation. In addition, the courts of appeal have original jurisdiction to try civil actions brought against judges of the industrial councils, the courts of first instance, individual judges of those courts, and individual judges of the courts of appeal for recovery of damages caused by intentional unlawful acts committed in the performance of judicial duties. This unusual form of action, carried into the French from the Roman law, is the *prise à partie.*

At the head of the French judicial system is found the Court of Cassation (*Cour de cassation*).[61] This Court is a court of review, as that term is explained above. Its purpose is twofold: to keep the law pure by assuring that the courts below do not diverge in their decisions from the law as it is found in the codes and other legislative acts, and—as a part of the same task—to secure the uniformity of the law throughout the area in which it is applicable.[62]

The Court of Cassation consists of the president, five chamber presidents and sixty-three councillors. They sit in divisions as do the lower courts. There are a criminal chamber and four civil chambers.[63] The councillors assigned to civil cases rotate among the various chambers but those on the criminal side are permanently assigned.

Cases come to the Court of Cassation by way of petition for review. Petitions in criminal cases go directly to the criminal chamber where they are ruled upon. Petitions for review of civil cases go first to the first civil section,[64] which may either send the request to another, specialized chamber or itself decide it. If after a hearing the Court

[61] Law of July 23, 1947, as amended by Law of July 21, 1952. The *Cour de cassation* sits only in Paris.

[62] To aid the Court, sitting in sections, to maintain uniformity in its decisions a central index of decisions (*fichier central*) was created in 1947. Law of July 23, 1947, art. 10. From this beginning has developed the *Service de documentation et d'études de la Cour de cassation* manned by twenty persons of magisterial rank. See Decree 58-1281, art. 19 of Dec. 22, 1958. In addition, the first president may call into being an *assemblée plenière* composed of at least fifteen of the senior members of the Court when he feels it is necessary in order to avoid contrariety of decisions. This group meets also to hear particularly difficult cases and cases in which another section or chamber has arrived at a tied vote. See Law 47-1366, art. 41 of July 23, 1947.

[63] The civil chamber works as four specialized sections. A not unusual division of its work load would be: first section, general supervision and routing of cases; second section, divorce, tort liability, civil procedure and social security; third section, commercial problems; fourth section, labor law and land rents.

[64] Formerly (1795-1947) there was a chamber (*chambre des requêtes*) that did nothing but serve as a screening device for civil cases. It would reject the obviously unmeritorious petitions and forward the others to the civil chamber. The change was made in an attempt to speed up the work of the Court, but it seems not to have done so.

finds that the lower court correctly applied the law, it dismisses the petition (*rejet de pourvoi*) and the judgment or decree rendered below becomes final. Should the Court decide that the lower court erred, it sets aside the decision (*casse le jugement*) and remands (*renvoi*) the case to another court of the same rank as that from which it came.[65] The Court of Cassation is free to send a case to any court of the appropriate rank except that from which it came or one that has had the same case before, in the event it is the second time the case has been remanded.[66]

It has been said that the Court of Cassation judges decisions, not suits. In a very real sense this is true, for cases may be brought before it only on the ground that a law has been violated or incorrectly applied or that a court has exceeded its authority. Nothing may be considered that has not been alleged in the original petition for review, and the decision of the Court can only be to send the case back to another court to be considered.[67] No evidence may be looked to, and the findings of fact below may not be disturbed by the Court of Cassation even if there is no evidence in the record to support them.

The court to which the Court of Cassation remands a case (*cour de renvoi*) is not bound to follow the higher Court.[68] If, however, the court of remand does not follow the Court of Cassation and on review that Court, all chambers sitting together,[69] again sets the decision aside and remands the case for the same reasons, the second court to

[65] Of course, if the decision is reversed on grounds that the court below did not have jurisdiction the remand will be to a court that does have jurisdiction.

[66] The case may be remanded to the same court if the reversal does not imply any fault in those judges. This is not the usual case, however.

[67] There is provision as well for a rare kind of case in which there remains nothing to be decided on the merits. In that event the Court may reverse without remanding the case (*cassation sans renvoi*). See also note 66 *supra*.

