The French Revolution and the organization of justice

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REPORT ON THE ORGANIZATION OF JUDICIAL POWER

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Gentlemen, today we intend to talk to you about the organization of judicial power.

Here, it is important not to take any step without being sure of the ground on which we tread, not to propound any maxim that does not bear within itself the pre-eminent quality of truth, not to find any result for which there is no support in the profound experience of man and that is not based on an exact knowledge of the emotions that move man, the passions that impel him and the prejudices that, depending on the situation in which he finds himself, can either dominate or seduce him.

Here, as we advance along the course we wish to take, the pitfalls become visible, the difficulties increase, the diversions become more numerous, and if the lawgiver for one moment lets go of the thread that should guide him and wanders haphazardly and as if lost in the turbulent arena of human interests, he will find himself unceasingly exposed either to missing or to failing to achieve the goal he proposes to attain.

Of all the parts of our work, that on which we are about to report is therefore indisputably the most difficult, and we must admit that we are far from thinking that, in this regard, we were well on top of the task that was assigned to us. However, it seems to us that we will have at least done enough under the inauspicious circumstances in which we find ourselves, and in the absence of sufficient time to develop our ideas to the extent to which they can be developed, if, when you examine the plan to be sub-

mitted to you, you feel that we have discovered the only judicial order that can be adopted, the only one that, in guaranteeing our rights, never infringes those rights, the only one that is accordingly suited to a free people, because it is the direct product of the true principles of society and the fundamental laws of morals and nature.

Influence of judicial power

It is not possible to determine how judicial power should be organized unless one has a proper idea of its impact.

There are no limits to the impact of judicial power; all actions of a citizen must be viewed, to a certain extent, as falling within its purview, because, no matter how little we think about this, we have to note that there is no human action that cannot be considered legitimate or illegitimate, permitted or prohibited, other than on the basis of whether it is or is not in accordance with the law. Since judicial power was established to enforce the law and since therefore its sole purpose is to ensure that everything that is permitted can happen and to prevent everything that is prohibited, it is easily realized that there is no action in society or even a domestic action that is not, more or less directly, under its jurisdiction.

Thus, judicial power makes its impact, so to speak, every day and at all times; and – just as things that influence us every day and at all times cannot fail to have a very profound effect on the whole system of our habits – we shall realize that, of public powers, the one that changes us most for better or for worse is undoubtedly judicial power.

Of all the human emotions, there is none that corrupts as much as fear, none that distorts characters more, none that more effectively prevents the development of all the faculties. If the forms of judicial power – this power that never ceases to act on us – were such in a particular State that they inspired only fear, for example, no matter how wise we might presume the political Constitution of that State to be, no matter how favourable that Constitution might be to liberty, by the mere fact that judicial power created only fear in all souls, it would prevent all the natural effects of the Constitution. While the Constitution would inspire energetic manners and strongly marked customs, judicial power, on the other hand, would tend to give you only weak manners and servile customs. And because it is in the nature of judicial power, as we have just seen, never to

suspend its action, you will readily see that it would fairly quickly end by changing all characters and by disposing you to prejudice and to institutions that are conducive to despotism and that, unfortunately, make despotism easy to support.

Thus, all those who have wished to change the spirit of nations have been singularly devoted to organizing judicial power in the way they thought appropriate. While they are too clever to ignore its influence, they can be seen, by the form of judgments alone, depending on whether they propose good or ill for the people, to call men to liberty and all the virtues that it can promote or to force them into servitude and all the vices that accompany it.

Athens, Sparta and, above all, Rome testify to this important truth – Rome, where the judicial system changed so many times and where it never changed without provoking an ongoing revolution in the destiny of the Empire.

It is not possible therefore to dispute the boundless influence of judicial power; but if its influence is unbounded, if it is greater than that of all the other public powers, there is accordingly no public power that must be limited with so much precision as this; there is accordingly no public power that should be organized with more concerned caution and more scrupulous care.

Purpose of judicial power

In order to establish judicial power in such a way that its influence is always good, it seems to me that we merely need to think with some care about the goal that we should naturally have in mind in creating this power.

This is because a society cannot exist without laws. The preservation of society requires courts and judges, that is, a group of men responsible for applying the laws in the different circumstances for which they are made and authorized to make use of public force, whenever such force is necessary in order to ensure the enforcement of the laws.

However, since the grand purpose of the laws in general is to guarantee liberty and thus to place the citizen in a position where he can enjoy all

the rights that are declared to belong to him by the Constitution, we feel that the courts and judges will be properly instituted only as long as, in the use they make of the authority given to them and the public force at their disposal, it will be virtually impossible to violate this freedom that the law requires them to guarantee.

In order to determine how the courts and the judges must be established, we must, above all, seek to determine how many ways there are in which liberty can be infringed.

As is well known, there are two forms of liberty: political liberty and civil liberty.

Political liberty consists of the ability of every citizen, either on his own initiative or through representatives, to assist in the making of the laws.

Civil liberty consists of the ability of every citizen to do anything that is not prohibited by law.

Political liberty comes under threat whenever, as a result of some circumstance or institution, a citizen does not assist in making the law with his full will; whenever, because of particular circumstances, the law, which should always be an expression of the general will, is merely an expression of a few individual wills; and whenever public power is so concentrated, distributed or ordered that it can easily contrive against the Constitution of the State and, depending on events, change it or destroy it.

Civil liberty comes under threat whenever the power that must protect the person or the property of the citizen is so organized that it is inadequate for this purpose and whenever, although it is adequate for this purpose, it unfortunately becomes easy to use it to the detriment of persons or property.

Political liberty cannot come under threat without civil liberty also coming under threat. We feel, in fact, that as the citizen loses his political liberty or the ability he enjoys to assist in making the law, his civil liberty, which is protected only by the law, will necessarily be less protected.

Nor is it possible for civil liberty to come under threat without political liberty also coming under threat. We feel that if the power designed to protect civil liberty, that is to say the kind of liberty we experience every day, tended to change it instead, any people that was enslaved by its civil Constitution would soon lack the strength and the courage to defend its political Constitution.

