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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A COMPARATIVE DISCOURSE ON FUNCTIONING OF JUDICIAL SYSTEM IN CIVIL LAW AND COMMON LAW SYTEMS, FRANCE AND INDIA

AUTHORED BY - ANUSHKA GUPTA & PRASHANT GUPTA

THE JUDICIAL SYSTEM OF FRANCE; A *Civil Law Country*.

France is a civil law country; the system emphasizes on the Statutes that are found within the code of law whereas the Common Law systems have been evolved over a period of time and are largely built on consensus and precedents. Common law forms the basis of law in most English-speaking countries whereas Civil law system forms the basis of law in most of the countries in the world except China and Islamic nations. France with an estimated population of 65,129,694 is divided into numerous departments; each department is further divided into districts; and each district has a court known as Tribunal of first Instance.¹

Each district is further divided into cantons, and each canton has a justice of peace, who dispenses summary justice, on all the matters of small importance, cheaply and expeditiously.² It is considered as a respectable court, with increasing importance. The Justice of Peace is consisted of one judge and one or two substitutes who take his place when he is prevented from attending. The justice of the peace happens to be the only judge in France whose hands are not completely tied by the law.³

France has a Dual legal system composed of Public law and Private law. Public Law (droit public) that defines the principles of operation of the State and Public bodies. This field of law is administered by the Administrative courts called Tribunaux administratifs. The Private Law (droit prive) is applicable on the private individuals and the private bodies, administered by Judicial courts.

Based on the subject matter, the courts are divided into two branches; the **ordinary Courts or judicial courts**, which handle the criminal and civil litigation known as ordre judiciaire and

¹ *Judicial System of France*, 17 Am. L. Reg. 705, 711 (1869).

² Charles Gans, *Judicial System of France*, 15 Jurid. Rev. 362, 378 (1903).

³ *Ibid.*

the **Administrative courts** which supervise government and public bodies known as *Ordre administratif*.

The Act of 16 and 24 August 1790, established this distinction between these two orders of jurisdiction that prohibits judicial judges to handle disputes concerning the Administrative or Civil servants.⁴ Thus, specific tribunals have been established in order to handle disputes involving Public persons. Earlier these courts were extremely reliant on the Executive branch, and slowly but surely, they achieved independence and impartiality as equivalent to those characterizing the judicial justice. In 1987, the presence of an independent administrative jurisdiction was recognised as a constitutional principle.⁵ Thus, the French Judicial system, appears to be so complex, but in reality is quite simple and is entirely based on two fundamental principles; the principle of double degree jurisdiction and the principle of hierarchy of Courts.⁶ Each branch has three tier hierarchical systems. The 1st degree courts are the lower and the inferior courts which are 3 in numbers each on civil and criminal side. On the Criminal side the three 1st degree courts are: The courts hearing the minor criminal offences for instance, traffic violations, minor assault and breach of peace known as **Tribunal de police court** with local magistrate. Then there are courts that hear less serious felonies and misdemeanours, called **Tribunal Correctional or Correctional Courts**. Then there is court of session for each of the departments of France exercising Appellate and original jurisdiction over crimes and serious felonies, called **Court of Cour d'assises or Assize Court**. The cases are tried by a jury of six jurors and a panel of three active judges, of which one judge in-charge and other two are associate judges. The court may sit with three judges alone, on matters relating to terrorism and illegal drug trade and also while sitting as a court of appeal. And in cases of conviction, it requires the assent of two-third majority.

In the like manner, there are divisions of the civil courts of 1st degree: the courts that hear the minor civil cases called *Tribunal d'instance*. Then there are courts having jurisdiction on civil matters over € 10,000, called *Tribunal de grande instance*. Then there are labour courts, land estate courts, social security courts or business court.

⁴ <http://www.viepublique.fr/decouverteinstitutions/justice/fonctionnement/tribunaux/comment-sontorganises-differents-tribunaux.html> (accessed on April 8' 2018.)

⁵ France/Act n° 87-1127 (31.12.1987).

⁶ Charles Gans, *Judicial System of France*, 15 *Jurid. Rev.* 362, 378 (1903).

The 2nd degree court is the court of Appeal (**Cour d'appel**) which hears appeal from lower courts (Tribunal de police and the Tribunal correctionnel). It is composed of three judges. It has several divisions for civil, criminal, social security and business.

There is a right of appeal to the Cour d'appel from the Tribunal de police and the Tribunal correctionnel. An appeal takes the form of a retrial based on the case dossier and issues of conviction and sentence based on points of law or fact.

The highest court is the **Court of Cassation (Cour de cassation)** which forms the third degree of court. This is the court of final appeal for civil and criminal matters. Since it's a judicial court, it doesn't hear cases involving claims against administrators or public bodies. Such cases are heard by the Council of state which acts as the Supreme Court of Appeal. The court is composed of nearly 85 trial judges and 40 deputy judges. It reviews the decisions of the trial court on point of law.

