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Investigative Judges as a Legal Transplant: Finnish Nineteenth-Century Criminal Procedure in Comparative Perspective

*Juiz instrutor como transplante jurídico: o processo penal
finlandês do século XIX em perspectiva comparada*

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ABSTRACT: After spreading widely in both Europe and Latin America in the early nineteenth century, the institution of the investigative judge began to gradually lose significance during the second half of the nineteenth century. This was the case both in France and in Germany. The main reason for the loss of significance was the development of criminalistics, professional criminal police and prosecutorial services. The investigative function that, following the old inquisitorial tradition, had fallen on the investigative judge at the beginning of the century, was no longer suited to the role of a judge. Instead, it made more sense to entrust criminal investigation to specialized professionals. When Finnish experts on criminal procedure set out to modernize the criminal law of the country in the 1890s, the investigative magistrate no longer seemed an interesting idea, and it did not seem reasonable to invest scarce professional resources in an institution that was losing significance. Instead, the legal resources would be better allocated to a professional corps of public prosecutors.

KEYWORDS: *Investigative judge; Criminal prosecution; Comparative legal history.*

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RESUMO: Depois de se difundir amplamente tanto na Europa quanto na América Latina no início do século XIX, a instituição do juiz instrutor começou gradualmente a perder importância durante a segunda metade do século XIX. Foi o que aconteceu tanto na França quanto na Alemanha. A principal razão para a perda de importância foi o desenvolvimento da criminalística, e a profissionalização da polícia criminal profissional e dos serviços de persecução. A função investigativa que, na esteira de uma antiga tradição inquisitorial, incumbia ao juiz instrutor no começo do século já não se encaixava no papel de um juiz. Em vez disso, fazia mais sentido confiar a investigação criminal a profissionais especializados. Quando os especialistas finlandeses em processo penal se empenharam na modernização do direito penal do país nos anos 1890, o juiz instrutor já não parecia uma boa ideia, de modo que não parecia razoável investir escassos recursos profissionais em uma instituição que estava perdendo importância. Em vez disso, os recursos seriam mais bem alocados em um corpo profissional de promotores públicos.

PALAVRAS-CHAVE: Juiz de instrução; Processo criminal; História do direito comparada.

SUMÁRIO: Introduction; 1. From the *ancien régime* to the nineteenth century; 2. The late nineteenth century: scientific criminal investigations and the modern police; 3. Finland; Conclusions; References.

INTRODUCTION

The investigative judge² was, according to Honoré Balzac, the most powerful man in France.³ Whether this was true or an exaggeration, the French author's claim nevertheless makes it clear that the examining magistrate was a central figure in French nineteenth-century criminal

² This is the translation of *juge d'instruction* used in this article, "examining" or "investigating magistrate" would be equally acceptable.

³ "Aucune puissance humaine, ni le roi, ni le garde des sceaux, ni le premier ministre ne peuvent empiéter sur le pouvoir d'un juge d'instruction, rien ne l'arrête, rien ne le commande. C'est un souverain soumis uniquement à sa conscience et à la loi." BALZAC, Honoré. *Splendeur et misères des courtisanes*. In: *Oeuvres complètes*. Paris: Plon Frères, 1846. p. 21.

procedure. As a result of the Napoleonic wars and the authority of French legal culture, many other countries adopted the institution of the investigative judge. These included countries with deep roots in the inquisitorial criminal procedure such as Belgium, the Netherlands, Luxemburg, Italy, Spain, and the entire area of the former German Empire.⁴ As part of Alexander II's judicial reform of the 1860s, the investigative judge (under the title of "judicial investigator," *sudebnyi sledovatel*) was introduced in Russia as well.⁵ Although the functions and powers of the investigative judge changed over the years, the institution remained in these regions, including Russia, where it has persisted through Soviet times until the present. Other countries with less or no tradition in inquisitorial procedure usually did not adopt the use of investigative judges. Examples include England and the other common law countries which had no history in the continental inquisitorial procedure, as well as the Nordic countries, which shared some features of the inquisitorial procedure but had never fully incorporated its principles into their criminal procedures.

Whether or not a country adopted the use of the investigative judge, however, cannot be fully explained by path-dependence or tradition alone. During the nineteenth century, many legal transplantations migrated across Europe, which makes it difficult to understand the investigative judge only in terms of legal traditions or modes of criminal procedure. Criminal procedure is always a combination of many factors, which make themselves understandable only in relation to each other. The

⁴ See ESMEIN, Adhémar. *A History of Continental Criminal Procedure, with Special Reference to France*. Boston: Little, Brown & Company, 1913. p.570-606. Later, the investigative magistrate was maintained in national codes, such as the German Codes of Judicial Organization and Criminal Procedure (1877), the Italian Code of Criminal Procedure (1865), and the Spanish Criminal Procedure Acts (1872 and 1882). See also JUNG, Heike; LEBLOIS-HAPPE; WITZ Claude Witz (eds.). *200 Jahre Code d'instruction criminelle - Le Bicentenaire du Code d'instruction criminelle*. Baden-Baden: Nomos, 2010; MAS-FERRER, Aniceto (ed.). *The Western Codification of Criminal Law: Revision of the Myth of its Predominant French Influence*. Cham: Springer, 2018.

⁵ On the Russian reform, see BHAT, Girish N. The Consensual Dimension of Late Imperial Russian Criminal Procedure: The Example of Trial by Jury. In: SOLOMON, Peter H. Jr. (ed.). *Reforming Justice in Russia (1864-1996)*. New York: Routledge, 2015. p. 63. A better-known part of the reform was the introduction of the trial jury.

investigative judge needs to be viewed as part of a package that includes the trial court and the prosecutor. The emerging police force, which was on its way to professionalization in the nineteenth century, is also a key part of the same machinery.

