The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems

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In the civil law group of the so-called Romanist legal systems, two of the most significant are the French and German. Although the constitutional and judicial organization of these two countries may not be immediately characterized as typically civilian for comparative law studies, an understanding of their composition and function is in some measure an essential part of the background that gives meaning to the civil law in contrast with the common law.

Constitutional and judicial organization is primarily a political matter rather than a doctrinal one, but the study of the law and legal system of a country is better understood in its total framework. Whether the country is classified within the civil law group, the common law group, the Scandinavian group, or the socialist group, the pattern of government seeks to effectuate their fundamental political philosophy. However, some aspects of the judicial framework and function are the necessary reflections of the basic nature of the legal system. Accordingly, the present article will merely outline the constitutional organization but will examine with more analysis the composition and attributes of the courts.

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1. Selected items of bibliography pertaining to both France and Germany, or of a general nature: Szlajtz, Guide to Foreign Legal Materials: French, German, Swiss (1959); von Mehren, The Civil Law System (1957); Déak and Rheinstein, Machinery of Law Administration in France and Germany, 84 U. Pa. L. Rev. 846 (1936); Burdick, The Bench and Bar of Other Lands (1939); Bowie and Friedrich, Studies in Federalism (1954); Zurcher, Constitutions and Constitutional Trends since World War II (1951); Dietze, Constitutional Courts in Europe, 60 Dick. L. Rev. 313 (1956); Dietze, Judicial Review in Europe, 55 Mich. L. Rev. 539 (1957); Dietze, Judicial Review in America and Europe, 44 Va. L. Rev. 1233 (1958); Lenhoff, The German (Bonn) Constitution with Comparative Glances at the French and Italian Constitutions, 24 Tul. L. Rev. 1 (1949).
I. FRANCE

CONSTITUTIONAL ORGANIZATION

The constitutional development of France since the French Revolution of 1789 is predicated upon a tremendous break from its antecedents: however, the same is not true for the private law of the country. Of course, the Code Napoleon of 1804 did unify the private law of France, and the Code embodied some of the fundamental achievements of the Revolution in the general principles of freedom of contract, the sanctity of private property, the equality of individuals, and the abolition of personal servitudes. But in its essence and in much of its detail, there was a direct and very strong continuity with the past, particularly in the nature of its civil law legal system.

The present discussion covers the constitutional organization of France under the Fifth Republic of 1958 and its relation to the preceding Fourth Republic of 1946. After World War II, the strong democratic spirit of the French people expressed itself in the 1946 constitution which made the elected National Assembly the supreme power, but the multiplicity and diversity of the political parties ultimately caused too much instability because no government could stay in office very long and could never effectively carry out any significant program. What France needed was a new Joan of Arc who would have an emotional as well as a rational appeal, and around whom all the people could unite. General Charles de Gaulle was called to fill the role.

Many prominent constitutions, especially the American one, emphasize the basic principle of separation of powers. Generally, one thinks in terms of the executive power, the legislative power and the judicial power. However, it would be a mistake to presume that the doctrine of the separation of powers has the same meaning in different countries. In the American concept, the separation of powers is principally understood as a system of "checks and balances" between the

powers: the executive is checked by the legislative and the judicial, the legislative is checked by the judicial and the executive, and the judicial is checked principally by the legislative.

Ever since the Revolution, it has been a primary objective of the French people, in reaction to previous political organization, to prevent and counteract any possibility of tyranny and arbitrariness. The separation of powers—executive, legislative and judicial—provided the broad formula, but primarily only as a distribution of functions; there are no checks and balances similar to the American system. Under the Fourth Republic of 1946, supremacy was vested in the National Assembly as the legislative power. The executive power administered the government but did so as subordinate to the legislative power. For the judiciary, the separation of powers meant the independence of the courts and the judges. The Fifth Republic of 1958 made important changes in the distribution of authority between the executive and the legislative powers, giving much more authority to the President and making the executive the most important power. The position of the judicial power was not greatly altered in this broad framework.

In a description of the constitutional organization of France, there must also be included two additional elements, the Administration and the Administrative Tribunals. Of course, the Administration may be considered as part of the executive power, but in France it has a strong identity of its own. Likewise, the administrative courts constitute a judicial system of their own, separate and apart from the regular judiciary. While these distinctive features must always be kept in mind, the present discussion will include the Administration in the section which describes the Executive Power, and the Administrative Tribunals will be considered in connection with the Judicial Power.

The simplest way to make a brief sketch of the constitutional organization of France is to outline each of the three major units.

**THE LEGISLATIVE POWER**

The French people have long rejected the idea of a “government by judges,” and while they did fear an executive dictatorship they did not fear a legislative dictatorship by an elected parliament. Accordingly, the Fourth Republic of 1946 vested supreme authority in the National Assembly. National sovereignty belongs to the people, and the will of the people is expressed through its elected representatives in the National Assembly. Here the separation of powers doctrine means the supremacy and independence of the legislative power. Accordingly, there can be no room for any effective veto or control by the executive, nor is it
acceptable to have any judicial review by the courts of the constitutionality of statutes. The complete sovereignty of parliament precludes any questions of constitutionality. Within the legislative framework of the 1946 constitution, there was also a second chamber called the Council of the Republic (upper chamber). Its powers were very limited, and it was completely subordinate to the National Assembly.

One check on the Assembly was the Committee on Constitutional Control (le Comité de Contrôle Constitutionnel), composed of 10 persons selected by parliament primarily from other than assembly members. The President of the Republic was ex-officio Chairman, and the heads of the National Assembly and Council of the Republic were ex-officio members. The function of this body, advisory in nature, was to assist in the function of parliamentary self-restraint (to question constitutional issues prior to legislation) rather than to exercise any substantial control of constitutionality. Along the same advisory lines, the government could ask for opinions from the Council of State (see under Administrative Tribunals) concerning statutory and constitutional interpretations. In the light of the French character of individuality and independence, and recognizing the profound reactions after World War II, the complete supremacy of the National Assembly, with its predominance over the executive and judicial powers, is perfectly understandable. However, for these very same reasons it proved to be unworkable, and in 1958 had to yield its position of primary importance to the Presidency.

Under the Fifth Republic of 1958, the general traditions and the liberalism and the popular character of French institutions were all preserved, but the legislative power was dropped to a much lower level. This is not to say that there was a simple reversal between the legislative and executive powers. It was not as simple as that. In the first place, the bicameral structure of the legislature was reemphasized. Although the National Assembly still comprises the directly elected representatives of the people and continues to be the main platform for public debate of national policies, the upper chamber, renamed the Senate, has equal powers in the matter of legislation. Instead of the previously unlimited power of legislation, the permissible range of topics is now strictly defined in a list. Even though the list includes many of the most im-

3. Under the French Constitution of 1958, the matters within the statutory power of parliament are the following: civil rights and fundamental guarantees accorded to the citizens for the exercise of public liberties; the obligations imposed by the national defense upon the persons and property of the citizens; the nationality, circumstances and qualifications of persons; matrimonial property, inheritance and gifts; the determination of crimes and offenses as well as the punishments applicable to them; penal procedure;
portant subjects, it is a far cry from the former existence of power. All matters not listed are subject to regulation by the government (i.e., the executive). Furthermore, even within the domain of topics on the legislative list, authorization may be given to the government for a limited time to issue regulations with the force of law when connected with a specific governmental program. Such executive enactments must be later ratified in the parliament. In some ways, however, the National Assembly still stands out as the most important unit of legislative power; for example, it alone may pass a vote of censure against the government. The principle of "separation" now consists of the right of political control by the National Assembly and the exclusive right of the government to formulate and enforce national policies. Consequently, parliamentary debate of the public affairs of the nation must pivot on the cooperation of the legislative and executive branches.

The former advisory Committee on Constitutional Control was transformed into a constitutional tribunal called the Constitutional Council (le Conseil Constitutionnel) and was given much more important powers. The nine members are appointed equally by the President of the Republic, by the President of the National Assembly, and by the President of the Senate. These nine are then supplemented by former Presidents of the Republic as ex-officio members. This new Council supervises the conduct of the popular referendums and the election of the President of the Republic; it also passes on the challenged mandates of members of parliament. In addition, the Council advises the President of the Republic concerning the exercise of emergency powers and concerning measures to be taken in time of crisis. The Council also decides disputes between the government and the parliamentary chambers as to whether certain proposed legislative measures exceed the powers granted to parliament by the constitution. The Council must pass on the constitutionality of organic laws; and it also may be directed by the

amnesty; the creation of new juridical systems and the statute of magistrates; the base, the rate and the methods of taxation of all types; the system of issuing money.

The law determines also the rules concerning: the electoral system of the parliamen
tary assemblies and the local assemblies; the establishment of categories of public institu
tions; the fundamental guarantees accorded to civil and military employees of the state; the nationalization of enterprises and the transfers of property from the public to the private sector.

The law determines the fundamental principles of: the general organization of the national defense; the free administration of local communities, of their power and their resources; education; the status of property, real estate laws and civil and commercial obligations; laws pertaining to employment, unions and social security. In addition, peace treaties, commercial treaties, and other treaties specified in Art. 53 must be ratified and approved by law.
President of the Republic, the Prime Minister, or by the President of either of the legislative chambers to examine the constitutionality of a proposed law or of an international treaty before it is promulgated or ratified. The decision of the Council is final. The innovation of this review of the constitutionality of legislation resembles what is known as "judicial review," but in France this seems to be political as well as legal in nature. Furthermore, the Constitutional Council is not a regular judicial organ but is closely affiliated with the legislative and executive branches.

**The Executive Power**

Under the Fourth Republic of 1946, the executive power was vested in the President of the Republic and the Council of Ministers (or Cabinet). The real head of the government was the President of the Council of Ministers (Prime Minister), named by the President of the Republic but requiring approval by a majority of the National Assembly. The legislative control was most dramatically exercised in his forced resignation when a majority of the Assembly refused to support a vote of confidence. From 1875 to 1914 (40 years), there were 55 changes of Prime Ministers; from 1914 to 1939 (25 years), there were 45; and from 1946 to 1957 (12 years), there were 25. In 77 years, there were 125 changes of Prime Minister. Although the executive power was thus subordinated to the legislative power, the principle of separation of powers gave it independence from the judicial power. It is often considered that the function of the executive is to administer the laws as distinguished from the legislative function of making the laws. In France, this is only partially correct because it is also within the executive function to make some of the laws. This is done by "decree-laws" on the basis of a parliamentary authorization to exercise this power of legislation for a specified period and with respect to specified matters, and also to meet the necessity of carrying on governmental functions during the recurrent periods of legislative inaction.

The *Administration* in France is not merely an adjunct of the executive branch of the government. It is really a whole organization in its own right, separate from the political organization as a whole, and constitutes the permanent framework of governmental activity carried on despite the changes in "governments." It is the mechanism responsible for stability and continuity of French national life. A change in the government affects the Administration only at its top level; in all the rest, there is continuity. The permanent civil servant is the *fonctionnaire*; he has a legal status which prevents his discharge except for very
serious reasons. To obtain these positions, people have to be trained at special schools and then pass competitive examinations. It is a career of prestige and security.

Within the administrative organization, there developed a system of administrative tribunals, headed by the Council of State, which served to regulate and control the functions of the administrative agencies and the executive authorities, and to settle disputes between individuals and any governmental agency. Thus, the lack of judicial control over the executive is more than counterbalanced by the administrative courts, so that the individual in France is perhaps better protected than elsewhere against public authority. A discussion of the administrative court system will be included with the Judicial Power because its most important function is more closely related to the adjudicative process.

Under the Fifth Republic of 1958, the greatest and most significant change was with reference to the position and powers of the President of the Republic. In addition to his traditional and formal powers, he has a number of completely new functions which give him effective political power. Although he must consult the Prime Minister and the Presidents of the two legislative chambers before dissolving the Parliament, he is under no obligation to follow their advice. Likewise, if the Government or the two legislative bodies suggest that he submit to referendum a matter involving the organization and functioning of the organs of government, he may refuse to do so. A special function of the President is to see that the Constitution is respected, and to insure by his arbitration the regular functioning of the organs of government and the continuity of the State. He is the guardian of the national independence, of territorial integrity, and of respect for agreements within the Community and for treaties. Most far-reaching of all is the President's power in the event of an interruption in the functioning of the constitutional organs of government. After consulting the Prime Minister, the Presidents of the two Assemblies and the Constitutional Council, he "takes the measures called for by the circumstances." At the same time, the National Assembly cannot be dissolved while the emergency powers are in force. The President may request Parliament to reconsider a law that is transmitted to him for promulgation, and it is up to him also to dissolve political deadlocks.