[68] In practice, of course, they usually do so. As an excellent example to the contrary there is the recent case involving Pierre Bonnard's unsold paintings. The civil court in Paris decided that all works of art are community property. [1952] Dalloz Jurisprudence 390. The court of appeals in Paris decided that the rule held only for completed works, that sketches and unfinished canvases are not included. [1953] Dalloz Jurisprudence 405. On review the Court of Cassation decided that the trial court, not the court of appeal, had been right and remanded the case to the court of appeal in Orleans. On remand, the court in Orleans ruled that no such work of art is community property unless released for sale or exhibition before termination of the community. [1959] Dalloz Jurisprudence 440.

The source of this recognized freedom of the *cour de renvoi* may perhaps be located in the broad principle of article 5 of the Civil Code providing that in the decision of cases judges shall not hand down general, regulatory decisions. While the text will not extend so far as Dean Pound would have it, POUND, SPIRIT OF THE COMMON LAW 180 (1921), it has been taken to mean that, in the absence of statutory dictate, no judge is bound to follow another judge's opinion or even an earlier ruling he has himself made. This freedom has been curtailed by statutes govering the second remand of cases by the *Cour de cassation*. Law of July 23, 1947, art. 60; CODE OF PENAL PROCEDURE art. 619.

[69] *Toutes chambres réunies* (at least thirty-five members). Law of July 23, 1947, arts. 58-60.

which it is remanded is bound to enter a decision in conformity with the decision of the Court of Cassation.

The Court has original jurisdiction to hear *prise à partie* actions against courts of appeal, assizes courts and individual members of the Court of Cassation. No such action may be had against the Court of Cassation as a whole. For hearings on these actions, as for the second review of a case in which its first decision has not been followed on remand, all chambers of the Court must sit as a single bench. In no other cases is this necessary.

Administrative Courts

It is in the administrative courts that the difference between the French and our own legal system is generally thought to be greatest. Disputes with the government that must, in the United States, be pursued by way of claims filed with the department of government concerned[70] are, in France, litigated before courts established for that purpose. The French system began not unlike our own. Claims were presented to the prefect (*préfet*) charged with supervising governmental interests in the department, a subdivision roughly equivalent to our states but having no powers of self-government.[71] Later, the prefect was given a council to assist in the adjudication of these claims.[72] In 1953 the prefectural councils were replaced with administrative tribunals, which have been given in addition to the prefect's claim adjusting powers a general jurisdiction that was earlier exercised in the administrative system only by the Council of State (*Conseil d'état*).[73]

Courts of Limited Jurisdiction

While the administrative tribunals (*tribunaux administratifs*) are the center of the administrative system, there are a number of specialized tribunals established for particular cases.

The councils for administrative litigation (*conseils du contentieux administratifs*) serve for the overseas territories[74] the same function as that served for the national government by the administrative tri-

[70] Or, in some instances as regards the national government, actions brought in the court of claims or under special grants of jurisdiction in the federal district courts.

[71] See note 7 *supra*.

[72] The *conseils de préfecture* were created by the Law of Feb. 18, 1801. Until 1926 the jurisdiction of a *conseil* was strictly departmental. In 1926 their number was reduced and their jurisdiction became inter-departmental. Laws of Sept. 6 and 26, 1926. At the same time their subject-matter jurisdiction was somewhat expanded.

[73] Decree 53-934 of Sept. 30, 1953.

[74] Antarctic Territories, Comoro Archipelago, Dahomey, French Equitorial Africa, Ivory Coast, Madagascar, Mauritania, New Caledonia, Niger, Oceania, St. Pierre and Miquelon, Senegal, Somaliland, Sudan and Upper Volta.

bunals.[75] These local councils have general jurisdiction, but are organized differently from territory to territory. Their decisions may be appealed to the Council of State.

The Court of Accounts (*Cour des comptes*) is charged with assuring the regularity of the accounts of all officers accountable to the government.[76] Members of the court are chosen by competition and may not be removed from office. This is not a court in the usual sense, since no claim or dispute is necessary to justify an exercise of jurisdiction by it. Its function is really that of a supervisory agency. A review of its decisions may be had before the Council of State.