The question that I will ask in this paper is why the investigative judge never became part of the Finnish procedure. The problem, as I will claim, cannot be solved without looking at the Finnish nineteenth-century situation in a European context. In other words, to work out an explanation we need comparative legal history. This is often – I would almost dare to say always – the case when trying to understand why legal institutions are adopted or not adopted.⁶ Before we turn to that, however, a few general remarks on the way I understand the history of criminal justice would be appropriate. Criminal justice, first and self-evidently, tends to connect to politics and social history. Second, professionalization affects criminal justice. Third, as always when social and legal institutions are involved, criminal justice is path-dependent: past solutions and legal traditions limit the extent to which a particular legal order or institution can change. Path-dependence also sets limits on the transferences from other legal systems that are likely to be rejected or adopted, and how they change if adopted. And fourth, criminal justice systems consist of functions which necessarily affect each other: a change in one of them is likely to cause changes in the others. Criminal justice systems typically include functions of pretrial investigation, prosecution, and adjudication. The responsibility for these functions may or may not belong to separate institutions.

In short, the argument is as follows. In 1808, the Napoleonic Code of Criminal Procedure introduced the investigative judge in France. The French procedure thus became a combination of the continental inquisitorial tradition, which the investigative judge continued, and the English adversarial procedure, which the jury, transplanted from English

⁶ On comparative legal history, see MORETEAU, Olivier; MASFERRER, Aniceto; MODÉER, Kjell Å. (eds.). *Comparative Legal History*. London: Edward Elgar Publishing, 2019; PIHLAJAMÄKI, Heikki. Merging Comparative Law and Legal History: Towards an Integrated Discipline. *American Journal of Comparative Law*, v. 66, n. 4, 2018, p. 733-750, <https://doi.org/10.1093/ajcl/avy045>.

law, represented.⁷ After spreading widely in both Europe and Latin America, the institution of the investigative judge began to gradually lose significance during the second half of the nineteenth century. This was the case both in France and in Germany, which is particularly important for this article because of the influence that the German *Rechtswissenschaft* exerted globally, and not the least in the Nordic countries. The main reason for this loss of significance was, as I hope to show, the development of criminalistics, professional criminal police and prosecutorial services. The investigative function that, following the old inquisitorial tradition, had naturally fallen on the investigative judge at the beginning of the century, was no longer suited to the role of a judge. Instead, it made more sense to entrust criminal investigation to specialized professionals. When Finnish experts on criminal procedure set out to modernize the criminal law of the country in the 1890s, the investigative magistrate no longer seemed an interesting idea. Also, the criminal police had already started taking charge of the field in Finland. Although part of the continental tradition, albeit rather loosely, and under German legal-cultural influence for centuries, Sweden (which Finland had been part of until 1809) and the other Nordic countries had never fully implemented the inquisitorial criminal procedure. These were countries with a heavy lay dominance and few legal professionals in their judiciary. In these circumstances, it did not seem reasonable to invest scarce professional resources in an institution that was losing significance. Instead, the legal resources would be better allocated to a professional corps of public prosecutors.

The article first establishes a comparative context in which some of the main features of the French, English, and German histories of criminal procedure are sketched (Paragraph 1). I will then move to the establishment of modern police forces in the nineteenth century (Paragraph 2), and finally to the Finnish late-nineteenth century discussions on the investigative judge (Paragraph 3).

⁷ See PLOSCOWE, Morris. The Development of Present-Day Criminal Procedures in Europe and America. *Harvard Law Review*, v. 48, 1935, p. 460; JIMENO-BULNES, Mar. American Criminal Procedure in a European Context. *Cardozo Journal of International and Comparative Law*, v. 21, 2013, p. 424.

1. FROM THE ANCIEN RÉGIME TO THE NINETEENTH CENTURY

According to the French Ordonnance of 1670, the investigation of crime (*instruction*) was entrusted to a *lieutenant criminel*, who was also a judge in criminal affairs. The examining phase thus belonged to the responsibilities of the same judge that also adjudicated the case. This was one of the hallmarks of the *ancien régime* inquisitorial procedure, and became one of the main objects of revolutionary critique.⁸

In search of alternative models, the critics turned to the adversarial model of the common law countries, which had become known through William Blackstone's writings in France, and to the idea of justices of the peace, already adopted in the United Provinces.⁹ After the Revolution, the criminal procedure largely followed the same principles as adversarial procedure in England and the United States. Both the jury of accusation and trial jury were introduced. The examining phase - public, oral, and contradictory - took place in front of the jury of accusation. However, in practice either justices of the peace or the directors of the jury of accusation often conducted their own investigations before the trial.¹⁰

After the revolutionary decade (1789-1799) and the Consulate, the tide turned back from the adversarial to the inquisitorial procedure, in that the office of *juge d'instruction* was created in the *Code d'instruction criminelle* of 1808. The French investigative judge now functionally replaced the jury of accusation, and his tasks were clearly inquisitorial by nature. Investigations were not conducted publicly. The investigative judge decided what witnesses or experts were to be heard, and also conducted

⁸ MOUSNIER, Roland. *The Institutions of France under the Absolute Monarchy, 1598-1789: Vol II, The Organs of State and Society*. Chicago: The University of Chicago Press, 1984. p. 319; BLOT-MACCAGNAN, Stephanie. CALLEMEIN, Gwenaëlle (eds.). *Du lieutenant criminel au juge d'instruction*. Rennes: Presses Universitaires de Rennes, 2018; GARNOT, Benoît. *Le lieutenant criminel au XVIIIe siècle, ancêtre du juge d'instruction*. In CLÈRE, Jean-Jacques; FARCY, Jean-Claude (eds.). *Le juge d'instruction: Approches historiques*. Dijon: Éditions Universitaires de Dijon, 2010. p. 13-20.

