The French Revolution and the organization of justice

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ADDRESS ON THE REORGANIZATION OF THE JUDICIAL POWER

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Gentlemen, the subject that you have just begun to discuss is of great interest to your deliberations. The judicial power is the public power the normal exercise of which will have the greatest influence on the happiness of individuals, on the progress of the public spirit, on the maintenance of political order and on the stability of the Constitution. After what you have done, your duty has now become more pressing with respect to what remains for you to do. It is when one has reached the middle of a long and difficult path that courage and vigilance must be rekindled to ensure that the goal can be reached. The wishes of France have been heard. The reform of justice and the courts is one of its most pressing needs, and public trust in the success of the regeneration will grow or decline depending on whether the judicial power is well or badly organized.

This subject, which at first appears to offer so wide a field, is nevertheless reduced by analysis to a few essential issues, decisions concerning which would greatly reduce the task to be done.

The Committee has proposed in Title I of its draft that you enact the constitutional principles by which the judicial power must be defined, organized and exercised. The reason why it did so is the same reason that led you to place at the head of the Constitution the Title *Rights of Man and the Citizen*. The exercise of the judicial power was so strangely distorted in France that it has now become necessary not only to seek for its true principles but also to keep them constantly present in the minds of all and in future to protect judges, administrators and the nation itself

from the false opinions of which it has been the victim hitherto. By first enacting the constitutional maxims, you will attain this great goal of public usefulness, and you will yourselves acquire a sure means of distinguishing, in the course of discussion, the proposals that you must admit or are able to examine from those that do not merit your consideration.

The strangest and the most wicked of all the abuses that have corrupted the exercise of the judicial power was the fact that bodies and simple individuals possessed *patrimonially*, as was then said, the right to have justice done in their name, while others could acquire this right through *inheritance or purchase* – the right to judge their fellow citizens – and litigants were forced to *pay the judges* in order to obtain an act of justice. In the first five articles of Title I of its draft, the Committee has proposed that you enact, as unalterable principles, the rules that justice may be done only in the name of the King, that judges must be elected by the litigants and commissioned in office by the King, that no judicial office may be purchased and that no charge shall be levied in order for justice to be done.

The second abuse that distorted the judicial power in France was the confusion created in the hands of the holders of this power between the functions they were required to perform and the incompatible and incommunicable functions of other public powers. It emulated the legislative power and revised, amended or rejected the laws; it rivalled the administrative power and disturbed its operations, prevented its movement and disturbed the agents of that power. Let us not examine what, at the beginning of this political disorder, the circumstances were that led its introduction to be tolerated, or whether it was prudent to give as protection to the rights of the nation against the arbitrary authority of the government only the aristocratic authority of the judicial corporations, whose interest was at times to rise up on behalf of the people above the government and at times to join with the government against the freedom of the people. Let us not seek either to check, by balancing the public good against the public ill that this false speculation has produced, whether the violation of the true principles was redeemed by adequate compensation in the form of real benefits. Let us say that such disorder is intolerable in a good Constitution, and that ours will cause the disappearance in the future of the reasons that led it to be supported in the past. Let us say that a nation that exercises legislative power through a permanent body of representatives cannot leave to the courts that enforce its

laws and are subject to their authority the power to review those laws. Let us say, finally, that, when this nation elects its administrators, the ministers of justice must not be involved in the administration of that for which they are not responsible. The Committee has enshrined these principles in articles 6, 7, 8 and 9 of Title I of its draft. They establish the complete subordination of the courts of justice to the legislative power and very expressly separate the judicial power from the power to administer.

The third abuse that dishonoured justice in France was the blemish of the privileges that had pervaded the country and even entered its sanctuary. There were *privileged* courts and *privileged* forms of procedure for certain classes of *privileged* litigants. In criminal matters a *privileged* offence was distinguished from a common offence.

Privileged defenders of the cases of others had the exclusive right to advocate on behalf even of those who could do without their assistance; because it is quite remarkable that no law in France has entrenched the natural right of every citizen to defend himself in civil proceedings, while the criminal law deprived every citizen of a defender to protect his life. Finally, the equal right of every litigant to be tried in turn without personal preference was violated by the most distressing arbitrariness – a presiding judge who could not be forced to grant a hearing and a *rapporteur* who could not be forced to report were masters at ensuring that you did not stand trial or that you might do so only when your interest in obtaining judgment had long since perished because of the excessive delay.