Clearly, the powers were patterned for the man. Their success will be determined by the manner of their use rather than by the nature of their formulation. And even those who have utmost confidence in the present incumbent may well be worried about his successor.
THE JUDICIAL POWER

In France, the judiciary is included as one of the three so-called "powers" of the constitutional organization chiefly in the sense that it is independent of the other two.

Judges have a different training than lawyers. They have membership in a judicial civil service, and there is an esprit de corps of the judiciary. The regular courts have no control over the executive or administrative agencies—this is exercised by the administrative tribunals—nor do the regular courts have any right to pass on the constitutionality of acts of parliament. Furthermore, by reason of the comprehensive codifications in civil and criminal law, the scope of the court's function is more restricted than in the common law system where judges are actively making the law. At first sight, it seems unusual that the administrative tribunals do not form part of the judicial power because in large measure they perform the same kind of function. However, for this reason they will be considered in connection with the Judicial Organization of France, in the fuller discussion of that subject.

Under the Constitution, the judicial authority is the guardian of individual liberty, and the independence of the judicial authority is guaranteed by the President of the Republic. The High Council of the Judiciary (le Conseil Supérieur de la Magistrature) is a disciplinary council for judges; it further assists the President of the Republic by presenting the nominations for judges of the Court of Cassation and First Presidents of the Courts of Appeal. It also gives its opinion on nominations by the Minister of Justice of all other judges. The High Court of Justice (la Haute Cour de Justice) is a special court for the purpose of trying criminal charges against members of the government and also to judge the only act for which the President of the Republic is held accountable, namely, high treason.

THE COMMUNITY

Before concluding this description of the French constitutional organization, brief mention must be made of the Community. This consists of the Republic of France and the Overseas States, joined on a new principle of equality. The overseas territories may continue as departments of France with local assemblies, or they may choose full autonomy as member states of the Community, or they may leave the Community to acquire complete independence. The regime is specially conceived to create ties of solidarity among the participants, taking into account the differences in their respective stages of social, technical, economic and political development. The principal organs of the Com-
munity, as such, include the President of the Community (President of the Republic), the Executive Council, the Senate of the Community, and a Court of Arbitration. Within this framework of organization and participation, the conditions of cooperation must necessarily be very flexible to leave room for maximum development of the Community's potentialities in the common interest of all its members.

CONCLUSION

The new constitutional organization of France is a combination of both continuity and innovation. The measure of its success in time will be determined by the people who are charged with its operation. While continuing in the tradition of a constitutional democracy, it now has a larger measure of the plebiscite character through more numerous possibilities of referendum to the people. Of course, the most significant change is the new central position of the President of the Republic. As chief executive he is part of the government, yet he is above it. The new form of government has the elements of firmness and stability; France has taken a new lease on life as a major world power; the economy of the country is improving; and one can look forward with optimism to its future.

JUDICIAL ORGANIZATION

The judicial organization of France has had a long continuous tradition with relatively few changes, and these were of a minor nature. Although the courts of one modern country bear great resemblance to those of another, it is in this area more than in the constitutional organization that we find certain attributes and characteristics which bear upon the nature of the legal system in which the courts function. To see and to understand this relationship in France, it is necessary to examine first the nature and organization of the magistrature; as in this connection it is extremely important to evaluate the qualifications and the attitudes of the individuals who, as a group, operate the judicial system. The regular courts constitute the heart of the system, but the present discussion will also include a description of the administrative tribunals.

THE MAGISTRATURE

In English language usage, the "magistrate" means a judge; but in France, the judges constitute only one of the three branches of the magistrature, because there are also the magistrates who serve in the Ministère Public, and those of the central administration in the Ministry of Justice. While recognizing the similarities within these three branches
of the *magistrature*, it is also important to distinguish them. The magistrates who sit as judges and decide cases litigated before them are referred to as the *magistrature assise*. The members of the *Ministère Public* serve as adjuncts of the court to assist in the judicial process and are referred to as constituting the *parquet* or *magistrature debout*. Likewise called magistrates are the members of the *chancellerie* in the Ministry of Justice who do the administrative work in connection with the court system, keep the records and prepare the statistics, work on the budgets, draft proposed legislation and prepare exams for the *magistrature*, and perform many other duties. Our interest is principally in the first two of these categories of magistrates. Both must have the same regular legal education, but upon passing the examination to become a magistrate the successful candidate must make a choice of either the *magistrature assise* or the *magistrature debout*.

The nature of the position of the judge is fairly universal, and does not call for elaboration at this point. The nature of the *Ministère Public* and the function of its members are more unusual and need description. The *Ministère Public* is an office or organization which participates in the judicial process by having one of its members serve as an adjunct to the court. He does not share in the process or the responsibility of actual decision, nor does he represent either of the litigant parties. His status is rather to represent the interests of society in general; he protects the interests of the law, of public order and good morals, and of society. The *Ministère Public* is a very old institution dating back to the 14th century when it started as the sovereign's representative along-side the courts. This aspect is still reflected in the fact of their appointment and control by the executive power through the Ministry of Justice. Nevertheless, the members of the *Ministère Public* have come to enjoy almost complete autonomy, and they exercise a thoroughly independent function. It is just as likely as not that this magistrate will argue for a result that is not in the immediate best interests of the government, and even if he has instructions which he must follow in his written pleadings he is free to urge contrary views in oral presentation before the court.

At the level of the principal courts of first instance, the *parquet* comprises a *procureur de la République* and his staff; at the higher levels, a *procureur général* assisted by *avocats généraux* are attached to each such court. In connection with litigation, the *procureur* has two functions: he advises the court as to the solution he considers desirable from the point of view of society as a whole, and in proper cases he is
a party to the proceeding. Sometimes his presentation is of considerable importance in the development of the law.

Generally speaking, there is a close relationship between these two categories of magistrates; their background and training are the same; their activities are in the same field. Although it is rare for a judge to be transferred to the parquet, the reverse is not uncommon especially to fill some of the more important judicial positions.

The position of the judge in France is one of prestige and security. Although appointments, promotions and supervision are in the hands of the executive authorities, the courts are completely independent in their judicial functions. The judge has a life tenure and need not be concerned about elections or politics. Normally, a court operates with a bench of at least three judges and on the principle of collegiality. That is, all decisions are per curiam of the court as a whole; there is complete secrecy of deliberations, and there are no dissenting or concurring opinions. This anonymity of the judges makes for less individual responsibility and greater personal security, but it also precludes the possibility of a particular judge making an outstanding name for himself by his keen insight and progressive ideas. For these same reasons, the bench does not attract the strongest personalities.

Since a judge enters upon his duties directly from his law school and magistrature examinations, his reliance is principally upon his university legal education. He has more in common with his magistrature colleagues and his old professors than with the practicing members of the bar, and he is accordingly much more of a theoretician than the practical-minded lawyers. This background and state of mind of the French judge produce an analysis of legal problems in terms of general principles, with the use of generalizations and conceptual abstractions. In other words, the judicial operation is perfectly suited to a civil law system with its codification of integrated and coordinated principles in a systematic plan. Finally, the court’s opinions are written in this same sort of short generalization which conforms to the civil law or Romanist approach to law. This is, of course, in complete contrast to the common law system in England and the United States, where the members of the bench are drawn from the practicing lawyers, where there is no systematic codification, where each case is discussed and reported in full factual detail, and where the court’s pronouncements are limited to the specific factual situation in the particular case.
Organization of Regular Courts

In France, as elsewhere, there are the three usual levels of regular courts: the courts of first instance (civil, commercial and criminal), the intermediate appellate courts, and the highest court. In addition, there are a number of special courts. It might be inserted here that France is territorially divided into 90 départements, each having 3 or 4 arrondissements, which are further divided into cantons and finally into communes.

Courts of First Instance. The courts of first instance in civil matters, with general jurisdiction or competence, used to be the tribunaux de première instance, and they exceeded 350 in number, with at least one in each arrondissement. In some of these, there were several chambers (for example, the Tribunal de la Seine in Paris had 27 chambers), but each chamber always consisted of three judges. Below these courts were the juges de paix, each acting as a single judge, and although limited to matters of minor importance, the range of their competence was fairly extensive. There was a justice of the peace in every canton. The 1958 reform of the judicial system in France (Ordonnance No. 58-1273 of Dec. 22, 1958, effective March 2, 1959) replaced the tribunaux de première instance with the new tribunaux de grande instance and these are collegiate (3 judges) in form; the number of courts was reduced to about one-half (172), but the rules concerning competence and procedure were preserved. The juges de paix were replaced with the tribunaux d'instance, each conducted by a single judge.

For commercial matters, the courts of first instance are the tribunaux de commerce, one in each arrondissement. These are not conducted by the regular judges of the magistrature but by unpaid lay judges who are elected from the local merchant community for a two-year term. Other special courts with a specific and limited jurisdiction (compétence) deal with certain matters which are more or less related to the area of commerce. They include the following: (1) The conseils de prud'hommes are a kind of labor court with jurisdiction over disputes between employer and employee concerning employment, and they are established for particular trades and industries. Each conseil de prud'hommes is composed of an equal number of employer and employee representatives who are elected for a term of six years and who serve without pay. When litigation arises in a trade or industry for which there is no conseil, it goes to the other available courts. (2) The tribunaux paritaires de baux ruraux deal with cases involving rural leases. (3) The commission du contentieux de la sécurité sociale et de la mutualité sociale agricole takes care of social security matters.
In criminal cases, there are three different courts of first instance ranging with the gravity of the crime charged: (1) minor offenses (contraventions) are tried before the tribunal de police; (2) most of the ordinary crimes (déits) are tried by the tribunal correctionnel; (3) major offenses (crimes) are heard by the cour d'assises, which is the only court that uses a jury. The cour d'assises consists of three judges and a jury of nine persons; all twelve deliberate together on questions of fact and of law, and decision is reached by majority vote.

In addition to the foregoing, there are also the High Court of Justice, previously mentioned under the Constitutional Organization, the military and the naval courts, the commercial maritime courts, and special children's courts for minors under 18 years of age. This multiplicity of courts of first instance is a reflection, in a way, of the French character of individuality, and presumably it makes possible for the French people the most satisfactory treatment for each kind of case. Every country has several basic courts of first instance in its judicial organization, and whether they be fewer or more numerous is not really significant; what really matters is their efficiency and the satisfactory administration of justice at the fundamental level where it directly affects most people.

Intermediate Appellate Courts. From the principal courts of first instance in civil, commercial, and criminal cases, an appeal lies to the cour d'appel. For this purpose, France is divided into 27 judicial districts, and each court of appeal has at least three judges. Most of them have more than one chamber—the one in Paris having the exceptionally large number of 17 chambers. To hear and decide an appeal, a chamber must be composed of at least three judges. The appeal is a reconsideration of the case to the extent requested by the party taking the appeal. In this process, the evidence given in the lower court can be reheard, and it is even possible to introduce new evidence. In its decision, the court of appeal decides questions of fact as well as questions of law.

The Highest Court—Cour de Cassation. At the top of the regular judicial hierarchy is the Court of Cassation. It is one court and sits in Paris, but it has about 70 judges (called conseillers) and is divided into five chambers. The first and second chambers deal with the regular civil matters, the third with commercial and financial matters, the fourth with social matters (labor and social security), and the fifth handles criminal cases. The President of the court is the premier président; and each chamber also has its président de chambre. For purposes of decision, a chamber must sit with at least seven judges present.
From its creation in about 1800, the Court of Cassation comprised three chambers: chambre civile, chambre des requêtes, and chambre criminelle, with the addition in 1938 of the chambre sociale for labor and social security matters. In civil matters, a case came first before the chambre des requêtes, which decided whether the case was fit to go before the chambre civile; otherwise it would reject the application but had to give a reasoned judgment for its dismissal. In 1947, the chambre de requêtes was abolished and the four civil chambers were set up instead. Another 1947 innovation was the assemblée plénière civile, to coordinate the work of the several chambers of the Court of Cassation, and to assure uniformity in the practice of the four civil chambers. The President of the court presides over the plenary assembly, which sits with at least 15 judges for purposes of decision, including the presidents and senior judges of each of the civil chambers, and also of the criminal chamber when appropriate. A matter must be referred to the plenary assembly when requested by the procureur général or if there is a tie vote among the judges in a chamber. A case may also be referred to the plenary assembly if it presents a question of principle or if its handling could cause a conflict between decisions.