In order to ensure that judicial power is organized in such a way as not to endanger either civil liberty or political liberty, it is therefore necessary that, without any kind of activity against the political system of the State and without any influence over the desires that led to the creation or maintenance of this system, judicial power has, for the purpose of protecting all individuals and all rights, a force that is omnipotent in defending and succouring, but becomes absolutely powerless as soon as its purpose is changed and attempts are made to use it for oppressive purposes.

That is posited.

Judicial power will accordingly be poorly organized if it depends for its organization on any will other than that of the nation.

Because, therefore, the individual will, to which the task of organizing judicial power would have been given and which would control all forms of judgments, would also be capable, as we have just seen, of influencing, as it sees fit, all the habits of the citizen, of thus corrupting the national character by the very enforcement of the law and by substituting for the strong and generous opinions of a free people the weak and cowardly opinions of an enslaved people and dealing a mortal blow to the Constitution.

Judicial power will accordingly be poorly organized if the holders of this power play an active role in legislating or can, in some way, influence the making of the law.

Because the love of domination lies in the heart of man no less than the love of freedom, because domination is merely a kind of independence and since all men wish to be independent. If the minister of the law is able to influence the creation of the law, it is certainly to be feared that

he will influence it solely for his own benefit, to increase his own authority and thereby to reduce liberty, whether public or individual.

Judicial power will accordingly be poorly organized if the courts consist of a large number of judges and thus create powerful coteries.

For while it may be appropriate for a people that does not enjoy political liberty that there should be powerful coteries of judges capable by their resistance of tempering the always disastrous action of despotism, this arrangement is, on the contrary, fatal for any people that possesses true political liberty. Powerful coteries of magistrates, with the awesome power to judge, are impelled almost involuntarily in all their actions by a dangerous *esprit de corps*, while their judgments are not likely to be censured by public opinion, since the praise or blame they may deserve or incur is divided among a very large number of people and thus, so to speak, non existent for a single individual. In a State that is free, such coteries necessarily end up by creating the most formidable of all aristocracies, and we know that aristocracy can cause despotism and servitude in any State when it is, unfortunately, introduced there.

Judicial power will accordingly be poorly organized if the number of courts and judges is greater than it should be for the administration of justice.

Because any public power is instituted as it ought to be only if it is necessary, and the only public power that is necessary is one that maintains liberty. It follows from this that a power that is not necessary is a power that accordingly does not maintain liberty. By the mere fact that it is a power, a power that does not maintain liberty necessarily acts against liberty, because any force that is not used for liberty is used against liberty. It is therefore important to destroy it. If in a State the courts were so constituted, and if their jurisdiction were so regulated or so confused that a civil action or a delict could fall within the jurisdiction of several courts at the same time; if many courts of different kinds were used to do what could be done by a single kind of court; there would then be public powers that were not necessary. There would then be public powers that would tend to impede liberty, and it would be necessary to reduce the number of courts and their types to the limit of what was necessary, until the time when their number could be rigorously shown to be indispensable.

Judicial power will accordingly be poorly organized if it is the property of either the individual exercising it or of an individual who employs someone else to exercise it.

Because, in general, it is a principle that a public power may not be the property of anyone, and the reason for this principle is simple: wherever a public power becomes a piece of individual property, there is a power that does not presuppose any preliminary choice of the person who exercises it or who transfers it as any other property is transferred by sale or concession. Powers of this kind destroy the natural equality of citizens; they do not exist in a State unless there are men who are powerful in themselves, men who exercise authority independently of the direct or indirect support of those over whom it is exercised. Wherever such men exist, it cannot be said that liberty is complete.

What is more, and in the first case, if judicial power is the property of the judge who exercises it, should we not fear that it will suggest to the mind of that judge the idea of a right just as much as the idea of a duty, and will a person who wields this power to judge as a right, a person who considers it to be a property that he exploits rather than as a duty that he must fulfil, not be tempted to abuse that power? Because here, no matter how weak it may be assumed to be, this abuse is always a violation of the liberty of the citizen. Should we not be careful to prevent this?

Furthermore, and in the second case, if judicial power is the property of an individual who may, if he chooses, employ someone else to exercise it, can the individual who is so employed and who obtains his authority from someone else ever be presumed to be independent of the person who employs him? In order for justice to be rendered impartially, in order for the way in which it is rendered to inspire great confidence in people, is it not appropriate that it should be rendered by judges who never depend on other persons but on the law and who, beyond fear and complacency, perform their duties with the full power, if this expression can be used, of their conscience and their reason?

Judicial power will accordingly be poorly organized if the people cannot influence the selection of the judges in any way.

Because, in order for the executive power to be one, it is no doubt appropriate that the holder of executive power should appoint the judges. However, we also need certain procedures before that appointment is made that ensure that no man becomes a judge who does not have the confidence of the people. For example, would it not be desirable that, in this country, the provincial assemblies appoint for each vacancy in the courts three individuals from whom the sovereign would be required to choose one? Thus, we would reconcile what is owed to the sovereign with what is owed to the opinion of the people in a matter that is so important to their liberty, and adulation and intrigue would then no longer be a consideration for judicial office. In order to obtain such office, it would always be necessary to display self-sufficiency and virtue.

Judicial power will accordingly be poorly organized if its actions are not so spread over the surface of the empire that, present everywhere, it is within reach of all citizens, who shall never seek its assistance in vain.

However, it is not sufficient for the law to be equal for everyone; if its influence is to be beneficial, everyone must be able to access it with equal ease. Otherwise, we should see the emergence of domination of the strong over the weak and all the fatal consequences that this would entail. It is appropriate therefore that the courts and the judges should be located in such places that the dispensation of justice would require only the least amount of travel possible for the citizen whenever it is necessary for him to travel and that the time spent trying to secure justice is never so great that a poor citizen would prefer despoliation or oppression to the use or exercise of his right.