⁹ BERGER, Emmanuel Berger. *Les origines du juge d'instruction sous la Révolution, le Consulat et l'Empire*. In: CLÈRE, Jean-Jacques; FARCY, Jean-Claude (eds.). *Le juge d'instruction: Approches historiques*. Dijon: Éditions Universitaires de Dijon, 2010. p. 21.

¹⁰ BERGER. *Les origines* (op. cit.), p. 40-41.

the hearing. The investigation produced the key written document, the file (*dossier*), which formed the basis for the subsequent trial. The investigation was also not contradictory, in the sense that the parties or their lawyers would have had the chance for cross-examination.¹¹

Napoleon's *Code d'instruction criminelle* (1808) created not only the investigative judge, but also the public prosecutor (*procureur*) in its modern form.¹² At first, the *procureur* was clearly subordinate to the investigative judge. With some minor exceptions excluded, the prosecutor could not investigate, nor could he decide who was to be the prosecutor for a case – the investigative magistrate made these decisions. With the French conquests and the reception of French legal scholarship the Napoleonic Code spread to Belgium, the Netherlands, Luxemburg, Switzerland, Italy, Germany, and Spain. The various systems remained more or less similar even after these regions regained their independence. From the mid-nineteenth century, however, the powers of the investigative judge began to slowly diminish. In practice, the use of police forces formally supervised by public prosecutors led to an increase in direct summoning proceedings following a preliminary investigation (*enquête préliminaire*). The prosecutor still needed the investigative judge to decide on pretrial coercive measures such as search warrants and pretrial detentions. In 1863 the police were given powers to decide on search warrants, and the prosecutor to decide on short pre-trial detentions in flagrant situations (*flagrant délit*). From that moment on, the amount of cases remitted to investigative judges has been steadily declining.¹³

Similarly in Germany, the public prosecutor (*Staatsanwalt*) in its modern form was created in the mid-nineteenth century. In the

¹¹ See FARCY, Jean-Claude. Quel juge d'instruction? In : CLÈRE, Jean-Jacques; FARCY, Jean-Claude (eds.). *Le juge d'instruction: Approches historiques*. Dijon: Éditions Universitaires de Dijon, 2010, p. 199-204. This, however, is not strange given the fact that cross-examination was only just at that time finding its way into the English criminal procedure.

¹² Both institutions had old roots, but space does not permit discussing them here.

¹³ GILLIÉRON, Gwladys. *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany*. Cham: Springer, 2014. p. 52-53; ELSNER, Beatrix; AUBUSSON DE CAVARLAY, Bruno; SMIT, Paul. The Examining Magistrate's Function and Involvement in Examining Matters. *Journal of Criminal Policy*, v. 14, 2008, p. 230-231.

inquisitorial procedure, the local court officials (*Schöffen*) had carried out the investigation, while the judges in the nearest central court took care of the prosecution (insofar as we can talk of this phase separately in the inquisitorial procedure) and adjudication. While investigations now increasingly became the domain of police, prosecutions were entrusted to the public prosecutor. However, the separation of powers between the prosecutor and the “German version of the *juge d’instruction* (*Untersuchungsrichter*) remained incomplete throughout the 19th and the greater part of the 20th century,” as Thomas Weigand puts it. The abolition of the investigative judge in 1974 finally made the public prosecutor “the undisputed master of the pretrial process”.¹⁴

In English, important changes occurred in the sixteenth century. According to the Marian Committal Statutes (1555), the local Justice of the Peace (JP) played a key role in criminal investigations. He had the power to issue search and arrest warrants, which local constables then executed. When the accuser brought the accused to the JP, he also had the right to jail the accused. The JP was required to question the parties about the charges before jailing the accused, but the JP was not required to examine the case any further, for instance to look for witnesses and hear them, although some JPs would carry out more thorough investigations than the law required. It was the JP’s duty to record the statements of the accused, the accuser, and any witnesses, and these documents (the pretrial depositions) were then used at the trial, first at the grand jury (which functioned to filter out the most outrageous or unfounded private accusations) and then at the petty jury. The JP was required, furthermore, to bind the victim and the accusing witness to appear in court, as well as witnesses against the accused, and the JP could also testify himself.¹⁵

The JPs gathered evidence only against the accused, not for him, and thus thoroughly lacked any objectivity. Although the system was devised to offer public assistance to private accusers (who had no

¹⁴ WEIGAND, Thomas. The Prosecution Service in the German Administration of Criminal Justice. In: TAK, P.J.P. (ed). *Tasks and Powers of the Prosecution Services in the EU Member States*, vol 1. Nijmegen: Wolf Legal Publishers, 2005. p. 203-222.

¹⁵ LANGBEIN, John. *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press, 2005, p. 40-43.

choice but to prosecute in serious criminal cases), it was not particularly favourable for them either. The prosecuting party was compelled to avail himself of the secretarial services of the JP or the trial court to have a bill of indictment drafted, and was charged for this. Compared to the continental system of public prosecution, a heavy prosecutorial bias characterized the English system, which remained this way until the transformation of the eighteenth and early nineteenth century.¹⁶

From a comparative point of view, it is interesting to see how England steered through the challenges of a modernizing society. Despite the JP's role, criminal prosecution in eighteenth-century England remained almost entirely in private hands. The victim or their representative had to take their case to court and bear the costs of the trial. It was the victim's responsibility to bring the witnesses to the trial and to demonstrate his case. Towards the end of the eighteenth century some prosecuting witnesses started to hire lawyers to assist them with the prosecution, but prosecution remained primarily the victim's responsibility. This was not changed by the fact that justices of the peace existed as a mediating organ between the parties and the trial court. The justice of the peace took the depositions of the parties and their witnesses and made sure that the prosecuting party and the accused appeared at a suitable court session. However, the justice of the peace usually remained passive, and left the criminal investigation entirely to the prosecuting party.¹⁷

At trial, the judge routinely questioned the accused, who appeared without legal counsel. This "accused speaks" trial, or the altercation process, in which the accuser and the accused took turns speaking before the case was left for the jury to decide, started to change in the 1730s. The fundamental changes took place through judicial practice, and they started with the lawyerisation of the prosecution. Unlike the defence, the prosecution had never been denied the use of counsel, although this was practically never done. The only exception were treason trials, which were rare. According to Langbein, the prosecution process first started to change in the London area, where solicitors began to conduct

¹⁶ *Ibid.*, p. 43-44.

