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Topic- Organization Of The Judiciary

Organization Of The Judiciary

The judicial organ everywhere differs essentially from both the executive and legislative organs. Subject to the qualifications mentioned in the chapter on executive organ, the supreme executive power is to day universally entrusted to a single magistrate While the legislative power is exercised by a more or less numerous assembly, usually consisting of two chambers. The judicial power, in the other hand, is exercised neither by a single magistrate nor by an assembly, but by a series of magistrates or collegiality constituted tribunals usually hierarchically organized one above another. With a supreme court of review of cessation at the apex.

In Anglo Saxon countries the courts, except those of appeal, usually consist of a single judge, while in Germany, France, and the continental European countries generally the system of *pluralite des juges* exists for all the courts except those of the justices of the peace that is, they are collegiality organized. Thus, in France the tribunals of first instance are composed of from three to fifteen judges, the courts of assizes of three judges, and so on, no judgment being valid unless it is rendered by at least three judges.

In France and continental Europe generally the idea of justice dispensed by a single judge has never found general favor, and the notion persists that the authority of a judgment bears a certain relation to the number of judges who render it. Plurality of judges, it is believed, affords a safeguard against arbitrariness and enables the court in criminal cases to resist more effectively the influence of the public prosecutor. But this system necessitates a great multiplicity of judges there are more than five thousand in France and nearly as many in Germany-and consequently a heavy budget for the department of justice, even With inadequately paid judges. For this and other reasons, some ministers of justice in France, especially in recent years, have proposed the abolition of the system of "plurality" and the substitution of a system of single judges for the lower courts.

The large number of judges in Germany, France, and the Continental countries generally forms a striking contrast to the organization of the judicial systems of Great Britain and the United States, where the number of judges is, in comparison, relatively small.

Another difference between the Anglo American and Continental systems to be found in the British and American practice by which the judges go "on Circuit" from county to county holding court in different towns that is, for the convenience of litigants the courts go to them instead of requiring them to seek out the court in a distant community. In continental Europe, on the other hand, the courts are "Sedentary" or localized, that is, they generally sit always in a particular town and litigants must take their cases there to have them decided.

Perhaps one advantage in the organization of the judiciary on the continent of Europe as compared with that in most of the American states is to be found in

the more unified and integrated character of the judicial system. In late years there has been a movement in the United States looking toward the reorganization of the state judiciaries so that the whole judicial power of the state (at least the civil, jurisdiction) shall be vested in one great court, of which all tribunals will be branches, departments, or divisions. Actual steps in this direction have recently been taken in several states (notably in Ohio, Wisconsin, Massachusetts, and Oregon) by the creation of judicial administrative councils to supervise and coordinate the work of the courts, and in 1922 a bill was passed by Congress creating a council of judges to supervise the work of the federal courts. The new constitution of Louisiana (1921) provides for a more highly unified system than is to be found in any other American state.

Organization of Courts in Federal States.

In states having the federal system of government there are usually two separate and distinct series of judicial bodies, one to exercise the national or general jurisdiction of the whole union, the other the local jurisdiction in each component state.

This is not necessarily so, however, as the organization of the German judicial system clearly shows. Instead of two separate and distinct systems one to exercise the judicial power of the federation (Reich) and the other that of each individual state (Land), there is a single uniform system for the federation and the states, all the courts being organized under national law and exercising their functions in accordance with a uniform code of procedure.

Thus the entire judicial system of the country, from the bottom to the top, rests upon the same basis the competence and procedure of all the courts are determined by national law, and they are held by judges Whose qualifications and tenure are prescribed by the same authority. There is no division of jurisdiction between the federation and the states , in short, the federal principle has no place in the judicial organization of that country.

Nevertheless, with the exception of the *Reichsgericht*, the courts are all regarded as state tribunals rather than as national courts, the judges being appointed by the state governments and their compensation being determined and provided by the same authorities.