Cases come to the Court of Cassation not only from the cours d'appel but also from any court of last resort. This is possible regardless of the amount of money involved in the dispute, because the issue may involve a serious question of law. The Court of Cassation is supposed to review only the issues of law and is not supposed to concern itself with questions of fact. However, it is not always simple to separate fact and law, so that while the court will not consider whether the findings of fact made below are adequately supported by the proof, it may consider whether these findings of fact furnish justification for the application of the rules of law on which the decision was based.

The procedure for taking a case to the Court of Cassation is called pourvoi en cassation because the name cassation comes from the verb casser, which means to break. The pourvoi en cassation differs from an ordinary appeal because the party who brings the pourvoi requests the court "to break" the lower court's decision. The Court of Cassation does not render an affirmative decision to supersede the lower one. The procedure in this regard is an unusual one. If the pourvoi is not well founded, the court will dismiss it (rejette le pourvoi). If the pourvoi is successful, the court will quash or annul (casse or annule) the judgment of the court below. However, since it cannot substitute its own substantive decision, it remands the case or sends it back with directions to another court of the same kind from which it came (but not the very
same one) for a new trial. In the usual situation, the retrial would be in a cour d'appel, and this is done in audience solennelle, which comprises two chambers where the court has more than one. At this stage, there are considered only the points on which the previous judgment was quashed; the trial proceeds in the usual manner and the parties may even raise for consideration points which were not previously presented.

If this second appellate court agrees with the directions of the Court of Cassation and renders a new judgment accordingly, the matter is ended; but it is not bound by the decision of the Court of Cassation and may reassert the view of the first appellate court. In such event, there may be another pourvoi en cassation, but this time it must be decided by the full court of the chambres réunies with at least 35 judges present. In this second pourvoi, the decision of the chambres réunies may dismiss the case and rejette le pourvoi. If it quashes again, however, this does not yet dispose finally of the case because it is then sent back to a third court of appeal. This time the Court of Cassation gives a compulsory instruction to apply the law as the full court has decided, and the point of law involved becomes definitively settled.

Apart from the lesser role which the judicial function has in relation to legislation, the regular courts in France suffer even further by comparison with the counterparts in other countries, especially in the United States, by reason of the absence of any control over the constitutionality of legislation and the existence of the parallel system of administrative tribunals.

**Administrative Tribunals**

The administrative tribunals and the administrative law of France are sometimes considered synonymous with its Conseil d'Etat or Council of State. To the French people, the Conseil d'Etat also means many more things; and in fact most of the work of the Council of State is to advise the government and the Council of Ministers about proposed legislation and about other matters. Nevertheless, especially outside of France, it is the judicial function of the Conseil d'Etat which has received the most attention because it is so significant. Although it is organized and functions within the executive power, the Conseil d'Etat, together with its inferior jurisdictions, has come to perform such an important judicial function that it would seem incorrect not to include it in a consideration of the judicial organization of France.

The Conseil d'Etat is divided into four administrative sections (interior, finance, public works, social security) and one section du contentieux. This last section performs the judicial functions, and its sub-
sections have been increased to eleven (as of 1956). Generally, cases are decided by a single subsection with at least three judges; if a case is heard by two subsections, there must be at least five judges present. In addition to the President of the Council and the judges, who are called conseillers, there are also a substantial number of maîtres de requetes and auditeurs in this descending order of rank; the traditional method of promotion is always by seniority. Within itself, the Council also has an organization to perform for it the same functions as the Ministère Public performs in the regular courts; the persons who act in this capacity are called commissaires du gouvernement. In this judicial capacity, the Conseil d'État controls and checks on the official acts of every administrative officer, from the lowest to the highest, including the President of the Republic. Considering the high degree of centralization, and the very extensive competence of the French administration, this covers a vast area of French life.

The proceeding in the section du contentieux is called a recours. The recours de pleine juridiction is used by a citizen-plaintiff to sue for damages from the State, or from a public authority, in reparation of a harm which he has suffered as a result of a wrongdoing (delict or tort) or a breach of contract. However, from the point of view of the external juridical observer, the most important proceeding is the recours en annulation pour excès de pouvoir. In this suit, the plaintiff directly attacks the administrative act or decision, and although he cannot claim damages, at the same time there may be an incidental monetary satisfaction in some of the successful cases. The recours en annulation pour excès de pouvoir is really at the heart of the contentieux administratif; it embodies the special and characteristic quality of the activity of the Conseil d'État. This is the way in which the weaknesses of power—arbitrariness, corruption, and so forth—are checked; and an effective, judicial control is maintained upon executive discretion. This is the way in which individual rights and liberties are guaranteed and are protected against public officers and against the government. This is a most important aspect of "the rule of law."

Prior to 1953, the Conseil d'État was the court of first and last resort for most cases and for all the important ones. At the lower level, there were the conseils de préfecture; and while these tribunals did a lot of work, their jurisdiction was limited to certain kinds of cases, and in any event there was an appeal to the Conseil d'État. During its existence of over a century and a half (since 1799), the Conseil d'État came to be so well accepted and so much respected and so much relied upon that its work increased very far beyond its physical capacity to keep up with it.
Accordingly, in 1953, there was a major reform whereby the conseils de préfecture of special and limited jurisdiction were eliminated, and their place was taken by 24 tribunaux administratifs as courts of general jurisdiction in administrative matters. Although the immediate result is to relieve the Conseil d'État of a great deal of the trials of first instance, time alone will tell whether the increased appellate work may not again make its burden excessive.

TRIBUNAL DES CONFLITS

In the great majority of cases, there is no doubt whether a matter is within the jurisdiction of the regular courts or of the administrative tribunals. Yet there are numerous situations where a person might bring suit first in a regular court and then in the administrative court, getting the negative decisions that the matter is not within the competence of either court. Or, if a suit is brought in one court, the defendant may contend that it belongs in the other. For these borderline cases, there is provided the Tribunal des Conflits, which does not decide the merits of a case but merely determines the jurisdiction in which it should be heard. This body consists of nine members. Generally four are judges of the Court of Cassation and four are judges of the Council of State, the Minister of Justice serving as the ninth member and president of the court. The Tribunal des Conflits is not part of either one system or the other, but is a separate entity. It does nothing more than decide conflicts of jurisdiction, and it carries out the rule of separation between the two systems of courts.

CONCLUSION

It is naturally in the judicial process of France that one finds more direct relationship with the so-called civil law system of the Romanist legal tradition than in the constitutional or political organization. The Roman law, after Justinian's reforms, represented the culmination and codification of one thousand years of experience since the first written text of the Twelve Tables. The original rigidity and narrowness of the civil law—jus civile—was tempered by the more flexible and extensive developments under the Roman praetors. For many centuries, problems were settled as individual cases, either by courts and magistrates or by the governing officials and the emperor. With the aid of scholars and jurists, and in due course of time, there evolved the generalizations and systematization and the purported comprehensiveness which characterize the ensuing Roman legal tradition. The idea of a basic written law, covering all the principal areas of private relationships, was not the start-
ing point of the Roman law, but represents rather the clarified distillation of ten centuries of experience and evolution.

Modern civil law systems have taken the apex of the Roman achievement for their new starting point, and for their identifying characteristic of comprehensive basic written law, expressed in terms of coordinated general rules and principles. Throughout all the political and technological changes of modern times, this fundamental nature of the Romanist legal systems has continued to express itself in every phase of legal education, of legal scholarship, of law practice and of the judicial process. Law study has been almost entirely based on the lectures of the professors and the texts of the jurists; the lawyers and judges seek their arguments and find their decisions in the general principles of the written texts. Decided cases illustrate the application and scope of the written law, and even the small area of real judicial development for new situations is scrupulously related to an existing text basis.

Of course, the contrast is with the common law system, where the bulk of the private law was made in the decided cases, and where the development of the law came primarily through the judicial processes. Legal education in the common law is based on the study of court decisions, and the judicial pronouncements of the past are the sources of law for the future.

For a long time, the academic study of comparative law was simply the contrast between the civil law and the common law. In this connection, two important facts should be noted. First, the common law is relatively young and only started its real development in the 15th century, with the early period of its development taking place in the primitive conditions of England. Second, the original rigidity and severity of the common law brought about the emergence of Equity, under which the English Chancellor can be compared to the Roman Praetor. With the substantial number of comprehensive statutes and statutory compilations in England, the United States and other common law countries, and with the mergers of equity and law constantly increasing—as the law of the Roman Praetors eventually merged with the *jus civile*—who can say whether the common law system may not now be experiencing some of the stages through which the Roman law passed many centuries ago?

Meanwhile, however, the differences still exist for us to study and to understand because they will certainly continue, at least for some time to come.
JUDICIAL ORGANIZATION

II. GERMANY

CONSTITUTIONAL ORGANIZATION

The other European country most closely identified with the Romanist legal tradition is Germany. This identification arises primarily on account of the "Reception" of Roman law in the 15th and 16th centuries, and the long concentration of German scholars on the study and elaboration of Roman law. In describing the constitutional and judicial organization of Germany as one of the most significant of the civil law systems, this must be West Germany, the Germany of today which represents the continuation of the Germany of yesterday. While the present organization is necessarily related to and is an outgrowth of its antecedents, the full historical treatment is far too much for the present limited purposes. It is not within the scope of this article to review the tremendous upheavals in the political and judicial structure and operation that occurred during the Hitler regime. Insofar as the fundamental principles of political democracy and the basic patterns of judicial organization are concerned, the present government of West Germany represents a continuation of the pre-Hitler system, with some modifications.

HISTORICAL BACKGROUND

During the past one hundred years, Germany has been through more extremely different forms of political organization and government than any other modern country. Before 1870, there were a great many small autonomous units without any effective central government. Then

4. Selected items (in English) of bibliography pertaining to Germany: GREAT BRITAIN FOREIGN OFFICE, MAUNAL OF GERMAN LAW (2 vols. 1950); Rheinstein, The Approach to German Law, 34 IND. L. J. 546 (1959); Mueller-Freienfels, German Law, 10 ENC. BRIT. 216; Harris and Schwartz, Comparative Law - Important Contrasts in the Administration of Justice in the United States and Western Germany, 30 TEX. L. REV. 462 (1952); Sweigert, The Legal System of the Federal Republic of Germany, 11 HASTINGS L. J. 7 (1959); Rupp, Judicial Review in the Federal Republic of Germany, 9 AM. J. COMP. L. 29 (1960); Nagel, Judicial Review in Germany, 3 AM. J. COMP. L. 233 (1954); Kirscheimer, Administration of Justice and the Concept of Legality in East Germany, 68 YALE L. J. 705 (1959); Cole, The Role of the Labor Courts in Western Germany, 18 J. OF POL. 479 (1956); McPherson, Basic Issues in German Labor Court Structure, 5 LABOR L. J. 445 (1954); Kerr, Collective Bargaining in Postwar Germany, 5 IND. & LABOR REL. REV. 323 (1952); WUNDERLICH, GERMAN LABOR COURTS (1946); Bachof, German Administrative Law with Special Reference to the Latest Developments in the System of Legal Protection, 2 INT. & COMP. L. Q. 368 (1953); Uhlman and Rupp, German Administrative Courts, 31 ILL. L. REV. 847, 1028 (1937); Barnett, Protection of Constitutional Rights in Germany, 45 VA. L. REV. 1139 (1959); von Mehren, New German Constitutional Court, 1 AM. J. COMP. L. 70 (1952).