To ensure that public officials conduct their offices within the prescriptions of their budgets, there was created in 1948 a Court of Budgetary Discipline (*Cour de discipline budgétaire*) composed of six members appointed for three years and presided over by the first president of the Court of Accounts.[77] The court has authority to adjudge fines against public officials guilty of budgetary irregularities. Decisions of the court are subject to review by the Council of State.

The councils of revision (*conseils de révision*), presided over by the departmental prefects, have authority over disputes arising from the requirement of national defense service.[78] It is these courts which adjudicate claims to immunity from national service—on grounds, for example, that one is not of French nationality or that one is not physically capable of serving. Their decisions also are subject to review by the Council of State.

The National Education Council (*Conseil supérieur de l'éducation nationale*) is composed of fourteen high-ranking officers of the Ministry of Education, ten members named by the Minister of Education, fifty members elected by the teaching profession (public schools), and three representatives of the private schools.[79] The council has general supervision over all curricular changes in the schools and, as a court, hears appeals from decisions of and disciplinary action taken by the academic councils and university councils, both of which in addition to their administrative duties have jurisdiction over disciplinary matters and disputes concerning the operation of their schools. Decisions of the Education Council are subject to review by the Council of State.

There are more than forty other administrative jurisdictions and commissions created to settle claims and disputes, but they are limited

[75] Ordonnances of Aug. 21, 1825 and Feb. 9, 1827; Decrees of Sept. 7, 1881 and Jan. 20, 1958.
[76] Laws of Sept. 16, 1807, May 16, 1941, Feb. 2, 1943 and Dec. 31, 1949; Decree of Nov. 22, 1951.
[77] Laws of Sept. 25, 1948 and Aug. 8, 1950.
[78] Laws of March 31, 1928 and Jan. 22, 1931.
[79] Law of May 18, 1946.

in their scope, often coming into existence only when a particular case arises and then dissolving again for years.

Courts of General Jurisdiction

Thirty-one administrative tribunals (*tribunaux administratifs*) have been established for the adjudication of administrative disputes.[80] Each tribunal is composed of a president and three or four councillors, one of whom serves as government commissioner.[81] The administrative tribunals can sit only if there are three members present. Should a member of the tribunal be disqualified or absent, the vacancy may be filled either from the membership of a neighboring tribunal or from among local attorneys (*avocats*). It is not usually considered desirable to use local attorneys for this purpose because they are inclined to apply the rules of the private law with which they work in the ordinary courts rather than the public law rules evolved for the administrative system.

The competence of the administrative tribunals extends to any subject matter that may be brought before them,[82] since they are courts of general jurisdiction. Their jurisdiction is limited, however, with regard to the parties whose disputes they may consider. Litigation before the administrative tribunals must involve the rights or obligations of one of the administrative persons (*personnes administratives*)—the state, communes, departments, public establishments[83] or professional orders.[84]

Appeal and Review

Decisions of the administrative tribunals are open to appeal to the Council of State.[85] That body's place at the summit of the administrative system invites comparison with the Court of Cassation, which

[80] Law of July 22, 1889; Decree of Sept. 30, 1953. There are twenty-four in France, three in Algeria, and one each in Martinique, Guadeloupe, Réunion and Guiana.

[81] In Paris the court has one president, five section presidents, twenty-five councillors and ten government commissioners. The role of a commissioner (*commissaire*) is similar to that played by the public ministry before the regular judicial courts. See text accompanying notes 114-16 *infra*; note 118 *infra*.

[82] Except for those subject matters for which the special *juridictions d'exception* have been created. See notes 74-79 *supra* and accompanying text.

[83] *E.g.*, schools, chambers of commerce, welfare agencies, National Office of Navigation, *l'Électricité de France*.

[84] *E.g.*, The Order of Advocates, The Order of Medical Doctors, The Order of Midwives, The Order of Architects.

Not all litigation involving these various parties goes to the administrative tribunals, only that which involves them as administrative (public) organs. For example, where a prefect is acting as guardian of the property of a minor who is a ward of the state, his duties are prescribed by the civil code, and any litigation growing out of them are private law disputes and must be taken before the civil courts.