Judicial power will accordingly be poorly organized if justice is not rendered free of charge.

Because justice is a debt of society, and it is absurd to exact a fee in order to pay off a debt. Furthermore, if justice were not free, it could not be claimed by a person who has nothing, and in order for justice to exist in an empire, then a person who has nothing must be able to seek justice in the same way as a person of means; institutions need to be created that enable a person who has nothing to struggle with the same amount of strength against a person who has means. What is more, if justice were not free, it would itself in some degree corrupt its own minister. A judge who viewed justice as a means to be acquisitive might be tempted to open

his soul to greed, and a greedy judge is always the slave of those who pay and the tyrant of those who cannot pay.

Judicial power will accordingly be poorly organized if the hearing of cases, both civil and criminal, in the courts does not always occur in public.

Because if there are men who, in performing their duties, should depend as much as possible on opinion or, in other words, the censure of right-thinking people, then it is judges. The greater their power, the more necessary it is for them to realize that they have beside them the foremost of all powers, one that is never corrupted, namely the formidable presence of public opinion. And they will never be aware of this power if cases are heard in secret. In such a deplorable situation, a great deal of room would be left open for the prejudices of the judge, his particular emotions, his misjudgments, the intrigues of men of bad faith, the influence of a need for protection, the secret denunciations – all the vile passions that lurk only in the shadows and that lose their ability to inspire fear as soon as they can be seen. Bathe the judges in the gaze of the people and – since crime involves only men who, even though they are observed from all sides, still dare to do evil – you may rest assured, especially if people are free, if their criticism can be expressed with vigour, that there will be nothing so rare as a prevaricating judge, because there is nothing so rare as a man who dares to face shame and to deliberately attract great infamy to himself.

Judicial power will accordingly be poorly organized if a judge enjoys the dangerous privilege of interpreting the law or adding to its provisions.

Because it is not hard to see that if the law can be interpreted and augmented or, what amounts to the same thing, applied at the whim of an individual, man is no longer under the protection of the law but rather under the power of the person who interprets or augments it. And since the power of one man over another is essentially what the institution of the law is proposed to destroy, we can clearly see that, on the contrary, this power would acquire prodigious strength if the ability to interpret the law were left to the person who held that power.

Judicial power will accordingly be poorly organized if, in criminal proceedings, this power takes on such forms that deprive the accused of all

trust or, in other words, if they are such that an accused, although certain of his innocence, still does not have enough innocence to escape the penalty with which he is threatened.

Because not everything was done when it was ordered that the hearings of all kinds of cases take place in public, when judges were disallowed the ability to interpret the law. Much more is required in criminal cases; all of the procedures used to discover an offence and a guilty party may also properly be used to determine the innocence of such a person.

One of the natural reasons why men live in society is undoubtedly the fact that it is only through social order that their existence is adequately protected.

We should fail to achieve the goal of social order, therefore, if, when the existence of any individual is threatened, the law did not do as much to help him as was commensurate with the risks that he runs.

Now, our existence is definitely never in greater danger than when we face criminal charges. It is in the case of criminal charges that the law, above all, must do absolutely everything to ensure that we lack none of the resources that we require to protect ourselves. And the foremost of all these resources is unquestionably trust in the law.

What do you do with judicial procedures in which the accused has no trust? You place the accused in a difficult situation where his reason is no longer sufficient to control the use of his faculties; you will deprive him of strength when you should be increasing it. You will cause him to lose his courage when he will never have greater need of it. You will thwart nature itself, which, having placed a conservative instinct in our hearts, so imperiously wants us to use our energy as the danger that threatens us comes closer and grows greater. However, you know that man does not agree to live in society to reduce the exercise of the rights or resources given to him by nature.

Therefore, you commit a great injustice, you essentially offend natural liberty, which is not different from social liberty, when you believe nevertheless that what you do is done only for liberty and you violate the rights of man by the very procedures that ought to protect them.

But how, by the very creation of the procedures intended to obtain the conviction of the guilty, could you create trust in the heart of a man who is unjustly accused?

Trust will arise when the law permits an accused to take as many steps to exculpate himself as will be taken against him to prove that he is guilty. If you produce witnesses who accuse me, then I must be able at the same time to call witnesses to justify my actions.

Trust will arise when the accused is truly able to choose his defences as he wishes. It is strange indeed that there are criminal codes that place on the judge responsibility for rejecting, in whole or in part, the defences of an accused. It is even more strange that, in an age of enlightenment, such a deplorable abuse should have found people to sing its praises.

Trust will arise if the accused is not reduced, in order to fend off the charges laid against him, to limiting himself to the circumstances of the charge, if, as in England for example, he can call on his entire past life to speak for his innocence, if he has the right to confront, to use the expression coined by a famous judge, the crime of which he is accused with his own earlier conduct, and if his good deeds, if his virtues, can be called upon and thus be used as defenders and witnesses for a person who has long surrounded himself with them.

Trust will arise if the judge who applies the law is distinguished from the judge who lays the charges. Criminal laws are necessarily disastrous wherever the distinction to which we are referring here is not carefully established. As long as a judge who accuses is the same as the one who judges, then we shall always have to fear that, if the judge indicts on the basis of false suspicions, his self-respect or sense of self-preservation will lead him to justify an unjust accusation through a very unjust conviction.

Trust will arise not only if the judge who indicts is distinguished from the judge who applies the law, but also if the judge who applies the law can do so only to the extent that another order of persons, jurors for example, has expressed an opinion on the validity of the charges. Because a person who is the holder of any power will inevitably love to use that power, we must, as far as possible, refrain from placing a judge in a position where he is able, as he chooses, to increase the opportunities for exercising his office. This inconvenience, which leaves so much room for individual

passions, absolutely ceases if, like a sword that can strike only if it is moved by an extraneous force, a judge can exercise the authority of the law only to the extent that such authority is determined by a decision that is not made by the judge.