5. The theoretical reception of Roman Law by Emperor Barbarossa occurred in 1158, in his Constitutio de regalibus drafted by the Reichstag of Roncaglia with the assistance of four famous doctores of the Faculty of Bologna. The practical reception took place between 1400 and 1600.
Bismarck forged the German Empire, which carried on for almost fifty years until the Weimar Republic came in 1919. The Hitler regime lasted from 1933 to 1945, and then there was military occupation until the present Federal Republic of Germany came into being with the Bonn Constitution of 1949.

Throughout all these shattering changes in constitutional organization and in the law-making processes of Germany, there was never any question about the classification of its private law as within the Romanist group of legal systems. Political philosophy and international activity do not change the ancestry of the private law system any more than a child can change its parents. It is interesting to note these several different stages, but the brief description of the earlier organizations will have to be limited to a few outstanding features of each, so as to deal more adequately with the present constitutional organization.

The German Empire, 1871-1918 (Deutsches Reich). The federated state known as the Deutsches Reich brought together all the numerous individual German States, but it was largely dominated by Prussia. This was probably the principal reason for Austria keeping out, because it was too much a rival of Prussia. Many distinctive features of German political institutions and attitudes come from the historical traditions of Prussia, including the importance of militarism and a strictly disciplined civil service. While in essence dominated by Prussia, the Constitution of the German Empire was in the form of an act of union between the sovereigns of the various individual German States (most of which were monarchies), with the King of Prussia as ex-officio German Emperor. Although the real center of power became vested in the national government which was inevitably associated with the state of Prussia, the separate states continued as significant political entities under their existing constitutions and each one retained a considerable area of governing power.

There was a Reich government and a Reich Parliament (Reichstag); and each of the individual states had its own Prince or Duke as well as its own government and parliament. However, neither the central nor the individual government was responsible to its parliament. The important legislative power was exercised by the Federal Council or Bundesrat, which consisted of all the state princes or their representatives, in conjunction with the Reichstag, which was a house of representatives elected from the entire country. The individual states had legislative organs of their own, but most of the important legislation, especially the comprehensive codifications, came from the central legislative power. With the exception of the constitutional and administrative law of the
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states, this period brought about an extensive unification of the law of Germany.

The executive powers remained largely in the hands of the individual states, but on the national level they were assigned solely to the emperor. The emperor also appointed the chancellor, who was often the minister president of the state of Prussia. The chancellor and the ministers were responsible to the emperor, and not to the representative bodies of the Reichstag or Bundesrat. Likewise, the executive control of all the vital aspects of national policy kept down the importance of the representative bodies. Some of the forms and concepts of this first German constitutional hierarchy have followed through or have reappeared in the later stages of German constitutional organization.

Insofar as the matters of civil law and codification are concerned, it was during this early period that some of the most important developments of German legal history occurred. Primarily, there was the confection of the German Civil Code (Bürgerliches Gesetzbuch). In addition, there were the Criminal Code, the Code of Civil Procedure, the Code of Criminal Procedure, the 1879 Statute of Judicial Organization, and the 1900 Commercial Code.

Soon after the political consolidation of 1870, a commission was set to work on the unification of the private law, and after several years of intensive scholarly work, a draft was completed. In this proposed civil code, the commission drew very heavily from the Roman law sources. This was not surprising because Roman law had been a dominant influence for approximately four centuries, since the so-called “Reception.” The comprehensiveness and quality of the Roman codifications had served not only to fill the many gaps in the existing laws but also to create a more pervasive common denominator among the numerous individual German states. By the late nineteenth century, these Roman sources had already been the focus of scholarly attention for a long time, and the German law became identified in large part with them. The strong nationalist reaction of the time raised objections to so much Roman law in the proposed new code. Demands for a more Germanic character led to the establishment of another commission and a second draft, which ultimately was adopted in 1896 and came into effect in 1900. However, the amount of increased Germanic content did not change the Bürgerliches Gesetzbuch from being a document of essential Romanist inspiration and development. Even under the drastic changes of the Hitler regime, the civil law classification of the BGB was not altered.

Weimar Republic, 1919-1933. The Weimar Republic of 1919 was based on a democratic constitution in which centralization was intensi-
fied, and the separate states became Länder (singular: Land). This constitution gave major authority to a legislative assembly (Reichstag) elected by universal suffrage with proportional representation. There was also a second chamber, the Reichsrat, but as under the Empire this represented the state governments and was not a strong body. The president was elected on a national popular vote and he appointed the chancellor and the ministers, who were responsible to the Reichstag. It was through his accession to this position of chancellor that Hitler came into power in 1933.

**Hitler Regime, 1933-1945.** The Nazis consistently abandoned all features of constitutionalism and developed what amounted to a table of administrative organization which established who could give orders to whom. Hitler was the supreme leader and his will was law. The Reichsrat was abolished, and the Reichstag became an ineffective body. The laws of the Reich were enacted by the Reich government, and later by the Fuehrer. The former states or Länder were in due course abolished as separate political entities, and all local administration was handled through the national authorities. Constitutionally, there was a complete concentration of power in one single central figure, and its practical exercise was carried out by individuals or agencies acting as authorized delegates of the Leader.

**Military Occupation, 1946-1948.** Not much need be said of this stage because of its special and temporary character. The legislative powers at the highest level were exercised by the Allied Control Council and laws were issued at the zonal level by each of the Zone Commanders. Due to differences between the Russian and other occupying powers as to the future of Germany, there developed a split into what has become two Germanies. The Russian Zone of occupation, known as East Germany, became the German Democratic Republic (Deutsche Demokratische Republik), and West Germany became the Federal Republic of Germany (Bundesrepublik Deutschland). Berlin, still in a special position under joint allied control, is divided into East Berlin and West Berlin. West Berlin is one of the Länder of the Federal Republic. During the occupation period in West Germany, the English, French and American military governments tried to re-establish some of the pre-Hitler institutions, and they prepared the way for the Bonn Constitution of 1949.

**The Federal Republic of Germany, 1949**

The eleven states or Länder of West Germany held a Constitutional Convention at Bonn in May, 1949, and they established a federal system of government. There was no representation in this convention from
the states of East Germany, but the new West German Government pur-
ports to be the government of all Germany. The same is to be said for
the East German Government. In East Germany, it appears that Soviet
Communist governments were established first for the separate states
(Länder), and then for the area as a whole. The German Democratic
Republic came into being on October 7, 1949; and in 1952, the local
governments or assemblies were abolished so as to constitute a centralized
republic.

In West Germany, the 1949 Basic Law, or Constitution, established
an organization of government similar to that of the Weimar Republic,
and although there are notable differences, there is a distinct continuity.
In its essential framework, the constitutional organization of the Federal
Republic of Germany comprises the usual three elements of executive
power, legislative power, and judicial power. However, these functions
and their relationships do not divide themselves in this manner for a
discussion of the more significant aspects of the institutions of govern-
ment, as was the case for France or as it would be for the United States.
In West Germany, the elements of government seem to be most signifi-
cant from the point of view of their place in a federal structure (Bund),
and they will be discussed with that in mind.

Under the Weimar Republic, the powers granted to the central
government were so extensive that the system may have been in practice
more unitary than federal. On the other hand, the Bonn Constitution
assigned a minimum of functions to the central government, leaving the
constituent Länder in a relatively powerful position.

Principal Federal Organs

The principal legislative authority is a popularly elected assembly
called the Bundestag (federal assembly or federal diet). The second
chamber of the traditional German type is called Bundesrat (federal
council), again composed of delegates sent and controlled by the execu-
tive governments of the Länder. While the Bundesrat participates in the
legislative process, its importance is far less than that of the Bundestag.

The federal President is elected for a five-year term by a special
convention, which consists of the members of the Bundestag and an equal
number of persons elected by the legislatures of the Länder. The Chan-
cello or prime minister is the most important person of the executive
branch. He is selected and appointed by joint process of the Bundestag
and the President. The Bundestag may express lack of confidence in the
chancellor only if at the same time a majority of its membership elects
some other person to be his successor. There must be an affirmative
replacement, not merely a negative dismissal which may leave an impasse for replacement.

As part of the constitutional organization, and as distinct from the courts which handle the usual kind of litigation, there is the Federal Constitutional Court to review the constitutionality and validity of legislative and executive acts. This concept of judicial review is an innovation in German practice and will be discussed in connection with the judicial organization.

The Bundestag. The Bundestag is the most important organ of the Bund and is the center of the federal system of government. It is elected by the entire people in universal, free, equal, and direct elections. The members are the representatives of the whole people, not bound by any orders or instructions, and subject only to their own conscience. The Bundestag makes the laws for the country as a whole, elects the federal chancellor, and controls the federal government. As an equal partner in the federal convention, it participates in the election of the federal president.

The Bundesrat. In the convention discussions, there was agreement on the proposition that there should be a second federal legislative organ, but there was much difference of opinion as to what it should be and what authority it should have. The conclusion reached—to have a council composed of delegates from the Länder—was a continuation of the earlier tradition in both the Empire and the Weimar Republic, and it gave the local governments a direct participation in the legislation and administration of the federation. As finally adopted, the Bundesrat is made up of members of the Land cabinets, and it is therefore a public platform for the leading Länder statesmen to give voice to the attitudes and proposals of their respective Land governments.

The Federal President. Under the Weimar Republic, the President was elected by the people for a term of seven years. He could dissolve the Reichstag, and could impose federal compulsion on a local government; he had far-reaching emergency powers, and he appointed and dismissed the chancellor and the cabinet. Under the Bonn Constitution, the President no longer has such sweeping powers. He is elected by a federal convention for a term of five years, and he may not have more than two terms. He has no emergency powers, he does not have free rein to appoint or dismiss the Chancellor. His position has much more of a fed-

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6. One of the unsuccessful minority views favored a more centralist organization in a senate of popularly elected representatives from the Länder. Another view proposed a mixed system with a second chamber which would have one element elected directly by the people and one element appointed by the Land governments.
eralistic character. This feature is further emphasized by the provision that in the event of inability of the Federal President, his functions are to be performed by the President of the Bundesrat, which is the federal council composed of members from the Länder governments. Internationally, the Federal President is the Head of State, concludes treaties, accredits and receives diplomatic envoys. With all this, the President is not a very strong individual officer, because he needs the countersignature of the Chancellor or the appropriate minister for almost all his acts. The dominant executive is really the Chancellor, comparable to the Prime Minister in England.

Important Federal Features

The Bund and the Länder. The Bonn Constitution is fundamentally federalistic in providing for a division of legislative competence between the Bund or federal authority on one hand, and the Länder or state authorities on the other. The federal legislative powers are enumerated, including some areas in which the federal authority is exclusive and some in which it is concurrent. The Länder have the residuary power which gives them all the legislative authority not specifically granted to the Bund, including education, police and internal administration. Furthermore, in the fields of their legislative authority, the Länder also have the right to conclude international treaties if the federal government concurs. Mention should be made that the fiscal authority is expressly divided between the central and the local governments.

A significant federal feature is the participation of the Länder in the adoption (and amendment) of the constitution. Approval is required from the popularly elected Diets or assemblies of two-thirds of the Länder. Actually, there was approval from all of them, and with large majorities in most cases. However, there can be no amendment respecting the federal form of government (i.e., the division of the Bund into Länder), the right of legislation in the Länder, and the basic principles of civil rights.

Although the Bundesrat is composed of representatives from the Länder governments (usually cabinet members), all the votes from one Land must be cast as a block so as to enhance its influence on the central government. In case a Land fails to fulfill its legal or constitutional obligations towards the Bund, it can be forced to do so only with approval of the Bundesrat (made up of Länder representatives), and after the difference has been submitted to and passed on by the Federal Constitutional Court. Under the Weimar Constitution, the power of federal sanction was vested in the Reich President.
The Länder have their own authorities and execute their own laws. The Länder also execute the federal laws as their own laws (with a few specified exceptions). However, in both cases, the Land execution is supervised by federal authorities; in the first case, to insure the legal validity of the execution, and in the second, to assure the legality and suitability of the manner of execution. This federal supervision applies only to fields which are within the exclusive or concurrent regulation of federal laws.