[85] Laws of May 24, 1872 and Dec. 18, 1940; Ordonnance of July 31, 1945; Decrees of Dec. 12, 1950, Nov. 19, 1955 and Dec. 27, 1956.

we find at the top of the ordinary judicial system. In fact, the Council of State has much broader powers than has the Court of Cassation, even in its judicial duties. The Council's broader jurisdiction is evident from its power to hear appeals from the administrative tribunals and their equivalents in the overseas territories. It reviews final decisions of administrative commissions and courts just as the Court of Cassation reviews decisions of the judicial tribunals.[86] And in addition to its judicial functions the Council of State has the position indicated by its name—it is an advisory council to the government.[87]

The Council of State has a size and structure as formidable as its varying duties. There are one hundred sixty-six members in all, not counting its titular president, the President of France.[88] There are fifty-eight auditors[89] who read records and prepare reports for the seniors. Next in rank above the auditors are fifty-one masters of requests,[90] then fifty-one councillors of state in regular service.[91] Filling the complement are five section presidents and one vice-president. Provision has been made for renewable one-year appointments for twelve additional councillors (*conseillers en service extraordinaire*) to help keep the Council from falling behind in its work.

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[86] Until the new reform provisions the *Conseil supérieur de la magistrature,* see note 110 *infra* and accompanying text, was, in effect, simply the *Conseil d'état* sitting in another capacity. This had the interesting result of having the judges of the Court of Cassation subject to review by the *Conseil d'état.*

[87] Created by Napoleon in 1799 (Constitution of 22 Frimaire an VIII) as a sort of privy council, it was to work on the preparation of the civil code and also to serve as legal advisor. In the latter capacity it was called upon to recommend to the First Consul the action to be taken by him, as chief of state, on claims for redress from official action. From this beginning the present system of administrative tribunals has grown. While the fortunes of the Council of State have not been uniformly good in all periods, it has in general become increasingly important over the years. An excellent demonstration of its current prestige is the provision that some legislative pronouncements cannot be validly issued without the prior advice of the Council of State. CONST. arts. 37-39, 92 (1958).

[88] Or the Minister of Justice as his deputy.

[89] *Auditeurs.* The auditorship was created as an apprenticeship during which candidates for the bench were to "listen and learn," but work was soon found for them.

[90] *Maîtres de requêtes.*

[91] The principal source of judges for the *Conseil d'état* is the National School of Administration (*Ecole nationale de l'administration*). That school was created in 1945, Ordonnance and Decrees of Oct. 9, 1945, to train candidates for the civil service. Students are admitted by competitive examination and must be university graduates unless they already are employed in the government. The lowest ranking members of the *Conseil d'état,* the *auditeurs,* are chosen by competitive examination from among the school's graduates. Three-fourths of the appointments to the next higher grade, *maître de requêtes,* must be chosen from among the auditors. Two-thirds of the councillors, the highest ranking members, must be chosen from among the masters of requests. Most of the members of the *Conseil d'état* are therefore career members holding seats from the time of their graduation from the civil service school until retirement age. The provision permitting appointments of members from outside the ranks at each level above the first enables the government to add to the bench particularly talented men who have not chosen administration as their initial careers. These men are often chosen from the higher levels of the executive departments.

The litigation section of the Council of State is composed of a president, a deputy president, at least twenty-three councillors, seven councillors from administrative sections of the Council and enough auditors and masters of requests to fill the positions of government commissioners [92] and *rapporteurs*.[93] The section is divided into eleven sub-sections with three or four members each. These sections divide the work, some deciding cases and others conducting preliminary hearings (as *organes d'instruction*). For very important cases there is provision for a plenary assembly consisting of the vice-president of the Council of State, the president and deputy of the litigation section, the presidents of the sub-sections, four councillors elected from the administrative sections, and a *rapporteur*. The largest part of the Council's judicial business is made up of appeals from the administrative tribunals, though, as noted above, it also serves as a court of review. In addition, it has original jurisdiction in some cases: reserved to it are challenges to decisions of the President of France or of the Council of Ministers and the invalidation of decrees as unconstitutional or contrary to law.[94]