Trust will arise if the method used to create the order of persons who decide on the validity of a charge is such that these persons can all be considered to have been chosen by the accused, that all are immune to any feelings of enmity or vengeance toward the accused and that, from the accused's point of view, all are so lacking in bias as is desirable in order to ensure that the judgments are impartial. It is above all as a result of such precautions that a man who is falsely charged will be given the freedom of spirit he needs to make provision for his own defence. It is only to the extent that you allow him to control the rejection of those who will determine his fate, whatever it may be, all those who inspire the slightest fear in him, that you will fill his heart with a feeling of true security and that, on the basis of his innocence, you will ensure that among the perils of even the most fearful charge, he will only ever see in the law an authority that protects him and not a power armed and ready to oppress or destroy him.

These are some of the steps that can be taken to create trust in the souls of accused persons and thus to reconcile what must be done to seek out offences and to punish the guilty with what is owed to the liberty of the individual, a liberty for the preservation of which all laws are created.

Moreover, it will easily be seen that all of the measures of which we speak here have been given to us by the laws adopted in England and in free America for the prosecution and punishment of offences. That is because only those laws, which were formerly in effect here, are humane. That is because only those laws are linked in a profound way with liberty, and there is nothing better that we could do in this regard than to adopt them at once, albeit improving the details of some of them, for example by perfecting, if it is still possible, the sublime institution of juries that makes it so commendable to all those who are inclined to think about the subject of legislation and the political and moral principles by which we must be governed.

Judicial power will accordingly be poorly organized if, whenever public order requires that in some part of the administration of justice some-

thing still be left to the discretion of the judge, the law does not take such precautions that it will become virtually impossible for a judge to abuse the more or less extensive authority conferred on him in those cases where the law relies on his discretion.

Here, I should like to talk about policing, the aim of which is to prevent crime, and which, if it is poorly instituted, is sufficient entirely by itself to completely degrade the character of a people and to bring about a profound revolution in the system of its beliefs and manners.

It is to our policing, so unthinkingly celebrated, to its painstaking efforts to keep the peace among us, to its tyrannical organization, to its ever-defiant activities in developing only with a view to sowing suspicion and fear in men's hearts, to the hateful secrets of its punishments and acts of vengeance – it is to the influence of all these things that we have for so long owed the destruction of our national character, the forgetfulness of all the virtues of our ancestors, our shameful tolerance of servitude, the spirit of intrigue that has taken the place of public spirit among us and that obscure licentiousness that is found wherever liberty does not prevail.

No matter what is done, there is always something arbitrary about the police power.[1] Since this institution is created, as we have just noted, solely to prevent crime, and just as a crime may be the fruit of a whole host of circumstances that are impossible to determine and that manifest themselves only as they occur, just as a crime always presupposes earlier disorder unless it is the fruit of a sudden passion, just as it is essentially to keep the peace that the police power exists, the peace that can be disturbed in so many different ways without it being possible for the person disturbing the peace to be found guilty – just as here, therefore, it is not of punishment that we are talking but of warning or correcting and supervising, we shall see that in this part of the administration of justice, the only thing the law can do is to clearly determine the scope of the police power, to limit that scope as far as possible and to arrange things in such a way that the selection of judges is always as good as it can be.

First of all, the law will have achieved its object if it arranges the social order in such a way that there is little need to use the power of police. The limits of police power expand as the level of social order declines. Wherever the law is wisely ordered for the easy development of the

faculties of man, he will find, beside his labour, a guaranteed existence and peaceful pleasures, and few offences will be committed there. Unfortunately, it is only too true that it is in the poorly thought-out organization of governments and their opposition to the natural development of our faculties that we must seek the causes of almost all crimes.

Second, the law will have attained its object if it does not entrust the exercise of the police power to those very judges and courts that are responsible for punishing crimes; for in that way the police power will become corrupt, because in that way it will expand its empire and it will only become more corrupt as it expands its empire. Since a judge who must prevent crime must also punish that crime, he is then likely no longer to distinguish between these two types of functions, to see only crimes where he should see mere faults, to see only guilty parties where he should see only men who might become guilty; and thus, by confusing two very different mandates, take away from the police power this character of moderation and gentleness that alone may make bearable what it contains of arbitrariness.

Third, the law will have attained its object if it sets a fairly short term of two or three years, for example, after which the police judges will cease to hold that office and if it makes them completely dependent, without interference by the sovereign, on the appointment and choice of the people.

As long as a man has only the power of the moment, and as long as he feels, because he is destined to join the ordinary class of people, that he cannot increase this power without injury to himself when he no longer has this power because he is expected to rejoin that class, there is no fear that he will abuse it and that he will use for his individual passions an authority that, when subsequently exercised by someone else, could so easily become harmful to him.

As long as, on the other hand, the choice of police judges is made essentially by the people, it is to be expected that in this regard the people will always choose the best judges. People can be won over only by the good that is done for them and I should dare to say that it is impossible that the people would entrust the exercise of police power to someone who, for example, stood out by his harsh manners, dubious actions and insolent or inconsiderate conduct.

Furthermore, there is a particular reason why the people alone should select its police judges whereas, on the other hand, it is good that the sovereign should be involved in the appointment of other judges. By submitting itself to the authority of the other judges, the people entrust themselves solely to the law because the other judges can act only through the law; but by submitting to the necessarily somewhat arbitrary authority of a police judge, it is not to the law alone but rather in many situations to a man that people entrust themselves. It is clear to see therefore that that man absolutely must be chosen by the people.

Finally, judicial power will be poorly organized if the judges are not answerable for their judgments.

I believe that it is sufficient merely to state this proposition in order for it to be adopted. A nation where judges are not answerable for their judgments would, without fear of contradiction, be the most enslaved of all nations; and it is easy to imagine that the spirit of liberty would grow in a people because of the fact that the agents of the executive power were made more accountable there.

However, there are limits to everything. If the judges have to be accountable, the limits of this accountability should also be so determined that they would not constantly be disturbed whenever they issue their judgments. Any man who holds public office must enjoy a certain degree of security in doing so. Otherwise, because he would be too frequently overcome with fear, rather than obeying the law he would obey the person who inspired such fear in him.