There is another exclusive characteristic of the judiciary in France- **The Constitutional Council**. This branch of judiciary is composed of nine members- the three are appointed by the president, three by the head of the National Assembly and three by the head of the Senate. The foremost function of the Council is to decide on the references which have not yet resulted into legislations i.e., review of Statutes prior to their enactment, whether or not they are in conformity with the Constitution. This review power is confined only to *Loi*, the organic laws made by the Parliament. It also oversees national elections and answers questions raised by the citizens regarding Constitutionality of laws. It operates through the mechanism of 'references' unlike India.

The orders are passed by the council in a paratextual manner, with no references of any judgment of any corresponding alien court, only confined to their constitution.

To remedy the actions done by the executive in order to defend the rights of the people, there is **Conseiller d'Etat** which is the high-level government official of administrative law in the Council of State of France.

INVESTIGATION BY JUDGES IN FRANCE

As in India and other common law countries, the criminal investigation is done by police, but in France, it is not the exclusive domain of police. This is also functioned by the public prosecutor and investigating magistrates. Thus, under the inquisitorial procedure, the judge is an officer of justice bestowed with a social function. The investigation by the judge is not limited to the evidence before him, but the law allows him to make any search for evidence.⁷

Therefore, the investigating judges have both investigative as well as judicial powers. They can give police instructions and interrogate the suspect and witnesses directly. However, he is not engaged in the investigative phase in all kinds of cases but only in the more serious cases, it becomes obligatory for him to involve. Thus, in less serious cases, such as the delits, this supervision function is generally entrusted to public prosecutors. But on a specific request made by the public prosecutors, the investigating judge may involve himself in these cases also.⁸ This judge decides whether the case is to be closed or subsequently be taken to the court once the investigation ends.

The public prosecutor decides whether or not to commence the proceedings in cases where the investigation for the violation of criminal law is undertaken by the police under the supervisory powers of the Prosecution Office.⁹

In a French criminal system, the primilinary investigative procedure was developed as early as the 17th century, but the position of judge d'instruction was mot introduced until the mid-19th century. In the hearing before him, prior to the court hearings, the major evidence is gathered either by the instructing judge and presented by the public prosecutors (through police services), and witnesses are heard. If he is not convinced that there's sufficient evidence of guilt to warrant a trial, no trial will occur. He undertakes the case only on the specific request by the public prosecutor or by the private citizen. The evidence collected and the testimony of witnesses make up the case's dossier, which is available to the defense in its entirety, so that the element of surprise which is quite prevalent in common-law trials, is eliminated from the main hearing. At the request of the public prosecutor's office, the instructing judge refers the

⁷ Dinesh C.Pande and V.Bagga, *Abridged Trial Procedure in Indian Law*, N.M.Tripathi Pvt.Ltd., Bombay, 1973, p.22

⁸ Jayasankar.K.I., *Investigation into Crimes - Supervision by Prosecutor*, NALSAR Law Review, Vol. 4, No.1, 2008 – 2009, p.138.

⁹ *Ibid*, p.138

penal dossier to the Tribunal correctionnel or Cour d'assises, which is not made available to the jury, which must base its decisions on the facts presented in the open court. The evidence can also be collected by the victims and subsequently the proceedings can be initiated either by the instructing judge or the public prosecutor.¹⁰ Thus, the victim plays an idiosyncratic role in French Judicial system. Victim is entitled to get the case investigated by the instructing judge in cases where the prosecutor decides not to proceed with the investigation. Also, the system provides for legal aid to the victim.

The stage of pre-trial comes to an end on completion of the dossier and there is sufficient evidence to proceed with the case and bring it to the court. If evidence is not sufficient then the proceedings are shelved either by the public prosecutor or by the instructing judge.

THE JUDICIAL SYSTEM OF INDIA; A *Common Law Country*.

The Supreme Court of India is the apex court of the nation. The judiciary in India functions as the guardian and the protector of the Constitution and the fundamental rights of the people. India has a single integrated system of Courts to be in charge of both Union as well as State laws.

The **Supreme Court of India** is the highest appellate authority in Indian Judicial system. Below the Supreme Court, each state or a group of states have **High Courts** and numerous subordinate courts are under these High Courts. Next below is the High Court. There is a High Court in each State. Each State is further divided into Districts and these Districts are presided by a **District and Sessions Judge** with original and appellate jurisdiction. The highest judicial authority in a District is the sessions judge. Then there are Courts of civil and criminal jurisdiction under the District and Sessions Judge, i.e. Civil Judge (Senior Division) having power to determine the civil matters of any pecuniary value and Civil Judge (Junior Division) known as Munsif having limited power to decide the civil matters. In the like manner, the criminal jurisdiction comprises the Chief Judicial Magistrates or Chief Metropolitan Magistrate and Judicial Magistrates or Metropolitan Magistrate of First and Second Class.