¹⁷ BEATTIE, J.M. *Crime and the Courts in England, 1660-1800*. Oxford: Oxford University Press, 1986, p. 35-36.

investigations themselves, to organize prosecutions on behalf of both public agencies (such as the Mint) and individuals, and to hire legal counsel for important trials. Gradually, judges began to allow counsel on the prosecutorial side, and then also to assist the accused.¹⁸

The pretrial process, with its increasingly effective evidence-gathering, was now also increasingly in the hands of lawyers, and this entailed risks that the judges soon addressed. They became neutral umpires, applying rules of evidence that were developed to safeguard the jury from undue influence by legal counsel. Evidence rules served as a filter between legal counsel and the jury, and determined which evidence was admissible. These huge changes in English criminal procedure, however, had little impact on the way crimes were investigated. The evaluation of evidence had always been free in English law. Circumstantial evidence, the main product of modern criminalistics, had always been admissible and continued to be so. The examining role of the JP, thus, was first replaced functionally by that of legal counsel, as lawyers now assumed an active role in examining criminal cases as counsel to both the prosecution and the accused. Gradually, lawyers could also expect help from professional police forces. These were established, first in London and then elsewhere, from the 1820s onwards.¹⁹ It is probably reasonable to call this the beginnings of a modern criminal justice system in England.

2. THE LATE NINETEENTH CENTURY: SCIENTIFIC CRIMINAL INVESTIGATIONS AND THE MODERN POLICE

When did police forces emerge in Europe? Italian medieval city-states already had functionaries in charge of pursuing and apprehending criminal suspects, and since the seventeenth century police officials called *sbirri*, ill-reputed for their corruption and brutality, patrolled the countryside.²⁰ In the eighteenth century, German territories began to establish bodies of police officers. A *Polizei-Hofkommission* (Police Head

¹⁸ LANGBEIN. *The Origins* (op. cit.), p. 111-147, 167-177.

¹⁹ BEATTIE. *Crime and the Courts* (op. cit.), p. 72.

²⁰ See HUGHES, Steven C. Fear and Loathing in Bologna and Rome: The Papal Police in Perspective. *Journal of Social History*, v. 21, n. 1, 1987, p. 97-116.

Commission) under the Austrian central government and the *Kommission für Sicherheits-, Armen-, Verpflegs- und Schubsachen* (Commission for Security, Poor Relief, Provisions and Deportations) were, amongst other newly erected administrative bodies, in charge of supervising the observance of police regulations.²¹ As for France, the scholarly consensus is roughly as follows. In the sixteenth century, the first police forces were created to supervise beggars and other marginalized groups. Together with the rest of the French state, its police forces were reorganized and centralized during 1660-1680 through the reforms carried out by Colbert. The Colbertian reforms did not, however, modernize the working methods of the police, but only their organization. Instead of patrolling the streets, policemen continued spending most of their working hours on the more lucrative “civil” tasks, such as the redaction of official documents and signing off after deceased persons.²²

In early modern Europe, the term “police” referred not to the body in charge of supervising order but to the large body of rules and regulations that practically all European lawgivers had issued as a matter of routine in order to administer and develop the modern state, and at the same time to maintain the estate society, both in the Old Continent as well as globally in the colonies.²³ Logically, early modern European police forces were mainly in charge of keeping public order and holding up the myriad different kinds of police regulations. Criminal investigations did not belong to their functions. Instead, on the European continent judicial authorities operating under the principles of inquisitorial procedure conducted the criminal investigations. In fact, as A.E. Anton phrased it, “when the procedure took its present form in 1808, it would have been thought absurd to allow it to have been conducted by the *gendarmerie*. [They] often lacked the independence,

²¹ EMSLEY, Clive. *Crime, Police and Penal Policy: European Experiences 1750-1940*. Oxford: Oxford University Press, 2007. p. 62; BERNHARD, Paul P. *From the Enlightenment to the Police State: The Public Life of Johann Anton Pergen*. Chicago: University of Illinois Press, 1991, p. 120.

²² VIDONI, Nicolas. *La Police des Lumières: XVIIe – XVIIIe siècle*. Paris: Perrin, 2018, p. 62-83.

²³ In recent decades, the literature on European police regulations has grown too large to mention even the most important works here.

impartiality, knowledge of the law, and sometimes even the intelligence necessary for the conduct of an *information*".²⁴

In the nineteenth century, the functions of police started to change.²⁵ Already during the first half of the nineteenth century, the Paris police was generally regarded as the world's best in criminal investigation. The mythical Eugène-François Vidocq, an ex-convict, founded the criminal police, the *Sûreté*, in 1812. Vidocq's crime-fighting organization, specialized in undercover operations, was widely regarded the world's best organization for criminal investigations in its time. After the initial period under Vidocq's leadership (which ended in 1827) and the July Revolution of 1830, the *Sûreté* was fully professionalized.²⁶

The *Sûreté*, however, was only a beginning. From the time of the Second Republic, the French police grew both in number and degree of professionalization. The Ministry of the Interior now hired police superintendents (*commissaires de police*), in charge of gathering proof of crimes and misdemeanours and reporting them to the prosecutor (*procureur*), on the basis of their professional abilities, whereas during the Restoration political considerations had ruled paramount. The number of these police superintendents in towns as well that of the rural *gendarmes* increased. The *gendarmes* were considered the most professional police force in France, especially when compared to the less competent *gardes champêtres*.²⁷

The English JPs, who in conjunction with the accusing party were mainly responsible for the investigations in early modern England, lost their leading role to the lawyers who emerged on both sides as counsel during the late eighteenth and early nineteenth centuries. Criminal police,

²⁴ ANTON, A.E. L'instruction criminelle. *American Journal of Comparative Law*, v. 9, n. 1, 1960, p. 442.