The Conflicts Court

Given two systems of courts, both of which have general subject-matter jurisdiction but nonetheless limited competence, there are cases where very difficult jurisdictional questions can arise. If a man should file his claim in a civil court and have it dismissed for want of jurisdiction, then file in the administrative court only to be dismissed again for the same reason, what can he do next? If a man has a claim against a local agency and attempts to invoke the jurisdiction of a civil court where he believes he will be more sympathetically treated, what can the agency do to get the case to an administrative court, where *it* expects greater fairness? The difficulty is compounded inasmuch as the ques-

92 The function of the commissioners, who appear before the *Conseil d'état* and the administrative tribunals, is similar to that of the public ministry (*le parquet*) for the ordinary courts. See notes 114-16 *infra*.

93 See note 98 *infra*.

94 A controversy presenting as its principal question the invalidity of a decree or act of a governmental officer on the ground that it is in *excès de pouvoir* is within the original jurisdiction of the *Conseil d'état* and must be brought there whether it is initiated by a private person or a government official. Decree of Sept. 30, 1953, art. 2. If the controversy arises from an alleged invasion of a contract right by the decree that is attacked, the case must be taken in the first instance before an administrative tribunal, which has the power to declare a decree unconstitutional or contrary to law if such a declaration is appropriate to a contract action otherwise properly before it. Soc. anon. des Grands Travaux de Marseille, Conseil d'état, [1955] Dalloz Jurisprudence 579. The *Conseil d'état* has, during most of its history, declined to consider the question of legality of any act of the Parliament. Examination of the constitutionality of proposed legislation is reserved to the *Conseil Constitutionnel* by title VII of the 1958 Constitution.

tion of conflicting competence cannot be finally decided by any civil court, even the Court of Cassation.[95] To solve these problems there is in France a most extraordinary court, actually more remarkable for what it is not than for what it is.

The Conflicts Court (*Tribunal des conflits*) [96] is one of the strongest benches in France. Yet it is almost never heard of outside professional circles; it hears fewer cases than any other court (though it has existed since 1848), it decided no case on the merits until 1933 and even now only rarely does so, and it is absolutely prohibited from arriving at an independent interpretation of the law governing the merits of a case. Its sole purpose is to keep the two judicial systems from trenching on each other's territory.

Because the Conflicts Court hears so few cases, no separate personnel has been established for it. The Court consists of three councillors from the Court of Cassation and three councillors from the Council of State, elected from their respective Courts for three-year terms. These six men in turn elect two more, usually one councillor each from the Court of Cassation and the Council of State. The president, who casts the tie-breaking vote,[97] is the Minister of Justice. Attached to the Court are public counsel (*ministère public*), two of whom are masters of requests in the Council of State and two of whom are advocates general (*avocats généraux*) before the Court of Cassation. These men serve more as additional *rapporteurs* [98] to the Court than as counsel as they are found with the other courts.[99] The practice has grown up that when the *rapporteur* is from one system, judicial or administrative, the counsel who reports on the case is from the other.

The usual way for a case to be brought to the Conflicts Court is for the prefect of the department concerned to file with the civil court that has taken the case a petition requesting that court to renounce its jurisdiction (*déclinatoire de compétence*) on grounds that jurisdiction properly belongs to the administrative system. If the court does so, there is no conflict; the plaintiff must take his case to the administrative tribunal. Should the court deny the prefect's petition,[100] the prefect must, if he chooses to pursue the matter, issue a decree setting

[95] See note 5 *supra*.

[96] Laws of May 24, 1872 and April 20, 1932.

[97] This has been necessary only six times since 1872.

[98] A *rapporteur* is the councillor assigned to give special attention to the case and report on it to his fellow judges. This is a practice of most of the collegiate courts in France.

[99] Regarding the role of public counsel before the regular judicial courts and the role of government commissioners before the administrative tribunals, see text accompanying notes 114-16 *infra*.

[100] The trial court should suspend the trial for fifteen days to give the prefect time for his next step.

out the conflict, which has the effect of suspending the civil court's jurisdiction to enter a final judgment until the Conflicts Court has ruled on the question. This decree serves to vest jurisdiction of the conflict in the Conflicts Court. That Court must decide the question within three months;[101] if the civil court has not received the decision of the Conflicts Court within four months it may proceed with the case as though a decision in favor of its jurisdiction had been rendered.