A wise organization of the judicial power must in future make all these injustices impossible since they destroy the civil equality of citizens in that part of the public administration where this equality needs to be most inviolable. Those are not simple legislative reforms but issues that are genuinely constitutional in nature. In articles 12, 13, 14, 15 and 16 of Title I of its draft, the Committee has brought together the provisions that it thought necessary to destroy the privileges relating to jurisdiction, the distractive debates as to which jurisdiction was at issue, the fetters on the freedom to defend oneself and any arbitrary preference in the dispensation of justice.

All the maxims contained in this Title I of the draft form the necessary bases for a proper constitution of the judicial power. They seemed to us

to be absolute truths independent of the position you might wish to take later with respect to the number, membership and distribution of the courts. The form of the instruments through which the judicial power may be exercised varies to a certain degree, but the principles that determine its nature and make it suitable for the purposes that it must attain in the organization of society are eternal and immutable. I believe, Gentlemen, that you must begin by proclaiming these salutary principles that will guide you in the course of your work, enlighten litigants on their rights and judges on their duties, and make an entire nation sensitive to the slightest breaches that could some day threaten to spoil this part of the purity of the Constitution.

When this first task is performed, you will already have taken a large step, and the natural order of the work will require you to determine the general system of the organization of the courts, which includes above all their classification and the gradation of their powers. In Title II of its draft, the Committee has given you a plan concerning which you can express an opinion only by deciding all of what must be regarded as truly forming the basis of the judicial order. It can be divided into three major parts, each of which can very well be dealt with separately by concentrating first on the establishment of the courts of first instance, moving from there to the superior courts, which will decide cases on appeal, and finishing with several parts of the judicial service that may require different forms and specific judges.

What the Committee has proposed to you requires the necessary destruction of all the existing courts and their replacement by the creation of new institutions. Here, the first question arises: is it necessary to recreate the judicial order from the bottom up, or is it possible to let several parts of the old structure continue in the new building?

The need for complete regeneration cannot be disputed. Not only will the Constitution not be complete if it does not include all the parts of which it must necessarily consist; but it will also be defective, inconsistent and lacking in solidity if all these parts are not brought into harmony. It so happens that nothing agrees less with the principles of the current Constitution than those on which the former judicial order was established.

You have adopted the principle that any public power that is not necessary is accordingly dangerous and harmful. The courts, which are the recipients of the public powers whose influence is most active, have multiplied as a result of the creation of tribunals of exception and privilege to a point that has not had and still does not have a parallel in any other nation. The abuses that are inseparable from this excessive increase in the number of courts have long since led to complaints throughout France. You cannot therefore retain the courts of exception and even less those of privilege.

It is another principle of the Constitution that any public power is established in the interests of those for whom its exercise is necessary. It follows from this that the courts must be created and distributed in the manner that is most favourable to the interests of the litigants. Following the abolition of the seigneurial justices ordered earlier and of the jurisdictions of exception that must still be ordered, most of the ordinary courts are neither constituted nor distributed appropriately for the requirements of the service they provide, for the convenience of the litigants, and do not fit within the new political order of which they must be part. They cannot therefore be kept in their current state. As for the superior courts, which used to call themselves sovereign, their makeup being calculated more to impress than for the genuine goodness of their service, more to subject large parts of the country to their authority than to make the exercise of this authority available to those who needed it, more to excite interest, prejudice and *esprit de corps* than to remind the courts of the place they occupy in the ranks of the public powers and from which they cannot remove themselves without offending against political harmony – this makeup, I say to you, that is insidious in its principles, oppressive in its effects and tolerable in only one respect that can no longer be reproduced, would wither and jeopardize the existing Constitution, if it could usurp a place there.

If we consider the other principles on which our Constitution is based, we shall be increasingly convinced that they all come together to require the complete renewal of our courts.