²⁵ On the social and professional history of the French police officials, see the articles in KALIFA, Dominique; KARILA-COHEN, Pierre (eds.). *Le commissaire de police au XIX siècle*. Paris: Éditions de la Sorbonne, 2008.

²⁶ STEAD, Philip John. *The Police of France*. New York: MacMillan, 1983, p. 60-62; EMSLEY. *Crime (op. cit.)*, p. 111.

²⁷ DONOVAN, James M. *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries*. Chapel Hill: University of North Carolina Press, 2010, p. 97-98.

although emerging almost simultaneously first in London, and then in other big cities and the countryside, developed somewhat later.²⁸

Similarly, modern police emerged in Germany. In Berlin, for instance, the beginnings of criminal police in its modern form date to the early nineteenth century. It took, however, until the last quarter of the century before criminal police became a clearly separate part of the police organization.²⁹

Professionalization was one of the main trends of nineteenth-century criminal procedure. Whether based on a true rise in crime or not, crime was nevertheless perceived as a true threat to the industrial, increasingly urban societies of the West. To explain the phenomenon of rising crime and to offer a scientific means of controlling it, a new scholarship of criminology developed to meet the need to “fight against criminality”.³⁰

Criminalistics, the science of criminal investigation, is another key term here. Although Vidocq is sometimes regarded as the “father” of criminalistics, the Austrian criminalist Hans Gross (1847-1915) coined the original (German) term. Although crimes have always been investigated, in the middle of the nineteenth century scientific principles began to be systematically applied to the field. Gross’s fundamental work *Handbuch für Untersuchungsrichter als System der Kriminalistik* (1899) [Manual for Investigative Judges as a System of Criminalistics] laid the basis for criminalistics as a recognized field of science. Although based

²⁸ See, for instance STEEDMAN, Carolyn. *Policing in the Victorian Community: the Formation of English Provincial Police Forces, 1856-1880*. London: Routledge, 1984; EMSLEY, Clive. *The English Police: A Political and Social History*. London: Routledge, 1996.

²⁹ See GLORIUS, Dominik. *Im Kampf mit dem Verbrechen: eine Entwicklung der Berliner Kriminalpolizei von 1811 bis 1925 - eine rechtshistorische Betrachtung*. Berlin: Berliner Wissenschafts-Verlag, 2016.

³⁰ For the history of criminology, see BECKER, Peter; WETZELL, Richard F. (eds.). *Criminals and their Scientists: The History of Criminology in International Perspective*. Cambridge: Cambridge University Press, 2006. Imprisonment, now meticulously planned with the help of scientific expertise, took the leading role in the punishment system. This article will not, however, concern itself with the growth of criminology or the prison system. Instead, my emphasis will be on the ways with which the courts proceedings were planned to maximize effective criminal investigation.

on criminology, criminalistics thus became an independent branch of science. As Peter Becker has shown, Hans Gross skilfully utilized the latest findings of psychology and anthropometry to develop the art of examining crimes. Whereas earlier, before the second half of the nineteenth century, investigators had depended primarily on written documents and witnesses as evidence, with the help of modern science the range of possible evidence exploded.³¹

Thus, building on existing knowledge and new scientific methods, the process of criminalistics was now systematically used to identify and classify offenders. By the 1870s and 1880s the police were already steadily taking over criminal investigations in many European countries. In the 1870s, European police organizations started to routinely photograph offenders.³² Anthropometric methods of measuring offenders' body parts were experimented with,³³ and although these experiments had no lasting effect on the detection and identification of criminal offenders, the use of fingerprints did. In 1901 Scotland Yard founded a fingerprint bureau, and in 1902 fingerprints were used for the first time as evidence in a criminal trial.³⁴ Graphology also became part of crime investigations, not to mention forensic medicine, which by the mid-nineteenth century had established itself firmly as an academic discipline.³⁵

³¹ See BECKER, Peter. Objective Distance and Intimate Knowledge: On the Structure of Criminalistic Observation and Description. In: BECKER, Peter; CLARK, W. (eds.). *Little Tools of Knowledge*. Ann Arbor: University of Michigan Press, 2001; BECKER, Peter. Zwischen Tradition und Neubeginn: Hans Gross und die Kriminologie und Kriminalistik der Jahrhundertwende. In: HEUER, G.; GÖTZ VON OLENHUSEN, A. (eds.). *Die Gesetze des Vaters*. Marburg: Literatur Wissenschaft, 2003; BECKER, Peter. Criminological language and prose. In: LEVY, R.; SREBNICK, A.G. (eds.). *Crime and Culture: An Historical Perspective*. Aldershot: Ashgate, 2005, p. 23-36; BECKER, Peter. The Criminologists' Gaze at the Underworld: Toward an Archaeology of Criminological Writing. In: BECKER, Peter; WETZELL, R.F. (eds.). *Criminals and their scientists*. Cambridge: Cambridge University Press, 2006, p. 105-133.

³² JÄGER, Jens. Photography: A Means of Surveillance? Judicial Photography, 1850-1900. *Crime, History & Society*, v. 5, n. 1, 2001, p. 27-51.

³³ EMSLEY, *Crime (op. cit.)*, p. 186-187.