As we make the judges more accountable, therefore, nothing is so necessary as that this accountability should be defined in such a way that, while it is sufficient to prevent judges from abusing their office, it is not so powerful as to prevent them from exercising it.

This is not the place to define a law concerning the accountability of judges, because this law must cover many more situations, depending on how much power it confers on judges and depending on how developed the Civil Code and the Criminal Code are.

We shall merely observe that, although it generally seems appropriate for judicial office to be held for life because of the unfortunately rather extensive knowledge required, knowledge that would not be acquired so eagerly if it were not to attain permanent status in society for the person possessing that knowledge, it would nevertheless be desirable after a certain period for judges to require reconfirmation. In such an arrangement of things, there need be little fear that a judge who is held in high esteem would run the risk of losing his position; people have too great an interest in keeping a good judge. Thus, only a bad judge would need to fear removal, and there are so many ways to be a bad judge and it is possible to prevaricate in so many ways in the use of judicial power without appearing to break the law in doing so, without finding oneself in a situation where one is responsible in his own eyes, that it is necessary here to leave something to public opinion and to accept that a person whose conduct has not constantly been so pure as to be above all suspicion should be forced at a certain point to renounce an office that can be held only by someone who inspires great confidence by the way in which he holds it.

Gentlemen, these are, more or less, the pitfalls that must be avoided when creating judicial power, if, as I said at the outset, we want to ensure that this power does not infringe either political liberty or civil liberty.

In such an endeavour, noting the pitfalls is necessarily tantamount to tracing the route, since the principles here become clear as the abuses are uncovered.

Since judicial power will be poorly organized whenever it is organized in accordance with the false principles to which I have just referred, it is therefore necessarily true that judicial power will be well organized whenever it is organized in accordance with the contrary principles.

As a result, to come back to everything that I have said so far, in order for judicial power to be well organized, it will be necessary:

First, in its organization as in the changes it may undergo, for judicial power essentially to depend solely on the will of the nation;

Second, for the holders of judicial power not to be involved in any way in the exercise of legislative power;

Third, for the courts to consist of only a small number of judges;

Fourth, for no more courts to be created than are required by the need to render justice;

Fifth, for judicial office not to be obtained venally and for the right to have justice rendered not to be the property or prerogative of any individual citizen of the State;

Sixth, for the sovereign alone to appoint the judges, but for him to choose them solely from among those individuals who are designated to the sovereign by the people;[2]

Seventh, for the courts to be brought as close as possible to the litigants;

Eighth, for justice to be rendered at no cost;

Ninth, for cases, both criminal and civil, always to be heard in public;

Tenth, for no judge in civil or criminal proceedings to have the right to interpret the law or to extend its provisions as he thinks fit;

Eleventh, in criminal proceedings, for the form of the proceedings to be such that they are capable of exculpating and inculpating an accused; and because only judgments in a form that is rendered by jurors or peers in this regard satisfy reason and humanity, for no other procedure for judgment to be accepted in criminal proceedings than trial by jury;

Twelfth, in that part of the administration of justice where something needs to be left to the judge's discretion, that is to say in proceedings involving police matters, for the judge to be subject to removal after a specific period and for the judge to be chosen only by the people without any involvement of the sovereign;

Finally, and in conclusion, in all proceedings for judges to be accountable for their judgments.

It seems to me that these propositions are at this time so many demonstrated truths.

From these demonstrated truths there emerges the following draft Constitution for judicial power:[3]

CONSTITUTION OF JUDICIAL POWER[4]

Title I
Of the courts and judges in general

Art. 1. The nation alone has the right to decide on the creation of the courts, and no change may be made in the organization of judicial power unless it has been ordered or consented to by the nation's representatives.

Art. 2. The courts and the judges shall not participate in any way in the exercise of the legislative power; and any citizen who holds any office in the judiciary may not be a member of the legislative body as long as he holds such office.

Art. 3. No more courts shall be established, and each court shall have only the number of judges that is required for the correct administration of justice.

Art. 4. In future, no office that confers judicial power may be created for any reason whatsoever in order to be sold.[5]

Art. 5. Justice, as it has been practised hitherto, shall be rendered in the name of the king as the supreme holder of the executive power.

Art. 6. Since the administration of justice is a public service that may not under any circumstances become the property of a citizen, no citizen of the State shall have the right to have justice rendered in his name.

Art. 7. Provision shall be made to ensure that justice is administered at no cost; and the legislative body, on the instructions given to it by the provincial assemblies, shall set for judges and officers of the courts sufficient fees in keeping with the dignity of their offices and the importance and nature of their duties.[6]

Art. 8. The hearing of and judgment in all kinds of cases shall take place in public. Consequently, and contrary to the current practice of the courts, in all cases requiring an examination of titles and a written debate, the rapporteur shall be required to read his opinion at the hearing, and in such cases the judges may not render their judgment or decision until they have heard, at the same hearing, the summary observations of the parties or their counsel concerning the work of the judge rapporteur.

Art. 9. No judge shall be permitted to interpret the law in any way whatsoever; and in a case where the law may be dubious he shall defer to the legislative body in order to obtain, where required, a more precise law.

Art. 10. All judges, without exception, shall be accountable for their judgments; and when the Civil Code and the Criminal Code are reformed, a law shall be passed to define the circumstances and the limits of this accountability.

Title II
Of the courts and of judges in civil proceedings

Art. 1. The kingdom shall be divided into a number of provinces of approximately the same area, in each of which a provincial administration shall be established.

Art. 2. Each province shall have a Supreme Court of Justice, located as far as possible in the most central city of the province, which court of justice shall consist of not more than two presiding judges, twenty counsellors, two general counsel and a prosecutor general.

Art. 3. Within the jurisdiction of each Supreme Court of Justice, there shall be created a number of approximately equal districts, and in each district a second-level court shall be established which shall consist of one presiding judge, six or eight counsellors, two advocates and a king's prosecutor.