Legislative Powers of the Bund and the Land. The Bund possesses both exclusive and concurrent legislative authority. The list of its exclusive powers is short and consists of matters which, by their nature, need uniform treatment or regulation. The Länder enjoy power to legislate in these fields only if expressly empowered by federal law. The concurrent legislative authority of the Bund includes a much larger number of fields, ranging from civil and criminal law and laws on economic subjects (including industry, agriculture, and labor) to the measures against infectious disease. It can legislate in these fields only (1) if the matter cannot be regulated effectively by Land legislation, or (2) if regulation by one Land would prejudice the interests of other Länder, or (3) if federal action is required for the preservation of the legal or economic unity of the country. On the other hand, the Länder can legislate in these fields only as long as the Bund does not exercise its legislative authority. The Länder are really free to regulate these matters only until federal legislation is passed. The Bund determines the conditions that permit it to enter these fields, but its interpretation is subject to the jurisdiction of the Federal Constitutional Court in case of disputes or differences of opinion.

Other Significant Features of the Bonn Constitution

In the establishment of the Federal Republic of Germany as a democratic and social federal state, it was also provided that the constitutional order in the Länder must conform to the principles of the republican, democratic and social state based on the rule of law (Rechtsstaat) within the meaning of the Bonn Constitution. Thus, the federal constitution determines the basic features of the constitutions of the Länder. The federal constitution also invades the normal jurisdiction of the Länder in

7. This list includes foreign affairs, federal citizenship, passports, immigration and emigration, extradition, currency, weights and measures, customs and foreign trade including international payments, railroad and air traffic, post and telecommunications, federal officials and employees, trade-marks and copyrights, co-operation with the Länder in criminal police matters, protection of the constitution, the international control of crime, and federal statistics.
providing that counties (*Kreise*) and communities (*Gemeinden*) must have a representative assembly resulting from universal, direct, free, equal, and secret elections. It also requires that communities must be safeguarded in their right to regulate, under their own responsibility, all the affairs of the local community within the limits of the laws. Finally, the constitution provides that the exercise of the powers of the state and the performance of state functions shall be the concern of the *Länder*, inssofar as the basic law or Constitution does not otherwise prescribe or permit. However, this is very much reduced in scope by another provision that federal law supersedes *Länd* law, provided of course that the federal law is constitutional and within the federal jurisdiction.

**Conclusion**

The purpose of this discussion has been to describe the constitutional organization of a country which has long been identified within the group of Romanist legal systems. No attempt has been made at political criticism or evaluation. Federalism, like democracy, is assured of effectiveness and longevity only if it is part and parcel of the living constitution of the country, observed in the spirit as well as the letter of the law. In the short time of its existence, the Bonn Constitution has proved workable and successful and seems to comply with the sentiments of most of the people. Under this new form of government, the country has made great progress in reconstruction as well as in industrial and economic growth. The fundamental civil law features of the private law have been continued in the major codes, the scholarly attitudes toward the law, the doctrinal basis of legal education, and in the nature of the judicial process.

**The Judicial Organization**

Historically, when judges and courts were first established, there may well have been a single court to decide all kinds of cases. In due course, the idea of appeal to a higher and more authoritative body led to the development of a judicial hierarchy, usually with three main levels of a court of first instance, an intermediate appellate court, and the highest court. In addition to this vertical arrangement of courts, there also developed a horizontal multiplication and classification of courts. With the increase in variety and quantity of both public and private transactions and relations, and with the vast innovations of technology, transportation and communication, it was inevitable that specialization should also invade the judicial system. The basic theory is that just as doctors and engineers become specialists in particular parts of their general fields, likewise the litigation in certain kinds of cases will be handled with better
understanding and greater efficiency by judges who have a concentrated training and experience in such fields.

The judicial organization of Germany gives one a first impression of this dual classification of horizontal specialization as well as vertical hierarchy. Before examining each court separately, it is better to see the general picture of the distribution of these courts. The administration of justice is divided among three principal spheres: ordinary jurisdiction, administrative jurisdiction, and constitutional jurisdiction. The ordinary jurisdiction is further divided into the regular courts and the labor courts. The administrative jurisdiction is divided into the general administrative courts and the special administrative courts for tax and finance matters, and the special administrative courts for social matters (social insurance, social security). In each of these five court systems—regular, labor, administrative, tax, social—there is a separate hierarchy in the usual pattern of courts of first instance, intermediate appellate court and highest court. There is also a distinction between the State or Länder courts and the Federal courts. This is not a duplication of courts at the same level within the respective systems as the distribution is at different levels. Thus, the highest court in each of the five systems is a federal court; the intermediate appellate courts and the courts of first instance are Länder courts.

In addition to these five basic court systems, there are federal courts to take care of disciplinary matters of federal officials, as well as the specialized military courts. For the purpose of coordinating the work of all the highest courts in each system, the Bonn Constitution provides for a top supreme court, which has not yet been established. Separate and distinct from the five basic court systems and the others already mentioned, are the newly established constitutional courts. The Federal Constitutional Court is, in a way, the highest court of the country. The judges who staff all these courts are selected first through election by a committee of lawyers and judges, and they are then appointed for life by the Ministry of Justice of the Land or of the Bund for the Länder courts and federal courts, respectively.

ORDINARY COURTS

The ordinary courts are basic courts of general jurisdiction. All matters which are not within the defined competence of one of the other special courts presumably go to these ordinary courts and thus they seem to be the real foundation of the whole system.8 There are

8. The total number of judges in all the courts (in 1960) was about 11,500; of these, over 9000 were judges in the ordinary courts.
four levels (vertically) in the hierarchy of these courts of ordinary jurisdiction: the lowest is the office court (*Amtsgericht*); next lowest is the principal court of first instance, the district or state court (*Landgericht*); next is the state court of appeal (*Oberlandesgericht*); and the highest is the federal high court (*Bundesgerichtshof*). All except the last are state or *Länder* courts staffed with state judges, and they are operated as part of the respective states. Since the same pattern is found in the other four court systems, the administration of justice can be seen as centered essentially in the *Länder*.

*The Amtsgericht.* The *Amtsgericht* deals with matters of minor importance but of very wide range, covering both civil and criminal matters. It handles the land register, the commercial register, and the matrimonial register. It supervises guardians and executors and it controls the enforcement of judgments. Generally, cases must not exceed a certain monetary value in order to come within the competence of this court. However, in order to obtain a speedy disposition, some kinds of litigation are included within the court’s competence regardless of the monetary amount involved. These include landlord and tenant matters, disputes between innkeepers and travelers, litigation concerning cattle and hunting, and alimentary support and certain other family matters.

The *Amtsgericht* is of course the most numerous of all the courts because it is found in every locality no matter how small. Accordingly, it will also vary in character from a single judge in a small place to a department which might have many judges. In civil matters, decisions are rendered by a single judge sitting alone. In criminal matters, the judge may decide alone or he may be assisted by two lay persons called *Schoffen*, in which event the court is called a *Schoffengericht*. In these cases, the lay members are not remunerated; they do not serve as a jury but as coordinate with the judge and with an equal vote in the final questions of guilt and punishment. This system of using ordinary citizens as members of the court brings the influence of the average people into the administration of justice; they get an idea of the legalistic reasoning of the professional judges, and the judges must listen to the common sense of the man in the street.

*The Landgericht.* The *Landgericht* is a court of general jurisdiction for both civil and criminal matters and, apart from its appellate jurisdiction in cases appealed from the *Amtsgericht*, it is really the principal court of first instance. In the ordinary courts system, it has

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9. In 1960, the *Amtsgerichte* numbered 856, while the *Landgerichte* were 92, and the *Oberlandesgerichte* 19.
jurisdiction in all matters which are not assigned to the minor competence of the Amtsgericht. Territorially, there is one Landgericht for a good-sized district or region. However, the court is divided into chambers, and each chamber functions with three judges, the president of the chamber (Direktor) and two associate judges.

In addition to the civil chambers for ordinary matters of private law, there are the chambers for commercial matters involving negotiable instruments, maritime matters, trade marks, cases against a defendant who is a merchant, and cases in which both parties are merchants. Many of these cases could go before either the commercial or the civil chamber, and the choice to go before the commercial chamber may be made by either party. A commercial chamber is composed of one regular judge and two commercial judges. The latter are appointed for three year terms from local merchants or others active in commercial life, and they serve without remuneration except reimbursement of expenses.

On the criminal side, the Landgericht may sit as a criminal chamber (Strafkammer) of three regular judges, or it may sit as an assize court (Schawurgericht) composed of the three judges together with six jurors. In such event, they all act and deliberate together, all having equal voice on the questions of guilt and punishment. For juvenile delinquents, the court sits as a special chamber called Jugendkammer.

The Oberlandesgericht. This court represents the next higher level in the hierarchy of the ordinary court system. In some of the Länder, there is only one Oberlandesgericht, although in most of the Länder there are more. The primary function of this court is to review the work of the several Landgerichte within its district. This review ordinarily takes the form of a Berufung, which is a reconsideration of the case to the extent that the parties request changes in the lower court’s judgment, and the appeal may be on both facts and law. It could result in a complete new trial with or without any new additional evidence. However, the pleading of new facts is excluded if the parties could have been expected to plead them in the original trial court.

The Oberlandesgericht is divided into several chambers called “senates”, which are either civil or criminal. There is no separate commercial senate. Each civil senate is composed of a presiding judge and two associate judges. When the criminal senate sits in exceptional cases as a court of first instance, it is composed of five judges. If a Land has several Oberlandesgerichte, it may establish an Oberstes Landesgericht to handle appeals in lieu of the Bundesgerichtshof for the few kinds of private law matters which involve no question of federal law. Only Bavaria has created such a court.
The Bundesgerichtshof. This is the highest court for civil and criminal matters in the hierarchy of the ordinary or regular court system. It is a federal court seated in Karlsruhe, and is the successor of the Reichgericht of the Weimar Republic. The Bundesgerichtshof is principally a court of review for the various Oberlandesgerichte of the Länder. It has a trial jurisdiction of first instance only in a few serious matters of criminal law for high treason and certain felonies of a political nature endangering public security. In some cases, it is necessary to have the permission of the Oberlandesgericht from whose opinion the appeal is being taken. The procedure is generally by way of a Revision which is limited to a consideration of errors of law as distinguished from errors of fact. Although the court is not supposed to re-open the lower court's findings of fact to see if they are adequately supported by evidence, there are some techniques of classifying certain things as matters of law. Thus, it may consider whether the findings of fact are tenable in the light of logic and experience, or whether the facts furnish justification for the application of the rules of law on which the decision was based. The court will not override findings of trade custom or commercial practice, but it may well re-examine the interpretation of a contract, especially the standard-form contracts in general use.

The Bundesgerichtshof is divided into eight civil and five criminal senates. For purposes of decision, each is composed of a presiding judge and four associate judges. Since each senate sits as the court of last resort, special rules have been established for the purpose of avoiding embarrassment. There is no problem if a particular senate wishes to depart from its own previous decision. However, where it proposes to depart from the previous decision of a different senate, there must be a consultation between the two senates. If they do not reach agreement, then the legal issue is referred to a larger unit of the court for a decision which must be followed. This larger body is called a "great senate"; it is composed of the president of the court and eight other judges. There is a Great Civil Senate and a Great Criminal Senate. Where a civil senate proposes to depart from the past decision of another civil senate or of the Great Civil Senate, the matter is referred to the Great Civil Senate (Grosse Senat für Civilsachen). Where a civil senate desires to depart from a previous decision of a criminal senate, or of the Great Criminal Senate, or of the Combined Great Senates, the legal question is referred for decision to the Combined Great Senates (Vereingten Grossen Senate), which is composed of the members of the Great Civil Senate and Great Criminal Senate along with the president of the whole court. The same applies where a criminal
senate wishes to depart from the previous decision of a civil body. A
senate may also refer to the Great Senate any matter involving questions
of fundamental importance involving the development of the law or the
assurance of a uniform case law.

A Great Senate decides only the legal issue referred to it, and does
so entirely on the basis of the written pleadings and record of the case.
There is no oral hearing, and the parties in the litigation do not make
any personal presentation to the court. In this manner, the work of the
Bundesgerichtshof is coordinated, and major issues receive the attention
of at least nine judges. It is accordingly fitting and proper that these
decisions of the Great Senates enjoy an exceptionally important au-
thority even outside their own court.