³⁴ See BEAVAN, Colin. *Fingerprints: Murder and the Race to Uncover the Science of Identity*. London: Fourth Estate, 2001.

³⁵ THORNTON, John. Criminalistics – Past, Present, and Future. *Lex and Scientia*, v. 11, 1975, p. 10, 13.

It is worth noting that the development of forensic methods was by no means a solely European enterprise. The best-known example is the Argentine Juan Vucevich, who invented a new method of fingerprinting in the 1890s. The influence of Italian criminological positivism (Cesare Lombroso, Raffaele Garofalo, Luigi Anfosso) arrived early in Argentina, and Vucevich was able to establish contacts with Italian criminologists, and a bit later with other Europeans. By the early years of the twentieth century, Vucevich's fingerprinting system was generally acknowledged to surpass earlier methods.³⁶

The progress in the forensic sciences would have been much less useful without the simultaneous changes in continental laws concerning evidence. In pre-nineteenth century evidence law, or the statutory theory of proof (the so-called Roman canon or *ius commune* law of evidence), criminal convictions depended on "full proof", which consisted of two eyewitnesses or a confession. In practice, the system had not been quite as rigid as this rule suggests for centuries. In the legal practice of most countries, the rule of full proof was only valid for serious crimes, whereas petty crimes could result in convictions even with lesser proof. In the absence of full proof, if the evidence was otherwise sufficient to convince the judge, an "extraordinary" punishment could nevertheless follow. This meant that the accused could be sentenced to a punishment less severe than capital punishment, such as forced labour or extradition. In this way, the statutory theory of proof had been losing importance for centuries, but the final blow was yet to come.³⁷

In the nineteenth century, the statutory theory of proof (which had never been observed in common law) was finally abandoned everywhere in the countries of the continental legal system, and was replaced by the so-called free evaluation of proof (*intime conviction*, *Freie Beweiswürdigung*). In France, it resulted logically from the adoption of the English-inspired jury after the Revolution. During the early nineteenth century, German territories followed suit. With the freer evaluation of evidence, no rigid

³⁶ See GARCÍA FERRARI, Mercedes. El rol de Juan Vucevich en el surgimiento transnacional de tecnologías de identificación biométricas a principios del siglo XX. *Nuevo mundo, mundos nuevos*, 2014.

³⁷ See LANGBEIN, John. *Torture and the Law of Proof: Europe and England in the Ancien Régime*. Chicago: The University of Chicago Press, 1974.

rules applied. The logic here was that jury members lacking legal training were not capable of mastering the rules of evidence. On the other hand, they were jury members precisely because the unspoiled, lay opinion was thought to be equal to – or perhaps even more worthy than – that of a legal professional. Any evidence – regardless of whether it consisted of witness statements, written documents, confessions, or just circumstantial evidence – thus could now amount to proof sufficient for condemnation. The most important result was, of course, that circumstantial evidence alone could now suffice. Because circumstantial evidence now became more important, the methods for obtaining it also developed.³⁸

The modern criminal investigation thus consisted of three elements that went logically together. The modern sciences of criminology, psychology, and anthropometry provided explanations for criminal behaviour, which served as a background for criminal investigators. The new techniques of fingerprinting and photography offered efficient methods of identification and cataloguing offenders, and also for the purposes of examining crimes. The disappearance of the last vestiges of the statutory theory of proof helped to make full use of the new scientific examination methods. On the institutional side, the new system of gathering evidence required specialized personnel, which led to the founding of criminal police agencies all over Europe. In the *ancien régime* system of inquisitorial criminal law, it was fully possible for the court to take care of criminal investigations, gathering the necessary evidentiary documents, summoning the witnesses, and questioning the accused. This worked equally well when the investigative judge stepped into the picture. However, it was no longer thinkable that the judge alone could bear the main responsibility for the investigation when the range of and techniques for evidence gathering multiplied during the latter part of the nineteenth century. Gradually, the modern criminal police took over criminal investigations. In the countries with an investigative judge, interestingly, two independent criminal investigations could take place: one carried out by the investigative judge and the other by the police.³⁹

³⁸ See HIETANIEMI, Tuija. *Totuuden jäljillä: suomalaisen rikospoliisin taival*. Vantaa: Keskusrikospoliisi, 1995, p. 15.

³⁹ JIMENO-BULNES. *American Criminal Procedure* (op. cit.), p. 426.

3. FINLAND

The question of investigative judges was discussed in Finland as well, when the so-called Wrede Committee was planning a wholesale reform of the procedural system at the turn of the century. At that time Finland was part of the Russian Empire, but had kept its own separate legal system from the pre-1809 Swedish period. The committee, led by Professor R.A. Wrede, published a large and thorough reform plan in three volumes in 1901. However, mainly because of a lack of finances, the reform came to nothing, as did all the ensuing reforms in the twentieth century, until many of Wrede's main ideas – a liberal system based on the principles of adversarial procedure – were finally realized in the 1990s.

The idea of modernizing the criminal procedure, following international models, was nevertheless in the air at the turn of the century. In 1895, a group of experts in procedural matters convened in Helsinki to discuss questions posed by Wrede's committee. One of the questions was whether criminal investigation should be entrusted solely to prosecutors (provided they were "competent civil servants"; far from reality at that time) or whether investigations should at least partly be carried out by members of the judiciary – in other words, an investigative judge. Wrede opened the discussion himself with comparative remarks on how prosecutors and judges conducted investigations together in some countries. In some of them (Germany, Austria, and Norway) the prosecutor investigated first, and the judge then continued the process, while in other countries the prosecutor and judge each conducted their own investigations simultaneously (France and Italy). The prosecutor, as described by Wrede, should decide how the investigation would proceed in the big picture, while the investigative judge made decisions on the use of pretrial coercive measures and led the investigation in practical terms. Here, practical concerns and realism took over. Wrede thought that the system was just too complicated for Finland. One would need to have access to, at the same time, prosecutors, investigative judges, and ordinary judges, all with a legal education.⁴⁰ This seemed redundant and over-organized in a country that was only beginning the process of