As we stated in the *Declaration of Rights*, all powers emanate essentially from the nation and are conferred by it. There are no powers that act more directly, more commonly on the citizens than the judicial power. The holders of this power are accordingly those whose selection is of the

greatest interest to the nation. However, there is not in any of the existing courts a single judge in whose promotion the nation played any role.

All those who judge us have acquired the terrible power to judge us, either by succession or by purchase. Besides the fact that this intrusion has violated the inalienable right of the nation, who can guarantee that, among those who have considered the judicial power to be a piece of merchandise, there is no one who will continue to treat this public office as a property that establishes between them and us only the relationship of a duty that binds and dedicates them to the service of the nation? And if this fatal error from which the public cause has suffered so often and of which so many citizens have been victims is not destroyed root and branch, who will protect us from the misfortune caused by the continuation of its usual effects? The articles of the *Declaration of Rights* are the beacons that we have established to light the path that you were to take. It would therefore be ill-advised to retain the judges that the lottery of heredity and the trading of offices have placed in the courts by the most unconstitutional of all authority, as long as this authority is not cleansed by a free popular election. We should not fear that the popular vote will deprive the public cause of the service of its valuable subjects, whose abilities, put to the test in the past by the existing courts, were not tarnished in the recent past by equivocal conduct or through an open expression of anti-patriotic feelings. More than one example has shown that the people cannot be so easily deceived with respect to their true interests as we are sometimes led to think; and although it is true that elections do not always produce the best choices, this will happen at a time when the nation cannot do itself so much harm by exercising its right to choose as has been done to it while it has been deprived of this right, especially in the last fifteen years by the abusive facility of the *admittatur* of companies and the disastrous lack of concern shown by the Chancellery.

As we also said in the *Declaration of Rights*, all citizens are equally eligible for all public dignities, positions and jobs, depending on their ability, and without any other distinction than their virtues and their talents. With what strength can this fundamental principle of any good constitution not be relied upon against the strength of those courts that currently consist solely of clerics and nobles, because those courts already have a number of positions allocated to the clerics and have again led to principles being forgotten to such an extent that, according to a law made by secret orders but recognized and enforced, only those citizens who are nobles or have

already been ennobled are admitted to those courts, to hold the offices that ennoble most of them only in the second degree? Thus, since these courts prefer nobility to ability to hold public office, where ability is essential and nobility altogether indifferent, they have sacrificed the rights of their fellow citizens, the justice due to true merit and thereby the real benefit of service to an inexcusable professional va-nity. Can the Constitution preserve these courts, which are prohibited in advance by the principles on which the Constitution is established? By their makeup, do they not violate the inalienable rule of civil equality? Are they anything but the corporate bodies of those who formerly held privileges? Do most of our citizens find any of their peers in those institutions? If you keep these confederacies of individuals of the two classes that wished to form orders here, they will not fail to militate against the abolition of the orders and to bring them back to life.

We should add that the security of the Constitution depends on the fact that it no longer contains any living offshoot of the unconstitutional tree that was felled and replaced. We should consider that the public spirit that must be born of this regeneration in order to ensure its success has no more dangerous enemy than the *esprit de corps*, and that there is no body whose spirit and boldness are more to be feared than these judicial corporations that have given the status of principles to all the systems that favour their domination, that do not forgive the nation itself for ta-king from them the authority that they have enjoyed and that will never lose either the memory of what they were or the desire to recover what was taken from them. Finally, let us say without fear, since the truth and interest of our fatherland demand it, that if the nation must recognize the virtue of some judges who are fine patriots, a host of unfortunately indisputable facts indicates that most of them are still reluctant to show themselves as citizens and that generally the spirit of the great judicial bodies is a spirit that is inimical to regeneration. What has happened in Rouen, Metz, Dijon, Toulouse, Bordeaux and especially Rennes offers convincing proof so that no further evidence is necessary.

Let us conclude that it is necessary to re-establish all our courts constitutionally since their present condition cannot be reconciled with the spirit and principles of our regenerated Constitution.

On what basis, therefore, will you organize the new judicial order? This is the second issue that requires your consideration.