If a petitioner with the same claim against the same defendant, in the same capacity, based on the same facts and law is turned away from each system of courts on the theory that the other has jurisdiction, he too may gain help from the Conflicts Court. He then petitions that Court to reverse (invalidate) one of the decisions refusing to exercise jurisdiction. The court whose decision is invalidated must take the case.

The third type of case that can be taken before the Conflicts Court is the only one in which that Court has power to decide a case on the merits. At approximately seven in the evening of September 13, 1922, two automobiles collided at an intersection of national highways numbered 88 and 63. One was a Ford motor car driven by a M. Bornon and the other was a Panhard truck, a government vehicle, operated by military personnel. Senator Rosay (or Rozay), a passenger in the Ford, was badly injured. The Senator filed his claim for damages in the Council of State.[102] That Court acknowledged its jurisdiction but decided that since the civilian driver was at fault[103] it could not make an award. In the civil courts the Senator was told that the military driver was the culprit[104] and that, therefore, no binding judgment could be entered except to relieve M. Bornon from liability. This litigation took until December 1926, and Senator Rosay had nothing for his pains but attorneys' fees. In 1932 the legislature, "astonished that in our day there can still be claims for which no judge can be found,"[105] acted to correct this case. The Law of April 20, 1932 (retroactive to April 1922) gave one in Senator Rosay's position the right within two months

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[101] The decisions open to the Court are: (1) that the conflict procedure was not regular in form and that therefore it has no jurisdiction; (2) that it is not appropriate to decide the question since the plaintiff below has abandoned his case; (3) that the civil court is competent and that therefore the *arrêté de conflit* should be invalidated; (4) that the civil court is not competent and that therefore the *arrêté de conflit* should be affirmed.

[102] Until 1953 the administrative tribunals—and the *conseils de préfecture* that preceded them—had no general jurisdiction.

[103] He turned too close to the embankment, swerved, and was on the wrong side of the road.

[104] He was going too fast, failed to signal his coming, and failed to give the right of way to the vehicle on his right.

[105] Note of René Martin, [1932] Dalloz Recueil périodique et critique, pt. 4, p. 273.

after the decisions of the courts of first impression became final (or six months after the effective date of the law) to petition the Conflicts Court for redress. That Court then had jurisdiction to decide the case on the merits. The Court would combine the two records below, gather more information if it thought it was needed, and decide the dispute as among all the parties.[106] In 1957 the regular courts were given jurisdiction over automobile accident cases involving official vehicles.[107] As this was the most fruitful source of litigation taken before the Conflicts Court under the law of 1932, that body of cases will be reduced for the future, but, since it was not limited to automobile cases, the jurisdiction has not itself been abolished.

Decisions of the Conflicts Court have an effect of res judicata and are not subject to appeal or review.

THE MAGISTRATES

Judges

Since the days of the monarchy the group of men qualified as magistrates has been divided into two groups according to their functions. The magistrates of the bench (*de siége*) fill the positions of judges in the regular courts.[108] They are promised independence from the government of the day by the Constitution,[109] and the High Council of the Judiciary (*Conseil supérieur de la magistrature*) has been created[110] to ensure that independence. The council, with its full membership,[111] meets at the call of the President of France to advise on promotions and appointments among the judiciary.[112] With the political members excluded,[113] the council sits as a court to decide upon disciplinary action against judges.

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106 In the Rosay case, the Court ordered that the damages, including the costs of all the fruitless litigation, be paid half and half by the government and M. Bornon.

107 Law 57-1424 of Dec. 31, 1957.

108 *Tribunaux de première instance, cour d'appel, Cour de cassation.*

109 CONST. art. 64.

110 CONST. arts. 64-65; Ordonnance 58-1271 of Dec. 22, 1958.

111 The President of France, president; the Minister of Justice, vice president; three members of the Court of Cassation, one of whom must be an advocate general; three judges from the courts of appeal or lower courts; one councillor of state; two persons not belonging to the magistrature and not public officials or practicing advocates. Ordonnance 58-1271, art. 1 of Dec. 22, 1958.