Moreover they exercise their jurisdiction in the name of the local governments and are subject to the oversight of the states in which they are situated. As there is one uniform judicial organization for all the German states, so there are common national codes of civil and criminal law and of procedure. Thus neither diversity in judicial organization nor diversity Of law exists in Germany, though the state is federal in its organization.

In the United States, on the contrary, there are many systems of judicial organization and of law and procedure as there are gates. Each individual commonwealth organizes its own Judiciary and frames its own codes of law and procedure, according to its own notions and ,its own conception of its local needs and conditions.

Nevertheless, there is in reality far more of resemblance than of diversity, owing to the common basis which is afforded by the common law, upon which the legal system of each of the states (except Louisiana) rests. There are, of course, variations, but in essentials there is remarkable similarity and

uniformity. Only in a limited sense are the courts of one state regarded by those of another as foreign.

The constitution of the United States requires that the courts of each state shall give full faith and credit to the records and judicial proceedings of the other states and the Spirit of judicial comity the, deference paid by the courts of one state to the decisions of the others-which characterizes interstate judicial relations constitutes a powerful unifying force.

This rule of comity, together with the full faith and credit provision, makes possible the enforcement in one state of rights acquired in others and likewise contributes to the prevention by one of acts which would infringe on prohibitions created by others.

Two General Types of Courts.

In all countries the judicial tribunals are of two kinds: first, those which may be called the ordinary or regular courts, whose normal function is the decision of legal controversies between individuals and the trial of criminal cases and second, those which may be classified as extraordinary or special courts. In the latter category may be placed the administrative courts, military, commercial, and industrial courts, labor arbitration courts, courts of claims, conciliation courts, probate courts, customs courts, courts of impeachment, consular courts, and various others. A good many of those of this latter category exercise only what is known as voluntary or non-contentious jurisdiction.

Administrative Courts

It is impossible here to consider the Organization and functions of the multifarious special tribunals which are found in the different countries. It must suffice to discuss briefly the most important of them, namely, the administrative Courts which are found in France, Germany, and a goodly number of other continental European countries. In these countries the administrative courts have a separate and distinct organization, they constitute a system parallel with that of the ordinary judicial courts, they are charged with deciding controversies mainly involving claims against the state, and they apply a body of law separate and distinct from that of the civil law.

The idea of the separation of the administrative jurisdiction from the ordinary civil jurisdiction originated in France at the time of the Revolution and was a consequence of the,general repugnance to the control which the judicial courts had exercised over the administrative authorities during the old regime. The feeling was that if the judges were allowed to decide controversies arising between the state and its administrative authorities, on the one hand, and private individuals, on the other, it would result in judicial interference with the operations of the government and impair the efficiency of the administration.

It was accordingly provided by law (Act of August 16, 1790) that the judicial and administrative functions should be kept separate and distinct and that the role of the judicial courts should be restricted to the decision of cases arising under the civil and criminal law. At first the decision of administrative controversies was left to the administration itself, but in time a series of special administrative tribunals or councils were created to exercise this function.

They are the council of prefecture in each departmental circumscription and the Council of State at Paris, which serves as the supreme administrative court, as the Court of Cassation is the supreme judicial court. The Council of State has the final jurisdiction, with some few exceptions, of questions involving the legality of all acts of the administrative authorities from the president of the republic down to the village mayor, and it may annul those which in its opinion are *ultra vires* and award damages to the individual who has sustained injury in consequence of such acts,

In some what the same manner as the English courts have built up the common law, the Council of State has developed a large body of administrative case law (jurisprudence) relative to the responsibility of the state and its local governmental agencies for their acts a responsibility which has been gradually extended until to-day it is almost as absolute as the liability of a private employer of labor for injuries sustained by his employees.

Originally established to protect the administrative authorities from interference on the part of the judicial courts, the administrative jurisdiction has become the protector of the individual against the arbitrary and illegal acts of the government and its administrative agents, and it may be safely said that in consequence of the extremely liberal jurisprudence which the Council of State has built up and the solicitude which it has shown for the protection of the individual against the wrongful acts of the government, the individual in France to-day enjoys a greater degree of protection against such acts than exists in any other country.