The sound administration of justice appears to depend primarily on the following three conditions: (1) that the courts not be more numerous than the actual needs of the service they provide require; (2) that, on the other hand, they be brought as close to the litigants as to ensure that the expense and inconvenience of travelling do not deprive any citizen of the right to obtain justice; (3) that besides the cases where the right to appeal is more an aggravation than a benefit, because of the insignificance of the subject matter, there are always two levels of jurisdiction, but never more than two.

Let us begin by considering the first level. This is the level that causes fewest problems. The Committee proposes one justice of the peace for each *canton* and a single royal court for each *district*.

The creation of justices of the peace is widely desired; it is requested in most of the submissions made to us; it is one of the greatest goods that can be offered to the useful inhabitants of the countryside. The jurisdiction of these justices of the peace must be limited to conventional matters that are very simple and of the smallest value and to questions of fact that can be clearly judged only by the man in the field, who can check on the spot the very subject of the dispute and who can find in his own experience more certain rules for making decisions than the science of forms and laws can dictate to the courts in this regard.

The Committee proposes that justices of the peace be authorized to judge matters without appeal up to a value of 50 *livres*, because a litigant will not really have gained anything, even when he wins his case, when he argues on appeal to the higher courts for such a small interest if he calculates what this will cost him in lost time, travel costs and procedural fees. I am well aware that 50 *livres* can, in the wealth of many citizens, be an important sum. However, those are the citizens who must be defended from the temptation to wager in a lottery that will ruin them completely if they lose, and that will not help them make real gains if they do not lose. To make a sound decision as to whether an appeal may be taken, do not give thought to what the subject of the trial may be worth to the person bringing the suit but what it is worth in itself and whether it could, without being absorbed, support the inevitable waste that it would suffer as a result of the corrosive effect of an appeal.

It will be necessary to eliminate from the duties of justices of the peace the wealth of forms and the involvement of practitioners, because the main purpose of that institution will not be met if it does not dispense a form of justice that is very expeditious, very simple and free of charge and unless natural fairness governs proceedings rather than the fastidious rules of the art of judging. In each *canton*, every man of property who loves law and order and has experience of the manners, habits and character of the inhabitants should, for this reason alone, have all the knowledge that he requires to become a justice of the peace when his turn comes.

The Committee has proposed that justices of the peace should hear all personal cases up to a value of l00 *livres* subject to appeal, and it has noted a number of cases in which it thought it necessary for these judges to have jurisdiction, regardless of the value of the claims involved. These cases are those that are most often the subject of proceedings among those who live in the countryside, those in which the most certain basis for the decision lies in an examination of the disputed matter, those, finally, that the courts themselves judge only after they have sought enlightenment and the prior opinion of experts. This necessary jurisdiction in the spirit of the institution of justices of the peace does not, moreover, cause inconvenience, because few of these trials will exceed l00 *livres* in value, the inhabitants of the countryside are always better judges in these cases than the men of law, and because, in the event of a patent injustice, their judgments will be reviewed.

Finally, since appeals from the decisions of justices of the peace are brought to an end summarily at the royal district court, it seemed to your Committee that all requirements were met for that category of detailed trials that is the scourge of the countryside to be expedited in future with all the simplicity and gentleness of organization that is appropriate for a reasonable people and a popular and beneficent government.

The jurisdiction of the royal district court begins where that of the justices of the peace ends; it supplements the system of the first level of cases in the ordinary system. The Committee's plan contains only three essential points for you to consider: the number of district courts, the number of judges in each court and the amount of jurisdiction at the first and final levels up to a value of 250 *livres*.

It is the determination of the number of courts at the first level above all that requires wisdom. Only so many as are strictly required need to be established, although the urge to plead should not be considered as part of the essentials of life, because if you allow this urge to be satisfied with such ease and convenience that it would create a desire and cause temptation, you will open the kingdom of the courts. Each *canton*, each city and even each town would have its own; but would it not then be clear that the spirit of your Constitution, rather than doing away with the strong desire to go to court, which is one of the most destructive scourges of family wealth, would tend instead to promote such desire? A single court should be sufficient in each district – whether the factor used to determine this is the common measurement of the territory allocated to each district, or the common population figure that they must contain – and if the general makeup of the districts had been neglected in the distribution of the departments such that some of them greatly exceed the common size, then it would seem wise to provide for an adequate service of justice by increasing the number of judges in the district court rather than by multiplying the number of courts in that district.