⁴⁰ *Tidskrift utgifven af Juridiska Föreningen i Finland (JFT)*, 1895, p. 278-279.

organizing a corps of professional advocates, and in which the main bulk of prosecutors would remain non-professionals for decades. According to Wrede, and he was correct here, an important difference between Finland and continental countries was that the Finnish system had never been as inquisitorial as theirs. The professor thought that the rights of the accused did not depend on which officials oversaw them, but rather on the procedures themselves.⁴¹

Wrede's leading idea in the committee work was that the whole procedure should be turned into an adversarial process. He was therefore critical of the fact that continental investigative judges conducted their work inquisitorially. According to Wrede, the only way that investigations could be impartial was if they were adversarial – in which case a separate investigative judge would not be needed at all. His conclusion was, thus, that prosecutors should lead criminal investigations.⁴²

Professor Jaakko Forsman – the leading criminal law expert at the time – also held suspicions about the inquisitorial procedure, and had a clear preference for adversarial procedures. Forsman understood the logic of having an investigative judge, in that the judge would supposedly seem impartial in their dealings with the investigations and the use of coercive measures. However, since he would naturally concentrate mainly on convicting evidence, this would not work in practice in the way some hoped. On the contrary, the accused and the public could easily identify the investigative judge with the prosecutors.⁴³

Two other committee participants, Nybergh and Serlachius, were clearly in favour of installing investigative judges. They were worried that if the committee's idea of not allowing appeals in questions of evidence would be accepted, the fate of the accused would depend on one trial session alone. Therefore, it would be much better to at least ensure that pretrial investigations were handled by a judge.⁴⁴ Nybergh and Serlachius, however, remained in minority.

⁴¹ *Ibid.*, p. 279.

⁴² *Ibid.*, p. 279.

⁴³ *Ibid.*, p. 299-300.

⁴⁴ *Ibid.*, p. 300-301.

Most of the experts thus thought that investigative judges were not needed in Finland. Professor Wrede explained that although “most civilized countries” had now introduced some form of investigative judge, “in our country the circumstances are in many respects so different than those in the big cultural nations, that these institutions cannot be transferred to us without further ado, but must be accommodated to our circumstances.” These circumstances consisted, more than anything, of the lack of legal professionals. Wrede’s committee was already planning to increase the amount of judges in the lower courts, in order to make them collegial courts (instead of the one-judge courts that they were). While at the same time the prosecutors were mostly unlearned in law, and learned advocates were rare, it was thoroughly unrealistic to allocate professional resources to staffing examining judgeships.⁴⁵

In Finnish trials, local juries consisting of laymen (*nämnd*) continued to act as an active source of information, just as they had done for centuries. In addition, however, the broader nineteenth-century social changes brought pressure to modernize the police force, as well and to create a specialized criminal police. Finland’s first police station (“police chamber”) was founded in 1816 in Turku (the old capital during the Swedish period, and until 1812 under Russian rule, when Helsinki became the new capital), and then other towns followed suit. Following the Swedish model, the police chambers organized preparative or police trials, which in minor cases, after the accused was heard, could lead to punishments. The police chief acted as the chairperson, while one of the police officers assumed the role of the prosecutor. In more severe cases, a police trial could end in remitting the case to an ordinary court of law; in such cases, the dossier of the police trial in fact served as the preliminary investigation.⁴⁶

In the 1850s, the discussions on converting the police force into a professional investigative agency started. Professor of criminal law Karl Gustaf Ehrström was particularly active in demanding that the models of London and Stockholm be followed, and that part of the police force should

⁴⁵ WREDE, R.A. Några synpunkter i frågan om ny rättegångsordning i Finland. *Tidskrift utgifven af Juridiska Föreningen i Finland*, 1895, p. 310.

⁴⁶ HIETANIEMI. *Totuuden jäljillä* (op. cit.), p. 17-18.

devote its time to criminal investigations, not just preventing crimes. By the 1860s, the detectives of the Helsinki police station already in practice formed a department of its own. In 1877 the “detective department” was formally established by imperial decree: the department now consisted of seven policemen. Gradually, other larger towns followed suit: Turku in 1882, Tampere in 1891, and Viipuri in 1897.⁴⁷

The prosecutors were also beginning to take direct charge of leading investigations, as the police chambers’ judicial powers were continuously criticized. The real problem was, however, that Finnish prosecutors were not particularly qualified. In the countryside, police chiefs (*nimismies*, *länsman*) were also at the same time prosecutors, and although in larger towns prosecutors (*kaupunginviskaali*, *stadsfiskal*) focused full time on their prosecutions, their legal knowledge was often thin. Already in 1866, Professor Karl Gustaf Ehström ruthlessly criticized the Finnish prosecutors. They were “poorly prepared” for trials, the police investigations that prosecutors helped conduct were “meagre”, and they often had not collected the evidence necessary to convict.⁴⁸ A committee in charge of developing policing in towns, in a memorandum of 1889, argued that prosecutorial services were in urgent need of improvement. In principle, the committee reasoned that the prosecution process should be kept separate from the police, as the adversarial principle was gaining ground. However, for practical reasons that separation was not yet possible.⁴⁹ A wholesale revision of prosecutorial services, then, had to wait until the comprehensive reform of criminal procedure, which entered in force in 1993.

The international trend towards adversarial procedure, with strong public prosecutors and weak investigative judges, is apparent in the background of these discussions, although nothing yet came of the desire for change. In the 1890s, the spirit of the time favoured strengthening the public prosecution services, which were notoriously unprofessional

⁴⁷ *Ibid.*, p. 29-30.