**Labor Courts**

In the field of ordinary civil jurisdiction concerned with litigation
between private individuals, one branch became so important that a
separate set of courts was established for these particular cases. The
so-called labor law questions (Arbeitssachen) include litigation involv-
ing employment contracts, disputes between management and labor as
to the existence and interpretation of collective bargaining agreements,
claims against a fellow employee with regard to torts committed in the
course of common employment, and so forth. Strangely enough, the
idea of these labor courts is sometimes said to have started a very long
time ago; their origin has been attributed to the French conseil de prud-
’hommes, which was introduced in France in 1807 during Napoleon’s
time. The jurisdictional and territorial operations of the labor courts
in Germany have fluctuated, but their importance steadily increased until
their consolidation and stabilization in the Labor Court Act of 1926.
This pattern has followed through into the present system. The purpose
was to provide speedy, certain, and inexpensive settlement of disputes,
of both a collective and an individual nature; and at the same time to
surround the procedures with appropriate legal safeguards. The hier-
archy in this labor court system consists of three levels; the first two
are in the Länder and the third one at the top is federal.

*Arbeitsgericht.* At the local level, the Arbeitsgericht is the court of
first instance. Each court is composed of one regular judge and two
lay persons appointed from the employers and employees, respectively.

*Landesarbeitsgericht.* At the district or regional level, there is the
Landesarbeitsgericht, composed of the president, several regular judges,
and a certain number of lay persons who are selected equally from em-
ployers and employees. For purposes of decision the court sits in chambers, each of which comprises one judge and two laymen.

**Bundesarbeitsgericht.** The highest court in labor matters is the Bundesarbeitsgericht, which is a federal court and is located in Kassel. This court functions in chambers, and for purposes of decision, each chamber has a president, two judges, and two laymen. When it sits as a Great Senate, it comprises the president of the court, the senior senate president, four judges, and two lay persons (one representing employers and the other representing employees), making a total of eight. The appeals to the Bundesarbeitsgericht come from the regional or Land labor court. They are generally limited to questions of law, and the amount in dispute must be over 6,000 DM ($1,439). Other appeals may be taken with the permission (generally given) of the Land labor court on account of the significance of the question at issue. Finally, appeal also lies to the federal labor court if a Land labor court has rendered a decision which conflicts with previous decisions of a Land labor court or of the federal labor court.

**General Observations.** The present system of German labor courts rests upon the Labor Courts Act of 1953. German labor law has long been divided into two main branches of individual and collective labor law, and the labor courts have exercised a very strong influence in the development of both. For example, in the field of individual labor law, the labor courts have been instrumental in introducing and expanding the principle of the right to equal treatment. At first limited to cases involving pensions and gratuities, its application has been extended to cover wage payments, dismissals arising out of strikes, and the re-employment of workers who had participated in strikes.

An interesting and significant feature of the labor court is that its chairman must require an attempt at mediation before he decides a case. During 1949, the processes of mediation and clarification and arbitration resulted in the settlement without contested judicial decision of approximately 88 per cent of all the cases which were initially presented to the labor courts. In this respect, it has been stated but cannot be confirmed that judges are selected for promotion partly on the basis of the percentage of cases which they settle without a formally contested decision. There may be, and there probably is, mild coercion by some judges to get the parties to accept with apparent willingness what they would be obliged to accept in any event. There is certainly no doubt that unusually extensive efforts are made by the chairman of the labor court to effect compromise and settlement at the stages of preliminary hearing, and that most cases do not have to go into a full
trial on the merits for a contested court decision. A final observation is that the parties must appear themselves before the labor courts of first instance. Lawyers are excluded unless the case involves more than 300 DM ($72). It has been remarked that this may be the principal reason for the labor courts being so successful.

**Administrative Courts**

Most of the major fields of law have approximately the same meaning and scope in widely scattered countries and totally different languages. However, this is not so for administrative law, for which there has been a relatively indigenous development in each country. The growth of this subject as a separate area has been comparatively recent and it has simply been the answer in each case to the needs of social and economic control within the political framework of the country concerned. In Germany, administrative law includes much of what is generally understood by public law; namely, the field of activities and regulation of all public bodies and offices at all levels. Administrative law covers public law disputes, challenges to an administrative act, and the questioned validity of subordinate legislation under the conformity test with its parent statute. It includes the activities of the communes, municipalities, and other public corporations in connection with social insurance, public health, welfare, housing, and reconstruction. It also encompasses the organization of road traffic, post and railways, electricity, water supply, taxes, public education, cultural activities, customs, excise, poor relief, and the regulation of trade and industry.

The administrative courts are independent courts, separated from the administrative authorities and subject only to the law; their judges have the same position as the judges in the ordinary courts. It is not surprising that specialized courts were started, almost 100 years ago, in order to deal more satisfactorily and efficiently with technical matters like taxation and administration and social insurance. Similarly, among the administrative courts, a further specialization has taken place, so that there has developed a separate system and hierarchy of courts for tax matters, and still another for social insurance matters, leaving all other matters to the general administrative courts.

The system of the general administrative courts includes two levels within the state competence, and the top level is federal. At first, there were procedural variations in what had been the French, British, and American zones, but since April 1960 all this has been consolidated on a uniform basis. It consists of the following organization.
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Verwaltungsgericht. In the system of general administrative courts, the Verwaltungsgericht is the court of first instance. It sits in senates composed of three judges and two lay members. (In the former British zone, this court was called Landesverwaltungsgericht.)

Verwaltungsgerichtshof. At the next level, there is the Verwaltungsgerichtshof, which is mainly a court of appeal. It convenes in senates of five judges each. If a senate wishes to depart from prior decisions, there must be a session of the full court consisting of all the regular judges. (In the former British zone, this court was called Oberverwaltungsgericht.)

Bundesverwaltungsgericht. The general administrative court of the federation, and the highest review court for all the states is the Bundesverwaltungsgericht, with its seat in Berlin. In addition to its appellate functions, this body also serves as a court of first and last instance in certain cases which involve the acts of the highest federal authorities, and in disputes between the states or between a state and the federation. This court deliberates and decides in senates, each of which consists of five judges.

TAX COURTS

Since 1950, the Finanzgerichte are the special administrative courts that handle tax and finance matters. As a court of first instance, the court operates in senates, each of which comprises three judges and two laymen. These decisions are subject to review by the federal tax court called the Bundesfinanzhof, which sits as a bench of five judges and is located in Berlin.

SOCIAL COURTS

In 1953, another set of special administrative courts was established to deal with litigation concerning matters of social insurance. The court of first instance is the Sozialgericht, which sits in chambers of one judge and two laymen. The appellate court is the Landessozialgericht, which decides in senates of three judges and two laymen. The highest court is the Bundessozialgericht, which functions in senates of three judges and three laymen. This federal court also serves as a court of first instance for disputes between the states or between a state and the federation. To coordinate its work within itself, there is a Great Senate, whose function is similar to the Great Senate of the Bundesgerichtshof. In this event, the Great Senate is composed of the President of the court, six judges, and four laymen.
CONFLICTS OF JURISDICTION

It may not always be clear within which system of courts a certain case should be instituted. This could be due to (1) a positive conflict, where two sets of courts assert jurisdiction over a particular matter, or (2) a negative conflict, where each declines jurisdiction on the ground that the matter properly belongs somewhere else. The ruling for the positive conflict is that a final civil court decision asserting jurisdiction is binding on the other courts. Thus, a case decided in the civil courts cannot be relitigated before a specialized court. However, a case decided by a specialized court can be relitigated in a civil court if it concludes that the matter is within its jurisdiction. For negative conflicts, there is no express ruling, but since the ordinary civil court system is the basic part of the whole judicial organization, it would presumably have to entertain the suit. Most of the conflicts develop between the general administrative courts on one side, and all the remaining courts on the other. In a few of the Länder, there used to be a special conflicts court, called Kompetenzkonfliktsgerichtshof, to decide both positive and negative jurisdictional conflicts. However, they have been abolished in favor of rules which resolve the conflicts within the existing courts.¹⁰

A FEDERAL SUPREME COURT

With five separate court systems, each with its own judicial hierarchy, plans have been proposed for a federal supreme court to be called Oberstes Bundesgericht. This court would comprise judges from each of the five highest courts, and its function would be to coordinate the work of the five federal high courts and to safeguard the uniformity of the administration of justice.

CONSTITUTIONAL COURTS

Following World War II, there was a strong movement for democracy and constitutionalism. In Germany, one of the significant expressions of this movement was the establishment in 1951 of the constitutional courts. An ordinary court cannot hold a law unconstitutional, but if the law is pertinent to its decision, it must stay the proceeding and refer the constitutional question for decision to the proper constitutional

¹⁰ The Administrative Court Law (Verwaltungsgerichtsordnung) of 21 January 1960, section 41, provided the following determinations: (1) if an administrative court decides it does not have jurisdiction, a different court cannot decline jurisdiction of a case on the grounds that it should go to the administrative court; (2) if one of the ordinary, labor, tax or social courts decides it does or does not have jurisdiction, this decision is binding on the administrative courts; (3) if an administrative court decides it does not have jurisdiction, it refers the matter to the court which in its opinion is the right one.
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court. To decide cases involving the constitution of a Land, there is the Landesverfassungsgericht. If the violation of a state constitution is in question, the issue is referred to the constitutional court of that Land, unless the Land requests the federal constitutional court to decide the question.

The federal constitutional court is the Bundesverfassungsgericht, sitting in Karlsruhe. It is not part of any of the judicial hierarchies, but since it is the keeper of the constitution and passes on the constitutionality of the laws, it is considered to be the highest court in the federation. The twenty-four judges are elected by the two federal legislative chambers in equal numbers, but eight of them must be taken from the high federal courts and have life tenure. The others have an eight-year term. There is thus a combination of stability in the eight permanent members, and change in the other sixteen, who probably reflect the political composition of the legislature. This court is composed of two senates, each having twelve judges with a quorum of at least nine judges. It has jurisdiction over constitutional disputes between the states and the federation, or of disputes among the federal organs of the constitution in matters of forfeiture of basic rights, suppression of political party, the validity of elections, or the impeachment of the President of the Republic or of a federal judge. It has jurisdiction over questions of the validity of a law (Normenkontrolle). On request by the federal government, or by a state government, or by one-third of the members of the Bundestag, it decides on the incompatibility of a state law with a federal law, or on the incompatibility of either of them with the Constitution or Basic Law (so-called abstrakte Normenkontrolle). It decides whether another court is correct in considering as unconstitutional a law which is pertinent to its decision (konkrete Normenkontrolle). Finally, it has jurisdiction over a constitutional complaint (Verfassungsbeschwerde), which may be brought by any party and which raises the question of whether the public authority has infringed a basic right or a right guaranteed by the Basic Law. This constitutional complaint may be made at no cost to the parties, but can only be brought after all other legal remedies (private, criminal, or administrative) have been exhausted without success.

The position of the Bundesverfassungsgericht is of special significance because its decisions are binding upon the constitutional authorities of the federation, of the states, and upon all public authorities. In cases dealing with the compatibility of state and federal law, and of either of these with the Basic Law, or with the validity of a rule of public international law, or with the question of the continued validity
of earlier law as federal law, the decision of the constitutional court has
the force of law. If one senate of the constitutional court wishes to
depart from the holding of the other senate, it is the full court (Plenum)
which decides, the full court requiring the presence of at least nine
judges from each senate. As readily seen, the functions of the federal
constitutional court go far beyond deciding on the constitutionality of
legislation and governmental acts. In some respects, the court has to
resolve conflicts that are of a political nature.

Any court decision and any governmental act may be attacked by
way of constitutional complaint on the grounds that it violates a basic
right of the party involved. However, it is a prerequisite that all other
remedies (appeal and otherwise) must first be exhausted. Very few
cases have resulted in reversal of any of the regular courts. The few
instances of reversal have dealt with the right of a party to have a fair
trial, especially in cases in forma pauperis where a court may decide
without a full hearing. As a result of these reversals, the regular courts
are very careful to give proper and fair trial.

In establishing this comprehensive system of judicial review of all
governmental acts—legislative, executive, and judicial—the Federal Re-
public of Germany has provided for all eventualities. Judicial review
has come to be generally recognized as one of the most effective con-
tributions to free and democratic government. It may take some time
to tell how well this system of placing final constitutionality decisions in
a group of judges will be absorbed in a country where the supremacy of
legislation had formerly been the cornerstone. Thus far it seems not
only to be working very satisfactorily, but all the indications point to
a strengthening of the entire governmental organization.