Art. 4. Each city, each town and each country parish shall also have justices of the peace, the number of which shall be determined on the basis of the population of the locations in which they are established.

Art. 5. In all cities of any size there shall also be courts of commerce; and in cities located on the seashore, courts of maritime commerce or courts of admiralty.

Art. 6. All the courts, known under the names of courts of exception, shall be eliminated, and the hearing of the cases for which the courts of exception were created shall in future be held, at first instance and on appeal, in the courts just referred to.

Art. 7. The duties and the jurisdiction of the new judges shall be governed as follows in civil proceedings:

The justices of the peace, assisted by two notables, shall hear all personal cases with no right of appeal that do not exceed fifty *livres* in value; they may hear only these cases, and they shall be required to refer to the regular judges all those cases that exceed this value.

The courts of commerce and of admiralty shall hear all proceedings relating to commerce, and they shall try those that do not exceed two thousand *livres* in value without right of appeal.

The regular courts shall hear all cases, involving real or personal rights, with a value in excess of fifty *livres*, with the exception only of cases involving commerce. If it is considered reasonable to continue to permit the regular courts to render judgment without right of appeal in cases with a value of up to a certain amount, a specific law shall be passed to define the circumstances in which the courts shall judge these cases without right of appeal and the limits to the value of the cases that they may hear.

Whenever the justices of the peace, the courts of commerce and the regular courts exceed their jurisdiction, or when they render appeal judgments or when they accordingly exceed their jurisdiction, appeals from these rulings shall be heard by the supreme courts of justice in each province, which shall render final judgment in all cases, regardless of the status of the parties.

Art. 8. Any party shall have the right to argue his own case, if he considers this appropriate; in order for the mandate of advocates to be as free as it ought to be, advocates shall cease to form a corporation or an order,

and any citizen who has completed the necessary studies and passed the necessary examinations may practise this profession and shall in future be required to answer for his conduct only to the law.

Art. 9. No woman may plead against her husband, no husband against his wife, no brother against his brother, no son or grandson against his father or forefather, and conversely, unless he or she was previously heard by a justice of the peace, who shall consider the subject of the dispute and be authorized to mediate it within a period of one month in order to pacify domestic disputes and do everything that caution would suggest to him to prevent an angry explosion in the courts.

Art. 10. In the city where the Supreme Court of Justice sits and in the locations where the courts of the second level are established, a charitable office of jurists known for their probity shall be established, and they shall specifically be responsible for examining the cases of the poor and assisting them free of charge with their advice to assert their rights.

Art. 11. Any poor citizen to whom the office of jurists has given a favourable consultation may, if he or she thinks fit, have one of the king's counsel argue his or her case in the regular court or one of the general counsel in the Supreme Court. Consequently, the cases of the poor shall be assigned to each of the general counsel in the Supreme Court or the king's counsel in the regular court, from year to year and in turn.

Art. 12. The Civil Code shall be rectified, and a committee shall be appointed to arrange it in a better way and, above all, to simplify it.[7]

Title III
Of the courts and of judges in criminal proceedings

Art. 1. The only judges who shall prosecute and punish offences shall be the justices of the peace and the judges of the Supreme Court of Justice.

Art. 2. Any citizen who is charged with a crime or arrested *in flagrante delicto* shall be brought before a justice of the peace.

Art. 3. The justice of the peace, assisted by four notables, shall hear the accuser and his evidence and the initial defence of the accused.

Art. 4. If the justice of the peace and his assessors are of the unanimous opinion that the accused is clearly innocent, in that it is impossible that he is guilty or the evidence is contradictory, the justice of the peace shall order him released.

Art. 5. If the justice of the peace and his assessors find that there is some likelihood that the accused is guilty, they shall bring him immediately to a house of detention, in the event that the offence with which he is charged is such as to require a sentence involving a loss of life or freedom, and the accused shall be released on bail in the event that the offence with which he is charged is of another kind.

Art. 6. As soon as possible after the accused is detained or provides bail and within twenty-four hours, the justice of the peace shall notify the Supreme Court of Justice that he has placed a citizen under the power of the law. This shall be the extent of the powers of the justice of the peace.

Art. 7. In each Supreme Court of Justice, two judges shall be appointed annually in order of the roster to preside over the hearing of criminal trials.

Art. 8. The jurisdiction of the Supreme Court shall be divided into districts, and each of these judges shall have an equal number of districts under his jurisdiction.

Art. 9. As soon as the Supreme Court of Justice has been notified that a citizen has been placed under the power of the law, a Supreme Court judge in one of the districts in which the offence occurred or is deemed to have been committed, shall order, within a time to be determined, that the proceedings heard by the justice of the peace be brought and that the accused appear.

Art. 10. When the proceedings before the justice of the peace are obtained and the accused appears, the hearing of the trial shall begin within a time that will also be determined.

Art. 11. This hearing shall be held, and judgment of the accused shall be rendered, in accordance with the procedures commonly used in proceedings before juries.

Art. 12. No accused may consequently be found guilty other than by a judgment of his peers, and the judge may not enforce the law or impose sentence unless the peers of the accused have found him guilty.

Art. 13. In order to allow the nation to benefit as soon as possible from proceedings before peers or before a jury, the National Assembly shall immediately appoint a committee, consisting of those of its members or persons from outside the National Assembly who are most commendable for their knowledge of the laws, and this committee shall be responsible for drafting a new Code of Criminal Procedure that reflects the principle of proceedings before juries.

Art 14. The same committee shall also be given a mandate to draft a new criminal law bill in which it shall ensure that sentences and offences are brought into harmony with one another as accurately as possible, observing the principle that sentences should be moderate and not losing sight of the maxim that any punishment that is not necessary is a violation of the rights of man and an attack by the legislature on society.

Art. 15. Pending reform of the courts and promulgation of the new code and the new criminal law, the ordinance of 1670 and the criminal laws hitherto in use shall be observed in both their form and their substance, with the exception of some of their provisions that are repealed by the provisions contained in the following articles.