As far as the number of judges in each court is concerned, it is even more important to calculate this strictly, since any excess will not increase the quality of the service and, given the large number of district courts, the slightest reductions in their spending would result in very substantial savings.

If we examine the extent to which the departments have been unequally divided into districts, because the number of districts varies from three to nine although the departments are more or less equal in area, it seems difficult to retain an equal number of five judges in each district court. This numerical equality of judges was created on the assumption that the districts would be more or less equal in area and population. Gentlemen, you will see whether it would not now be more appropriate to decide that the district courts will have five judges and a King's counsel only in those departments where the number of districts is less than the prescribed number, and in those where there are six or more districts there will be only three judges and a King's counsel in each court. This number actually appears sufficient for the needs of the service in that it forces the courts to hold as many hearings per week as the number of cases requires and by authorizing the use of additional assessors hired from among the men of law in the event that one of the judges is sick or legitimately ab-

sent. This provision, which would better balance the strength of the courts with their jurisdiction, would also ensure a better makeup of these courts in that it would leave room only for the most excellent individuals. Moreover, it would create substantial savings in terms of annual spending on the justice system.

With respect to the jurisdiction of first and last resort to be conferred on the district courts, the only serious problem would appear to be whether the limit of this jurisdiction should not be increased over 250 *livres*. The considerations set out earlier to justify the limit of 50 *livres* for the jurisdiction of justices of the peace should again be applied here with the additional comment that since the district courts are the first level of courts of record, it is these courts that will hear the most intricate cases between citizens who are least able to endure the costs of the proceedings; and these courts, which are required to be punctilious with respect to the forms, will be accessible only under the direction of the ministerial officers who control the approaches to these courts; and that the further removed they are, the less expeditious they will be and as a result initially and, in far too many cases, later, the need for unnecessary expense will simply increase.

Note the situation of the litigant who argues on appeal to a Superior Court or even to a presidial for a property of 10 *livres* in income or 250 *livres* in capital. If he loses his case, see whether he might have lost two or three times the value of the subject of his case and if he wins his case, see again whether he has truly won the value of the property that is awarded to him. You will accordingly protect the individual interest if you dismiss the appeal in all cases where, as a result of the small amount involved in the case, his advantage is merely illusory or even ruinous, and the more flexibility in this regard you give to the new organization of the courts, the easier it will become for you to simplify the general system of the courts.

I shall stop here, Gentlemen, because the observations to be made later, relating to the institution of justice on appeal, open up a new area for discussion. They would take me too far at this time and would also be premature. In opening the discussion, I planned merely to offer you my initial observations, first concerning the order that I think should be observed in the course of this discussion and then on the views that deter-

mined the first parts of the draft that is before you and that must also be taken into consideration first.

I feel that it is advantageous to begin by expressly enacting the principles that constitute the judicial power; I have stated the reasons for this, and if they seem conclusive to you, each of the articles in Title I of the draft must be considered and be the subject of a decree.

You can move on immediately afterwards to the organization of the courts that will form the first level of jurisdiction; you will examine each of the provisions that the Committee has proposed to you and concerning which I have set out the main reasons supporting the creation of justices of the peace and district courts.

The institution of a superior level of jurisdiction for the decision of appeals, and that of the other parts required to complete the court system, will be included in order in the work schedule. Each of these parts will offer particular considerations that it would be pointless, and even harmful to the quality and speed of your deliberations, to want to cover all at the same time. I shall seek, albeit with the greatest restraint, the indulgence of the Assembly in submitting new developments to it when the advancement of the deliberations might require this.

Note

This text is a translation from the French. The French version is based on the parliamentary archives of the time:

Archives parlementaires de 1787 à 1860,
Première série (1789 à 1800), Tome XII, du 2 mars au 14 avril 1790,
Paris, Société d'imprimerie et librairie administratives et des chemins de fer Paul Dupont, 1881,
pages 344 à 348.