112 Magistrates, both those who sit as judges (*de siége*) and those who are members of the parquet (*debout*), are appointed from among law graduates who have successfully passed a competitive examination. Once appointed these men all become members of the magistracy, a civil service. Provision is made, in addition, for appointment of men from high executive or administrative office and law faculties who have the required training in law. Candidates appointed after examination start at the lowest courts and progress up the hierarchy by promotion. Some of the highest ranking positions are filled directly by presidential appointment. Ordonnance 58-1270, and Decree 58-1277, both of Dec. 22, 1958.

113 When only the judicial members are sitting, they meet at the chambers of the Court of Cassation and are presided over by the president of that Court.

The Parquet

The other branch of the magistracy does not enjoy so insulated a position. Subject to more political control, though they may not be appointed or dismissed by the government except through procedures hedged with safeguards,[114] they serve a function quite unknown to the common law where the outcome of litigation is left entirely to the two adverse parties. In France there has been added a third voice, that of the public interest. Attached to all but the minor courts[115] are trained counsel whose duty it is to represent the law and the people; these men constitute the public ministry (*ministère public*, often referred to as the *parquet*).

In criminal cases the public ministry serves a dual role that seems at first sight to destroy the reality of their service as a third party. The public ministry are officers of the state and, as such, are directly involved in the investigation and prosecution of all criminal cases before the court to which they are attached. Yet it appears in practice, as it is intended in theory, that the public ministry is able to retain a large measure of impartiality even though it is the agent of prosecution.[116] The *ministère public* is a hierarchy headed by the Minister of Justice and the members of that hierarchy are subject to the orders of their superiors. The most unique aspect of this position, however, and the mechanism through which the third party in fact enters criminal litigation, is the limit that has been assigned to authority from above. The public minister must brief and submit to the court in writing the position of his superiors, but when it comes time for his oral presentation he is free to present any position that he feels, in good conscience, is the correct one. The French have a phrase that very aptly describes the case: *la plume est serve, la parole est libre.*

The public ministry is represented before the courts of primary jurisdiction by a procurer of the Republic and his deputies, before the courts of appeal by a procurer general and his deputies, and before the Court of Cassation by the Procurer General to the Court of Cassation and two advocates general (*avocats généraux*) for each chamber or section.

The Administrative Tribunals

Councillors of the administrative tribunals outside Paris are divided into two civil service ranks or classes. The second class is se-

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[114] See note 112 *supra.*

[115] No representative of the *ministère public* is regularly assigned to the *tribunaux d'instance* or various *tribunaux d'exception.*

[116] It should be noted here that the same representative of the *parquet* who participated in making the record before the examining magistrate does not participate at the trial.

lected from among graduates of the National School of Administration (*École nationale d'administration*) who have been admitted to practice before the litigation bar of the Council of State. Three-fourths of the councillors of the first class are chosen from the councillors of the second class. The remaining one-fourth of the posts are filled by the government as it chooses.[117] Three-fourths of the posts of president of administrative tribunals and councillors of the tribunal of Paris must be chosen from councillors of the first class from outside Paris. The remaining one-fourth are chosen by the government as it wills. The president of the administrative tribunal of Paris may be chosen from section presidents of that court or from members of the Council of State.

Attached to the administrative courts there are government commissioners who serve there the function of the public ministry.[118] These men, though, are appointees of the administrative branch of government; they are not members of the magistracy and have a different course of training and different procedures for appointment and promotion.[119] They are not, of course, assured independence since they are a part of the administration. In fact, however, they are probably subject to no more interference than are their counterparts in the ordinary judicial system. The dual court system has worked as satisfactorily as it has largely because of an absence of political meddling.

[117] The government is not, however, completely free. It must comply with certain requirements prescribed for the public administration under the scheme detailed in Decree 53-936 of Sept. 30, 1953 and modified in Decree 54-599 of June 11, 1954.

[118] There is no separately organized *parquet* for the administrative system. The duties of the public ministry are fulfilled by regular members of the administrative tribunals and Council of State who serve temporarily as government commissioners.

[119] Ordonnance and Decree of July 31, 1945; Decrees of Sept. 30, 1953 and June 11, 1954.