Art. 16. No order for arrest may be made in future unless it is supported by a majority of two to one of three judges.

Art 17. In future, any accused shall have the right to choose one or more counsel to defend him.

Art. 18. The review of the facts in defence of the accused may no longer be postponed until after the trial, and witnesses for or against him shall be heard at the same time at the hearing.

Art. 19. A simple death penalty shall be the harshest sentence that may be imposed on a guilty person.

Art. 20. The death penalty shall be imposed solely in the case of murder or high treason.

Art. 21. The making of distinctions in sentencing is hereby abolished for ever.

Art. 22. The property of the convicted person may not be forfeited under any circumstances; only where a complainant party appears at the trial, and if this party states and proves that he has suffered damage caused by the convicted person, shall the complainant be awarded a sum equal to the estimated amount of the damage sustained from the property of the convicted person.

Art. 23. During this session, a provisional law shall be promulgated to reform the criminal law and the criminal ordinance solely in respect of those provisions they contain that are contrary to articles 16, 17, 18, 19, 20, 21 and 22 of this Title.

Title IV
Of the courts and of judges in relation to police matters

Art. 1. This Title applies solely to the police power, the object of which is to prevent offences, and not to the power related to the administration of the political and economic interests of the city.

Art. 2. The police power shall be exercised in the cities, towns and villages on behalf of the municipalities.

Art 3. The justices of the peace shall be the only ones authorized to judge police matters.

Art. 4. In order that the police be administered correctly in the cities, the cities shall be divided into districts more or less equal in area, and each district shall have its own justice of the peace.

Art. 5. In order that the police be correctly administered in the towns and villages, the towns and villages shall be combined into cantons, and each canton shall have its municipality and its justice of the peace.

Art. 6. There shall also be appointed in each district of the cities a number of notable citizens, who shall perform the duties of assessors to the justice of the peace.

Art. 7. Similarly, there shall be appointed in each canton, a number of notable citizens, who shall also perform the duties of assessors to the justice of the peace of the canton.

Art. 8. Immediate action shall be taken to draft a police code and law, the purpose of which shall be to determine the functions of the municipalities, justices of the peace and their assessors with respect to police matters, the forms of sentences to be imposed by justices of the peace, the circumstances in which appeals from their sentences may be filed, the type of sentence they may impose and, in particular, the limits to their supervision and authority.

Art. 9. The task of drafting the police code and law shall be entrusted to the committee responsible for the Criminal Code and law; since the police law, the purpose of which is to prevent crime, must absolutely correspond to the criminal law, the purpose of which is to punish crime, and since each can be brought to the level of perfection of which it is capable only to the extent that both laws are based on the same principles, both will constitute one and the same work.

Title V and last
Of the election and appointment of judges

Art. 1. No citizen may be elected a judge before attaining the age of thirty years.

Art. 2. The judges of the supreme courts of justice and the regular courts shall be appointed by the king on presentation to the king by the provincial assemblies of three names for each vacant position in the courts.

Art. 3. The judges of the courts of commerce and of admiralty shall be elected and appointed by a plurality of votes, without the intervention of the sovereign, in the assemblies of traders, merchants and ships' captains in each of the towns in which a court of commerce or of admiralty is established. The only exception to this rule shall be the presiding judge of each court of commerce and each court of admiralty, who shall be ap-

pointed by the king, as are the judges of the regular courts on presentation to the king of three names by the meeting of traders, merchants and ships' captains, hereinbefore referred to.

Art. 4. The justices of the peace and their assessors shall be elected and appointed by a plurality of the votes and without the intervention of the sovereign by the general assemblies of the municipalities.

Art. 5. A particular law shall determine which persons may be elected judges of a supreme court of justice or of a regular court.

Art. 6. A particular law shall determine which persons may be elected judges or presiding judges of a court of commerce or of admiralty, and the same law shall determine the term of office of both the presiding judges and the judges of the courts of commerce and of admiralty.

Art. 7. The law creating the municipalities shall determine which persons shall be elected justices of the peace or assessors to the justices of the peace, and the same law shall determine the term of office of both the justices of the peace and of their assessors.

Art. 8. Finally, the law creating the provincial assemblies shall determine everything concerning the election and appointment of jurors.[8]

Gentlemen, that ends our work on the constitution of judicial power.

It is with regret that, in dealing with the constitution of this power, we were forced to propose an arrangement that is completely different from that which has been established for so long among us.

If it would have been possible simply to make improvements, rather than destroying in order to rebuild from the start, we would have done so all the more willingly since the nation has undoubtedly not forgotten everything it owes to its judges; how salutary, in times of trouble and anarchy, their wisdom has been; the extent to which, in times of despotism and when authority, ignoring all limits, threatened to encroach on all rights, their courage, their firmness, their patriotic devotion have been useful to the cause, which always tended to be ignored, of the people; with what devoted care they strove to maintain in our midst, by preserving the old

maxims of our forefathers, that spirit of liberty that is found today in all hearts in such an astounding and such an unexpected manner.

On the basis of this thought, perhaps it would be appropriate if the National Assembly did not promulgate at this time any part of the Constitution in a definitive way, not even the Declaration of Rights, a much more important and much more difficult project than people imagine; if, instead, it merely approved, rejected or modified that project and issued an absolute judgment solely when the work on each point of the Constitution has been completed and it will be possible to present as a single whole the development of all the principles that guided those who drafted it.

So much effort in the cause of preventing evil certainly deserves a great measure of gratitude from us.

Unfortunately, when we are asked to lay lasting foundations for the prosperity of an empire, it is not gratitude that we crave but rather justice. It is not what we owe to many but what we owe to all that may become the rule of our deliberations, and the judges themselves would chastise us certainly if, prevented by the respect we profess to have for them, we failed to perform the whole of the task that has been given to us.

We should not hide this fact, and the principles that we have developed will make this only too obvious, but present circumstances require another judicial order than that which we have respected for so long. Our judiciary was strongly designed to resist despotism, but now that there no longer is despotism, if our judiciary retained all the power of the institution, the use of this power could easily endanger our liberty.