In France, if he suffers an injury at the hands of the state or its administrative agents, he can sue the state in the administrative courts and obtain a

pecuniary indemnity, whereas in England and America, where a different rule prevails, he cannot generally sue the state, but must be content with a damage suit against the particular officer or agent who committed the wrong and who is personally responsible many cases such a remedy is ineffective, as where the officer is insolvent and unable to pay the judgment recovered.

In France a suit against the state is a very simple matter no attorney is necessary the cost of bringing the case before the Council of State is only a few centimes and cases are dispatched with remarkable celerity. The remedy thus provided is availed of upon a large scale, and many thousands of cases are decided every year by the Council of State.

In Germany a distinction is made between the state as a natural person and the state as *Fiskus or Fisc*, and the individual who has a claim against it by reason of tortuous acts committed by its agents can either sue the agent in the ordinary courts or the state as *Fiskus*. This privilege was definitely provided by a law of May 22, 1910, and by Article 131 of the new constitution of the Reich it was extended to apply to the acts of all public servants, national and state. Unlike the French rule the German laws make public servants liable not only for their personal faults but also for acts committed in their official capacity, and the principle of liability extends to military as well as civil servants.

The Anglo-American System.

In England and the United States, and in countries generally where English legal institutions have been introduced, the doctrine of administrative jurisdiction, as it is known and practiced on the continent of Europe, is little known. There the doctrine prevails that the state is never liable in tort nor in

contract except under the procedure of petition of right. There administrative law is not a separate branch of jurisprudence, and specially constituted administrative courts with jurisdiction over controversies between private individuals and public officials do not exist, at least not in the form in which they are found on the Continent.

Disputes between the public authorities and private citizens like differences between private individuals themselves, are decided by the regular judicial courts and according to the ordinary law of the land. The private citizen who is injured by the action of the public authorities has exactly the same remedies that he would have if the injury had been committed by another private individual, that is, a personal damage suit against the wrong doing officer. In short, there is one law and one court for the citizen and the public functionary alike.

The English (and American) doctrine is that all legal controversies must be decided by the ordinary judicial courts because we theory of the law assumes the supremacy of the latter and the notion of administrative jurisdiction is inconsistent with this theory. The right to sue the state is not admitted except where it is expressly conferred by statute, and when it is conferred it is usually subject to restrictions which often make the action difficult.

In England, observes **Dicey**, The idea of legal equality, or of the universal subjection of all classes to one law administer ed by the ordinary courts, has been pushed to its utmost limit With us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility as any other citizen for every act done without legal justification. The reports abound With cases in which officials have been brought before the courts and made in their personal capacity liable to

punishment or to the payment of damages for acts done in their official capacity.

Every act of public authority, no matter by whom or against whom it is directed, is liable to be called in question before an ordinary tribunal, and there is no other means by which its legality can be questioned or established. Dicey emphasizes what he called "the rule of law," a rule which in England and America makes public servants liable for their acts equally with private individuals, and he contrasts this rule with what he called the privileged position of public servants in France and Germany. To him the very essence of the *droit administration* Is the special position of functionaries in respect to their immunity from responsibility, but in fact this immunity is only one aspect of it.

Criticism of the Continental System.

In both Great Britain and the United States there is a prejudice against the Continental system of administrative law and administrative jurisdiction and Popular belief prevails that the administrative judges are not independent, that they render their decisions at the behest of the government, that they do not decide cases according to fixed rules of law, that public officers are legally irresponsible and protected against damage suits, and the like.

This prejudice is, however, based in large part upon misunderstanding, and English and American jurists are not lacking who frankly recognize the obvious merits of the Continental system. Even Dicey has expressed admiration for the skill and ingenuity which the French Council of State has displayed in building up from year to year a vast system of jurisprudence and in devising remedies for the protection of private individuals against the

arbitrary and illegal conduct of the administrative authorities, and he admits that the French system does possess merits which Englishmen do not always recognize.