III. SOME COMPARISONS OF THE CIVIL LAW AND THE
COMMON LAW SYSTEMS WITH PARTICULAR REFERENCE
TO THE PLACE AND FUNCTION OF LEGISLATION AND
JUDICIAL DECISIONS IN FRANCE AND GERMANY

There is no novelty in comparing the civil law and the common law,\textsuperscript{11}
nor in emphasizing this means towards a better understanding of either

\textsuperscript{11}See selected bibliography in notes 1, 2, and 4 supra, and also the following:
Lawson, A Common Lawyer Looks at the Civil Law (1953); Howe, Studies in
Civil Law and Its Relations to the Jurisprudence in England and America (1905);
Schlesinger, Comparative Law (2 ed. 1959); Dainow, The Civil Code and The Com-
inon Law, 51 N. U. L. Rev. 719 (1957); Rheinstein, Common Law and Civil Law: An
Elementary Comparison, 22 Rev. Jur. U. Puerto Rico 90 (1952); Schwenk, Highlights
of a Comparative Study of the Common and Civil Law Systems, 33 N. C. L. Rev. 382
(1955); Lipstein, The Doctrine of Precedents in Continental Law, 28 (Part III) J.
Comp. L. and Int. L. 34 (3rd Ser. 1946); Goodhart, Precedent in English and Con-
or both. It is hoped, however, that there are new readers and that the discussion with reference to specific functioning institutions will convey impressions of interest and meaning. In relation to the constitutional and judicial organizations of France and Germany, two things of fundamental significance stand out particularly. One is Legislation as a specialized productive function of the constituted organs of government, and the other is Judicial Decisions as the productive work of the courts. These two topics have accordingly been selected as the focus of examination for a comparative discussion of some of the broader aspects of the civil law and the common law.

**Legislation and Judicial Decisions**

The heading “legislation and judicial decisions” can be immediately identified as coming from a person whose principal background and mode of thought are of the civil law, or Romanist tradition, rather than the common law. The common law jurist would probably say “enacted law and case law” or, reversing the phrase to reflect his own emphasis, he would say “the common law and the statutes.” Herein lies the first and perhaps most important comparison or distinction between the two systems.

**Legislation as the Basis of the Civil Law.** As seen in the examples of France and Germany, the main source or basis of the law is legislation, and the large areas are codified in a systematic manner. It may well be that in the many centuries of Roman legal history before Justinian, and certainly before Gaius, a good deal of the legal development was through individual cases decided by either judicial or executive authority. Nevertheless, the starting point for the study of Roman law is the promulgated codification of the fifth century B.C., known as the Twelve Tables. In any event, the Justinian codifications of the sixth century represent a peak of achievement which classifies Roman law as a system of written law duly enacted and promulgated.

A very distinctive feature of a Romanist legal system is the fact of its codes. While a code is in form a statute duly enacted by the proper legislative procedure, it is quite different from regular statutes. A code is not a list of specific rules for particular situations but rather a carefully arranged and closely integrated compilation of general principles. Furthermore, it purports to be comprehensive and to cover the whole subject—not in details but in bases for decision. A code reaches a much
higher level of generalization and is put together with a higher scientific structure of classification and systematization. A code provides not only specific answers, but these very answers constitute the basis for working out additional answers for new kinds of problems. The nature of a code in a Romanist legal system calls for a liberal kind of interpretation, so as to have it serve as the basis of decision for more and new situations. The same attitude also prevails with reference to ordinary statutes in a civil law jurisdiction. There is generally a very high regard and respect for legislation.

A significant feature about legislation in modern civil law is the importance attached to the debates and discussions in connection with its original formulation. This is especially true about the codes. Thus, in France, the history of the proposals and debates and changes which constitutes the immediate history of the Code Napoleon have been indispensable to its interpretation. Likewise, the Protokolle and Motive of the two drafts of the German Bürgerliches Gesetzbuch contain a very minute and detailed legislative history which played a vital role in the early period of its interpretation.

Judicial Decisions as the Basis of the Common Law. During the period of the development of the English law, there was no powerful central parliament, but there were the strong King's Courts. When a court decided a particular case, its decision was not only the law for those parties, but it had to be followed in future cases of the same sort, thereby becoming a part of the general or common law. Thus the common law, as a body of law, consisted of all the rules that could be generalized out of the judicial decisions up to that point of time. New problems brought new cases and they resulted in more rules for the common law. Actually, the common law was conceived to be all-embracing and to cover everything; if a rule of decision had not already been formulated, it was up to the judge to declare it.

Legislation in the Common Law. The legislative branch of government in early England was much later in development than the executive. The King was the central figure, and the King's Courts constituted an effective judicial organization. One of the most significant factors in connection with the growth of the English parliament was the hostility of the crown and of the King's Courts. Since an act of parliament was a law that had to be applied, every statutory enactment constituted that much restriction of what was otherwise the domain of the common law. The jealousy of the courts found natural expression in an attitude of antagonism towards these statutes, and they refused to place any value on the legislative history or discussions; in particular, the courts sought
to minimize the infringement of “their” common law, and this resulted in the establishment of a very strict interpretation of statutes.

In the civil law, on the contrary, the legislation was the most highly respected source of law. Not only is the attitude of the courts one of liberal and extensive interpretation, but even in totally new kinds of cases, civil law courts generally try to find a legislative text which they can use as a basis in one way or another for their new decision.

Judicial Decisions in the Civil Law. It is sometimes said that in civil law jurisdictions, the function of the court is merely to apply the written law. This is a very narrow statement, and it would mean a very narrow judicial function. Actually, when a court applies a law it has to interpret that law; and in the process of interpretation, the court may well extend the scope of the law considerably beyond that originally contemplated. In this way, even the civil law court can be considered as “making” law—interstitially, as it were. (Fuller treatment of this topic is found infra.)

Comparative Comments. Some comparative studies of civil law and common law discuss the differences between the legislative basis of the civil law and the case-law basis of the common law, but conclude that with the statutory encroachments in the common law and the judicial law-making in the civil law, the net result is approximately the same in both systems, with a sharing of honors between legislation and judicial decisions. While there is a measure of truth in this conclusion, it is a far cry from a correct understanding of the two systems. No matter how much legislation infiltrates into the common law, and regardless of how much judge-made law develops in a civil law country, the fundamental difference in the nature of the two systems continues to express itself in all sorts of ways, stemming from the two systems’ different attitudes and techniques concerning legislation and judicial decisions. Despite all the statutes in England, and all the case law in France, no one has ever suggested an exchange or a merger of the classifications of their respective legal systems.

Doctrine and Legal Science

Doctrinal Materials. One of the ways in which the essential nature of the Romanist legal systems evidences itself distinctly is in the development of the doctrinal materials and the legal science. In the common law, there is not generally as large a quantity of doctrinal writings by jurists, and these are likely to consist of analyses of decided cases with an attempt to classify and distinguish the rules they represent. In the earlier of the modern French and German doctrinal works, there are not many references to decided cases; the basis of discussion is in the general
principles of the legislation, the patterns of development in the codes, the
genral theories of law, and the indicated directions for future develop-
ment.

In the common law, the purpose of the doctrinal works is to ascer-
tain and collect the distilled essence of the decided cases. In the civil
law, the doctrine is an inherent part of the system and is indispensable to
its analytical exposition; it is not a recognized source of law, but it has
exercised a great influence in the development of the law. It moulds the
thought of students, gives direction to the work of practitioners, and
guides legislators towards consistency and systematization.

*Legal Education.* All the members of the legal profession learn the
language of the law in their legal education. The program and method
of law study establish and fix the fundamental understanding and the
mode of thought which form an inherent part of the individual for his
whole life's career. The history of the common law teaches the primacy
of the decided case, the important role of the King's Courts in the de-
velopment and unification of the law, and the strict interpretation of
statutes in order to minimize the legislative infringement upon the judi-
cial prerogative. The history of the civil law teaches codification with a
high level of abstraction and general principles, a superlative regard and
respect for legislation, and a very liberal attitude in the interpretation of
statutes.

In the specific courses of study, the common law student studies and
discusses actual and hypothetical practical problems. He learns very care-
fully the judicial decisions which have come to have great importance,
and he develops a skill in identifying the narrow holdings of a case and
in distinguishing it from another case. The civil law student starts his
study with a code and a textbook. He learns about the Justinian codifi-
cations and their influence in his present-day legal system. He is taught
general principles and how to think in abstractions. It becomes part of
his being to appreciate classification and coordination of subject matter
and to take for granted a comprehensiveness of the law. By contrast, he
seldom has to read any decided cases, and he is generally not much con-
cerned with what the courts have to say. He concentrates on his codes
and textbooks and the notes he took on his professors' lectures. Of
course, it is not correct to imply that the common law student never reads
a law book of general import and philosophical speculation. Nor is it
correct to say that the civil law student has no appreciation at all of judi-
cial decisions, especially more recently with the *travaux pratiques* and
practical problems. It is necessary, however, to recognize that the for-
mation of the law student is inevitably predicated upon the nature of the
legal system. Thus we return to the original proposition that judicial decisions constitute the basis for the nature of the common law systems, while legislation is the basic characteristic of the Romanist legal systems.

In a civil law system, the primary place and importance of legislation have always been well established. The place and significance of the doctrine are likewise not subject to doubt or dispute. However, in recent times, there has been much questioning and discussion concerning the place of judicial decisions and their contribution to the development of the law. This area will now be investigated a little more fully, considering the matter from two points of view: (1) the judges and the courts, and (2) the authority and use of decided cases.

**JUDGES AND COURTS**

*Training and Recruitment of Judges.* The training, selection, and tenure of judges have a lot to do with the way they think and work and decide cases. In the common law countries, there is no particular training for judges because the judges are drawn from the successful practitioners who have made a good name for themselves. All their experience has been of a practical nature, and their approach as judges continues to be the same. With a legal system based essentially on decided cases, the judges must necessarily be practical, and the elevation of a member of the bar to a seat on the bench is the perfectly natural procedure.

In civil law systems, there is a greater difference between the judicial function and the practice of law. Both have the same theoretical study in law school, but at that point the individual makes a choice of direction, and he goes into the practical apprenticeship training for either one branch of the legal profession or another. With very few exceptions, this choice is definitive. Going directly from law study into a judicial association, the future judge preserves his theoretical attitude toward the law. He finds himself with other people who have the same approach, by reason of which he continues to see the legal system as a whole body of coordinated legal principles at a high level of generalization and abstraction. The position of the judge in France, for example, is one of respect and prestige and life-long security. On the other hand, the emolument is on the modest side compared to some other countries, and the individual judges remain anonymous (except in the few situations where a single judge sits alone) on account of the secrecy and collegality of their procedure. For these same reasons, the French judiciary does not attract the strongest men of the profession. However, a high standard is maintained through their training and examination programs
for admission and by their devotion and high purpose in the performance of their duties.

**Method of Deciding Cases.** When it comes to deciding cases, the French court does not see a specific problem in its resemblance to or difference from a prior case, but rather in its relation to the pattern of general principles of the written law in reference to which a decision will be reached. Whereas the search in the common law is for the leading case or a similar case to cite as authority, the search in the civil law is for the appropriate text which governs the particular problem. Again, it must be stated that while this does not preclude the common law judge from discussing general principles, nor the civil law court from considering prior cases, the difference is in the totally different extremes of approach, and even where there may be some resemblance the difference of degree is great enough to overcome impressions of similarity.

**Manner of Writing Opinions.** When it comes to writing opinions, the difference is most strongly emphasized. In the common law, the decision of a case first sets out all the facts which led up to the dispute and which identify the problem; then, an examination is made of other cases, especially those cited by the opposing contestants in support of their respective positions. All of these have to be evaluated to determine which are inappropriate or distinguishable. Finally, the court settles on the ones which are in point, and on their authority the new decision is rendered.