It is accordingly essential that an absolute revolution take place in the system of our courts, but it will take time and other institutions must anyway be prepared before you can consider the new judicial order that has been proposed to you.

However, an empire has never found itself in such a more deplorable state of dissolution than ours. All relationships have been broken, all authorities are ignored, and all powers are destroyed. All institutions are overthrown with violence, all manner of sacrifices are audaciously ordered, all duties are breached with impunity, each day brings to light new

excesses, new prohibitions, new acts of vengeance. Crime is increasing everywhere, and whenever the banner of liberty is now raised among us, it is covered with blood and tears.

In the midst of so much disorder and anarchy, and at a time when there was never such a need for justice to be deployed with a more imposing machinery, what is there left for you to do? What you have already done in part, gentlemen, but what you did not do in a way that was sufficiently explicit. You still have to request a last act of patriotism from these same judges who, on so many occasions, have given us such brilliant evidence of their love for the public weal. Like us, they see that the provinces want a new judiciary and that by proposing to you a new arrangement of judicial power, we are merely bowing to the widely expressed view of our principals. They cannot therefore hide the fact that a revolution in the administration of justice has become inevitable, but, like us, they see that if, until this new judiciary is established, the courts remain without jurisdiction, it will be impossible to calculate the ills of all kinds that such inaction will produce. However, they are citizens as they are judges, and you must therefore invite them to support with all their strength the efforts that you are making to restore peace among our fellow citizens. It also seems to us that they will hasten all the more to respond to your invitation when they can achieve true grandeur at the very moment when the nation requires them to make substantial sacrifices, to look to the public weal with as much enthusiasm as if their devotion were to secure for them either a more powerful authority or more extensive prerogatives.

That is not all. The judges can do nothing on their own if the strength of the public does not support them. It would therefore be more convenient to give to the public all the power it requires to act effectively. I may be permitted here to express my personal opinion. I shall no doubt not be accused of not loving liberty, but I know that not all movements of peoples lead to liberty. But I know that great anarchy quickly leads to great exhaustion and that despotism, which is a kind of rest, has almost always been the necessary result of great anarchy. It is therefore much more important than we think to end the disorder under which we suffer. If we can achieve this only through the use of force by authorities, then it would be thoughtless to keep refraining from using such force. May no one say to me that this force can again become dangerous. First, I do not know why, but I think that men who always distrust are born for servi-

tude; that trust is the attribute of great characters, and that it is only for men with great characters that Providence has created liberty. Then, what will we have to fear when all citizens are at their post, when a profound revolution has occurred in social customs, when the prejudices that we obey are no longer anything but ancient errors, when, by dint of experience, we unfortunates have managed not merely to realize this but to feel that we can be happy only with liberty? Let us leave there, then, all these pusillanimous fears, and when we have an incalculable number of means to bring to perfection the task that we have begun, let us no longer suffer the disorder that we have an interest as well as a duty to prevent. May the leader of this empire, this king whom you have just proclaimed so justly and with such solemnity as the restorer of French liberty, agree with you in restoring calm in our provinces so that, by your combined efforts, by joint supervision, the days that follow will not be marked by desolation, that for the honour of humanity, this revolution shall be peaceful and that in future the good that you are called to do will, if possible, leave in the soul of each of your fellow citizens neither bitter regret nor painful memories.

Note – This text is a translation from the French. The French version comes from the original edition of the report (Paris, Baudouin, imprimeur de l'Assemblée nationale, 1789).

NOTES OF BERGASSE

[1] I wish to explain here what I mean by the arbitrariness of the police. There must never be anything arbitrary in the punishments imposed by the police; in this regard, as in other parts of the administration of justice, the law must provide for and determine everything. But the precautions the police are required to take to keep the peace necessarily contain, up to a point, something arbitrary, as do the acts of surveillance over individuals and things, and it is necessary to permit this.

[2] That is to say by the representatives of the people.

[3] Before going further, it should be noted here that there are only two ways to reject this project. Either it must be proved that the principles just expounded are wrong or it must be proved that the following articles are not in accordance with those principles.

[4] Among the articles set out below are some that belong more to the legislation than to the constitution of the courts; but since they essentially relate to public order and they are also directly derived from principles that have just been developed, we thought they should be added here, subject to assigning them to their proper place when the finishing touches are made to the work on the Constitution.

[5] Hence the reimbursement of all judicial offices and because it would be profoundly unjust for the holders of these offices to be ruined in the re-establishment of public order, hence the reimbursement of judicial offices not only on the basis of the actual revenues derived therefrom, as has sometimes been suggested, but on the basis of the purchase contracts. This fact must not be hidden: the State has never been in a less favourable position than it is in today to provide such reimbursement, and when it is a question of making such payments, it will only be with the greatest difficulty that this can be reconciled with what is owed to individual property with what is required by public need. However, reform of the judicial system is absolutely essential.

[6] Since the tax authorities collect on the basis of various pleadings duties that unfortunately form a substantial part of the public revenue, it will be necessary to ensure that these duties are repealed and that replacements are provided in a way that is less burdensome for the people.

[7] It is possible that in reforming the Civil Code, and especially the civil law, we shall find that it is possible to introduce trial by jury into civil proceedings, as we proposed to do in criminal cases. We should then succeed in reducing further the number of judges, and if it is true that in a well-ordered State there must be very few judges and few laws, we should then come closer to the system of a good constitution.

[8] In these final articles, it will be seen that it is only when provincial states and municipalities have been created – something that should be done immediately – that we can complete everything relating to judicial power. This should not come as a surprise, because all parts of a constitution hang together. If each part needs to be worked on separately, it would be prudent not to adopt any one part definitively until it is possible to examine all of them and until the interplay, so to speak, between them has been seen. Only then would we truly understand the different relationships, and it would become possible, when they are compared with one another, to improve some by means of others and thus to give the Constitution the unity of principles and results that alone give it its strength and its continuity.