⁴⁸ EHRSTRÖM, Karl Gustaf. Anmärkningar rörande Finlands rättegångsordning i brottmål. *Tidskrift utgifven af Juridiska Föreningen i Finland*, 1866, p. 48-50.

⁴⁹ *Komiteanmietintö 2/1889* [Committee on Improvement of Policing in Towns], p. 38; HIETANIEMI. *Totuuden jäljillä* (*op. cit.*), p. 35-38.

and weak in Finland. Although investigative judges had played a central part in continental systems for a long time, their star was rather on the decline. The experts in the other Nordic countries – Denmark, Norway, and Sweden – had weighed the possibility of change as well, but decided against it. The fact that Finnish legal tradition had never been dogmatically inquisitorial, only more or less so, did not speak for adopting the institution of the investigative judge, which was a clear product of the inquisitorial tradition. By this time, Finland had also joined the international trend of establishing professional police forces and placing them in charge of criminal investigations. Along with the chronic lack of trained legal professionals, this made the case clear: investigative judges were not needed.

CONCLUSIONS

I hope that I have shown how the emergence of the investigative judge in Continental Europe was intimately linked to fundamental changes in the whole system of criminal procedure. Criminal procedures tend to form systems in which every part – pretrial investigation, prosecution, and trial – is linked to every other part. One of the parts cannot be changed radically without affecting the other components of the system.

As for how the early modern trials in England and on the continent compared, many things were similar. A defence counsel was not allowed in criminal trials on either side of the English Channel. Criminal police did not yet exist anywhere. Instead, criminal investigations into minor matters were solely in hands of the individual victim, who had to take the case to court and manage the prosecution. In cases involving serious crimes in England, the victim was assisted by a justice of the peace (as well as in victimless crimes), while in the continental inquisitorial procedure the judge with his staff bore the main burden of the investigation. However, great regional differences existed between the different continental systems. Whereas the adversarial procedure practically disappeared in most parts of the Continent by the sixteenth century, in Scandinavia the victim and the accused could still settle even homicide cases as late as the seventeenth century, which shows that they were often in charge of deciding whether and how criminal cases ought to proceed.

Compared to the continental system, both similarities and differences are clear. In both systems, the prosecution of serious crimes was organized rather effectively, and the victim or other potential accuser could not prevent the case from going to court. In England, he or she was required to bring forth charges himself, with the help of the Justice of the Peace, while on the continent the public prosecutor did so regardless of whether the accused wished or not, and, after the case reached the court, the judge started managing the case as an inquisitor – in principle, objectively. Again, the Nordic countries were different. There, public prosecution was still underdeveloped in the early modern period, and the prosecutor's resources were largely concentrated on protecting the crown's financial interests, while the potential accuser's power over cases involving private people's interests remained considerable until the nineteenth century.

The investigative judge was an innovation of the early nineteenth century, when European criminal procedure was in a formative phase. Juries, the symbol of bourgeois liberty, were an English legal transfer that was adopted first in revolutionary France and then in many other continental countries. Such legal transfers almost always underwent change when they were adopted, and so did the jury. The idea of the jury came together with the liberal procedural principle of trial publicity, because juries composed of laymen could not function in secrecy. This did not mean, however, that in continental countries the whole procedure became public. The investigative judge, the new innovation of the Napoleonic procedural code, followed the old secrecy principle of the inquisitorial tradition. The role of the investigative judge was thought necessary to secure an impartial investigation, which in the old system the judge had – despite the problems of the old system – represented. To entrust criminal investigations to the police was unthinkable at that time, because criminal police did not yet exist.

In Scandinavian countries, little happened on this front before the late nineteenth century. In the northernmost part of Europe, the court organization remained based on local juries, whose lay members (much like the German *Schöffen*), aided by the representative of the crown (*länsman*), took care of the initial criminal investigations as well. It was only towards the end of the century that criminal police was organized.

At the same time, the first major efforts to reform Finnish criminal justice, by the Wrede Committee, began. By this time, the international attraction of the investigative judge was already waning. The other Nordic countries, despite some discussions, had not adopted the institution. Germany, the other major international reference point for Finland, had investigative judges, but they were already losing their power to another major procedural actor, the public prosecutor.

During the second half of the century, police forces gradually took over criminal investigations in France, Germany, England, and Finland. When this happened, the *raison d'être* of the investigative judge becomes dubious in the countries that had introduced the institution. The general trend of the recent decades towards a common law-inspired adversarial procedure has, indeed, caused many Western countries to completely remove the office of the investigative judge (France) or to replace it with a judicial office with lesser powers. Thus, in Germany, the 1975 reform replaced the investigative judge with the prosecutor as the leading actor in criminal investigations in serious cases. A new pre-trial judge, *Ermittlungsrichter*, no longer led investigations but only decided on the use of pre-trial measures of constraint such as detention. In 1988, a similar reform followed in Italy. In France as well, the investigative judge has lost their dominance in criminal procedure in favour of the prosecutor, who now leads the investigation in most cases and decides when a serious case is remitted to the investigative judge. In practice, the investigative judge rarely becomes involved; however, the cases they oversee are often the most complicated ones, dealing with delicate issues such as political corruption, drug trafficking, and terrorism. Since the 1980s, abolition of the *juge d'instruction* has been proposed several times, but without success. Defenders of the institution prefer to have a politically independent judge in control of these cases instead of a prosecutor who is accountable to the executive branch.⁵⁰ The *juge d'instruction* is often seen as an impartial administrator of laws and, therefore, legitimate. Here, we are at the heart of French legal culture.

⁵⁰ See ELSNER *et al.* *The Examining Magistrate's Function* (*op. cit.*); HODGSON Jacqueline S. *The French Prosecutor in Question. Washington and Lee Law Review*, v. 67, n. 4, 2010, p. 1363.

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