In France, the report of a decided case is very brief, and it seems that the higher the court, the shorter is the opinion. In its description of the case, there is only a meagre minimum of the essentially relevant facts, a succinct statement of the applicable rules and principles of law, and the conclusion which follows from the application of the law to the facts of the particular case. There is a strict prohibition against the rendition of a judgment in the form of a general ruling, and the decision is the law only for that case and for the parties involved. The manner of writing opinions obviously and necessarily reflects the basic mode of thought for legal problems and for deciding litigated cases.

Again, it would not be correct to leave the impression of a hard and fast and complete differentiation between the common law and civil law reports of decided cases. On the one hand, the common law reports may well contain substantial outlines and discussions and applications of established general principles. On the other hand, the collateral reports of the procureur (representing the Ministère Public) in the regular French courts, and of the commissaire du gouvernement in the administrative courts, often contain the full factual history of the dispute and the problem. Nevertheless, as we have already seen in other situations,
the basis of operation is altogether different, again reflecting the difference in the nature of the legal systems.

**Silence or Insufficiency of the Written Law.** In the common law, the absence of written law presents no problem for the court; on the contrary, it is only in the presence of a pertinent legislative text that the court has the problem of restricting the scope of its applicability. By contrast, the legislative basis of the civil law puts the court in a difficult position when the written law is insufficient or completely lacking for the immediate problem. The responsibility of courts everywhere is to render decisions in disputed cases, and in some of the civil law countries there is express legislative instruction that the courts cannot evade decision on the grounds that there is no applicable law.

One of the most celebrated illustrations is Article 1 of the Civil Code of Switzerland, which authorizes and orders the judge to render the decision which he would make if he were legislator. Of course, even the legislator cannot act in complete disregard of the whole legal system, and presumably his action would be consistent with the existing law and legal principles. At the same time, the judge naturally considers the extent of actual practices which are sufficiently consolidated to be considered as custom, and he can always draw on the pervasive abstractions identified as the general principles of law.

Under Article 4 of the French Civil Code, a judge would be guilty of a denial of justice if he refused to decide a case under the pretext that the law was silent, obscure, or insufficient. Article 21 of the Civil Code of Louisiana instructs the judge “to decide equitably,” with resort to “natural law and reason or received usages.” In Germany, the tradition is well established that it is the court’s function to fill gaps in the written law. One way to do so is by using customary law which is a recognized source of law, but of course it requires a judicial decision to establish this. In the absence of custom, there are always general principles.

It would require a separate and extensive essay to describe and compare the judicial techniques by means of which the courts in the civil law countries perform what may really be designated as a “law-making” function as distinguished from a “law-applying” function. It may be through an extension by analogy, by a very flexible process of interpretation, by the resort to custom and general principles, by “filling gaps,” and by any number of other devices, even the “presumed” intent of the parties. For our present purposes, we must limit ourselves to the observation of this phenomenon without a full analysis of its manifold expressions. Within the established framework of the present discussion, the one question which forces itself upon us is whether the performance
of this kind of function by the civil law courts does not obliterate the characteristic attributes which are supposed to distinguish them so emphatically from the common law courts.

The reply must be in the negative. In the first place, in a Romanist legal system, the written law is the supreme source, and only where it is lacking or insufficient may the court find a solution in some other way. The quantity of such "law-making" by courts in civil law countries can never represent more than a minute fraction of the total law, whereas in the common law country, the principal bulk and all the residuary areas of the legal system are judge-made law, as the primary and basic source of law. Second, the common law judge makes law directly as the most significant phase of his official authority, whereas the civil law judge performs this kind of function by reason of legislative delegation or under cover of legislative interpretation. Third, the system and comprehensive nature of the codes in a civil law jurisdiction restrict very severely the scope of the judicial function. Finally, it must be recognized that this kind of marginal function of the courts—even if the judges were much bolder and more ambitious than they are—cannot seriously change the nature of the legal system in which they operate. The other factors of history and sources and the nature of its development are never wiped away from a well established legal system.

**Authority and Use of Decided Cases**

In addition to the "judge-made" feature of the common law, the next most significant attribute would seem to be the authority and use of decided cases. Therefore, this is not only a necessary aspect of a comparative study, but it is also a means to achieve a better understanding of the place and function of judicial decisions in the civil law systems, especially as seen in the countries of our immediate observation, France and Germany.

**Precedent and Stare Decisis in the Common Law.** When a common law court decides a case, it is the general understanding that the point of law therein established must be followed and applied in subsequent cases before the same court and before other lower courts. The case itself is called a precedent, and the doctrine which makes it binding is called stare decisis. Precedent and stare decisis are essential to the nature of the common law system in which decided cases constitute the principal source of law. Such factors might seem to incorporate a lot of rigidity into the common law and prevent it from working out more suitable solutions for new kinds of situations. However, the common law courts have successfully avoided this problem by the technique of distinguishing the immedi-
ate set of facts from the factual situation in the prior cases despite an impression of similarity. In such circumstances, the previous decision is not a precedent and need not be followed. By the process of distinguishing cases, the common law courts preserve a considerable amount of flexibility in their legal development. On the other hand, if a prior case contains a solution which the court considers desirable in the immediate case, there is no need to distinguish it. Another factor which makes for flexibility in the common law is the power of a court to "overrule" an old precedent, thereby effecting a complete change in the legal rule applicable to the situation.

"Jurisprudence Constante" in the Civil Law. Generally speaking, precedent and stare decisis have no place in the civil law. At the same time, there is no reason why a civil law court must decide a new case differently from the way it resolved the same problem in a prior case. In a similar fact situation, there will be the same pertinent code articles or legislative texts, the same interpretation and reasoning will be applicable, and the same result should be obtained. However, reaching the same decision by a repetition of the same process is quite different from being bound to follow the earlier case. There may be a difference of opinion as to the appropriate governing texts or principles, and there may well be different views concerning the arguments of analysis or interpretation.

If an important question has been decided several times in the same way, and especially by the higher courts, there is no purpose to be served in continuing to repeat the same process over and over again. When a point of law becomes fixed in this manner, the series of consistent decisions are said to establish a jurisprudence constante which the civil law courts will accept and follow. This is quite different from the doctrine of stare decisis in the common law, whereby a single decision constitutes a precedent which has to be followed.

In a civil law system, the doctrine of jurisprudence constante accepts the authority and use of decided cases. In fairly recent times, there has actually been a much greater use of decided cases than is generally realized. This is not changing the nature of the civil law system, but it is something that should not be overlooked.

Practical Observations in France. In every decision, a French court must state the reasons on which it is based; if it does nothing more than cite a prior case as authority, the decision is null for lack of motivation. This clearly excludes the ideas of precedent and stare decisis. At the same time, however, the French practitioner, with a problem on which the code is not perfectly clear and specific, looks to the cases to see how the question would most probably be decided. He cites these cases to the
court and, unless there is some strong reason for not doing so, the like-
lihood is that the court will decide in the same way. If previous cases
can be considered as establishing a jurisprudence constante, the court may
say "It is established that . . ." or "It is the tradition that. . . ." In
such situations, the legal writers and commentators would say "It is the
view of legal science and the constant judicial practice that. . . ." Some-
times, a single decision of the Cour de Cassation establishes a precedent
in the full sense of the word—as a decision which must be followed.
This happens when the decision is rendered by the combined chambers as
chambres réunies, or as the assemblée plénière, or when it is an arrêt de
principe which consolidates a general rule after its affirmand in a series
of similar decisions. Not to be overlooked in the context of this subject
is the fact that the Court of Cassation's reversal (revirement) of its own
decisions is very rare.

The Conseil d'Etat is much freer in its expressions of "law-making"
and shows considerable respect for prior decisions as sources of rules of
decision. Some of its leading cases are very definite and stable, and
many general principles have been established, especially in connection
with this court's power to control excesses of administrative authority.

While judicial decisions are not recognized as a regular formal
source of law, from a practical point of view it must be stated that they
have become an important part of French law. One is not likely to hear
or read the phrase "case law," but nevertheless it is through the decided
cases that certain areas of French law have received their most signifi-
cant modern development. Examples of this are found in the strict li-
ability for damage caused by instrumentalities, in the matter of unjust
enrichment, certain alimony claims by illegitimate children, and the doc-
trine of abuse of right (abus de droit).

Practice and Experience in Germany. As in the case of France, the
description of the situation in Germany must begin with the assertion
that judicial decisions are not considered as a regular formal source of
law, and that with the exception of some decisions of the Federal Con-
stitutional Court, they are not binding as precedents. However, it would
be not only incomplete but also incorrect to stop at that point, because
the decided cases are generally consulted and often followed. Even with-
out the status of binding precedents, judicial decisions are extensively
cited by both practitioners and judges, and they are often given what
might be called de facto consideration and application. The reasons for
this treatment can be seen in the organization and procedure of the judi-
cial system. In the five different branches of courts (ordinary, labor,
administrative, tax, social), all the courts of first instance and of inter-
mediate appeal are organs of the separate states or Ländter. In each branch, the top of the hierarchy is the single federal court. One of the functions of the federal high court is to inculcate and maintain uniformity within that branch of courts for all the lower echelons of the respective states. Accordingly, without the official status of precedent, and without a binding doctrine of stare decisis, it is the normal and expected thing for decisions of the federal high courts to be consulted and generally followed. As a matter of fact, it has been stated that the decisions of the Bundesgerichtshof are generally followed throughout all the regular court system. Furthermore, some of the decisions of the federal high courts have an additional weight of authority in the special situations previously described when rendered by a Great Senate or the Combined Great Senates. Not only is such a decision binding on the individual senate which requested it, but it also sets a pattern for judicial uniformity within the federation.

In the administrative court, there has developed a practice which results in giving to certain decisions a special status of significance and authority. The practice is to publish only those decisions which are considered important, and the selection is made by the Praesidium, composed of the President of the high court, the Presidents of the senates, and two senior judges. Then, if a senate wishes to depart from a published decision on a point of law, the question must be decided by the full court. This practice of selecting the decisions for publication is also being followed by the Bundesgerichtshof.

As in France, the German courts also recognize the doctrine of jurisprudence constante, or a series of consistent decisions on the same point, and this is called standige Rechtsprechung. However, this can be carried a step further in Germany than in France, because custom is a recognized official source of law, and if a decision of a federal high court is repeatedly followed so as to be considered a general practice of the courts, the rule of the case becomes binding as "customary law" (called Gerichtsgebrauch).

In Germany, more than in some other civil law countries, it is recognized that the courts have a certain creative function of making law. This creative judicial activity may be exercised to fill gaps in the written law, either according to basic principles of law with regard to the requirements and experience of practice, or, as more frequently occurs, through the technique of purporting to interpret some text of the written law. In addition, there are some instances where the written law uses a broad formula which is deliberately designed for implementation by the courts and for the evolution of norms of decision from the decided cases. Ex-
amples of this are seen in such concepts as good faith, due care, public morality, and so forth. Finally, there is one area of German law where there is now a definitely established and clear-cut rule of precedent for certain decided cases. These are the decisions of the Federal Constitutional Court, which are expressly made binding upon all German courts and administrative authorities, and which have the force of statutes in some situations.

The foregoing description of the authority and use of decided cases in Germany should not be misunderstood as tantamount to an adoption of the concepts of precedent and stare decisis as known and practiced in the common law. There is a big difference between the general scope of these concepts in the common law and the German illustrations, which merely show that a civil law system need not be the completely opposite extreme of total disregard for decided cases. In Germany, the development of the law is not rigidly bound by prior judicial decisions; but at the same time, the courts do not have complete freedom in their application of the law.

Conclusion

The place and function of legislation and judicial decisions in the common law and in the civil law are not totally contained within hard and fast attributes which are mutually exclusive. Each system has certain strong characteristics of a general and comprehensive nature which have come to be especially identified with it. However, this does not prevent a country classified in one system from having or incorporating some measure of the traditional features of the other. In such cases, the measure is usually relatively small, and in their basic nature the two systems remain what they have been and what they are. The problem is not to fuse or assimilate these two great legal systems, nor is there any purpose to a relative evaluation in terms of quality and merit. Each serves the society in which it developed and in which it functions. In every country, the legal system is a living organism which breathes and grows and adjusts to serve the needs of society. As students of the law, and especially as students of comparative law, it is our privilege as well as our responsibility to study the different systems and to try to understand them.