Unlike the United States and United Kingdom, the Supreme Court of India has jurisdiction over all the courts in India.

¹⁰ *Ibid.*

INVESTIGATION BY THE POLICE IN INDIA

Investigation is the most vital piece of criminal justice system. Investigation and prosecution in India are two separate parts of it. The police perform the absolute function of sending a case to the court for the trial. Once the investigating agency files the report before the judge, the role of public prosecutor begins. The separation of the prosecution agency from the police after the Code of Criminal Procedure, 1973 was to guarantee that the police have no influence over the prosecutors.

The police force works under the government. Although, this absolute and exclusive power of investigation handed to the police has occasioned in numerous malpractices such as distortion of facts in cases, filing false reports, categorizing genuine cases as false and also cooking up false cases against anyone to revenge or for bribe.

The process of trial in India is legalized by the Code of Criminal Procedure, 1973. The court of the lowest jurisdiction on the criminal side is the Judicial first-class Magistrate, higher to which there are Assistant Sessions Courts, Sessions Courts, then comes the High Courts and the Supreme Court. Except regarding matters for which original jurisdiction was given to the sessions court in very rare matters, all the proceedings begin before Magistrate's Courts. The proceedings can either be on the basis of police report or otherwise than on police report, by the way of complaint before magistrate.

A COMPARATIVE ANALYSIS

From this free discussion of the judicial system of the civil law country France and common law country India, the improvement of the each can be promoted taking from the experiences of the other. The distinctness can be diluted by the idea of convergence. India may gain from France the great advantages of a well-regulated court of appeal, and of a provision for executing the laws by public prosecutors.¹¹

In a common law country, greater importance is given to the 'courts' (in the form of precedents, *stare decisis*, interpretation) whereas in civil law countries, much importance is given to the 'codes'. Slowly, under the idea of convergence, this distinctness of both the legal systems is being diluted as the common law country like UK has found more relevance in quoting

¹¹ *The Judicial System of France*, 1 L. Rev. & Q.J. Brit. & Foreign Jurisprudence 428, 437 (1845).

legislations and civil law country like France has started quoting precedents.

Prof *Conrad* emphasizes on ‘inherent power of judges to decide law’ in common law jurisdictions. In India, the judges have wide power of interpretation of the laws, which often led to evil and corrupt consequences, on the other hand, the laws in civil law countries like France are much more certain whereas Judges in France as opposed to Indian Constitutional culture, have no power of detailed interpretation. Their task is to apply law as it is.

France may gain from India the enormous advantages of keeping separate the judicial and legislative works, of paying judges all the more satisfactorily and decreasing their numbers, and by and large, of withdrawing from any chances of political corruption from the neighbourhood of the Bench.¹² The number of judges in France is extremely high although the number of judges must depend upon the capacity of bar of furnishing able men, along with fulfilling the necessity of preventing delay in the system.¹³

The constitutional Council in France is absolutely prohibited from dissent, as an impressive dissent leads the author of the majority opinion to refine and clarify its initial circulation¹⁴, whereas in India, each member of the Court has the prerogative to write separately.¹⁵ It upholds the independence of the individual judge to speak in his or her own voice, and the transparency of the judicial process.¹⁶ Also, the judges in France exercise a curtailed power as they are not supposed to pass an order of general and regulatory nature, but only those orders with specific application of law.

The judiciary in France follows ‘*pseudo syllogism method*’ in deciding cases.¹⁷ As a result of which the judgment differs from a common law judgment not only in style but also in content. The canons of interpretation are generally not found in any order of the council and they lack ‘reasoning’. They go by very pure deductive logic whereas in common law the words of the statute are interpreted to reach a conclusion called ‘oracles of law’.

¹² *Id.*

¹³ *Id.*

¹⁴ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 8 (2010).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The orders by the Constitutional Council in France follow a standard method and are very precise and divided into three parts; a) mere narration of the constitutional provisions, with no interpretation that form the major premise, b) the minor premise, which consists of the legislations that are being questioned and c) the decision or the conclusion.

CONCLUSION

There are some general principles that must be followed in every judicial system. *Firstly*, to procure the services of the best men, ample amount of salaries must be given to judges. *Secondly*, the judge must not be able to hold any political office and must not be in any direct or indirect connection with the government or the legislature of the country. Every judicial system must embody these values which are essential for ensuring intelligent and truthful exercise of the Judicial office and these values are partially reflected by Indian judicial system, as there have been often debates and discussions on low salary of judges and judiciary often exercising legislative and executive functions with expanding powers by the way judicial activism. Adjudication by Supreme Court in domain of Public Interest litigation being one such example. Increasing power of Judicial review being another.

But these principles, not even in their slightest form govern the judicial system of France and there are indeed countless aberrations from these fundamental values.¹⁸ The number of judges is exceptionally excessive and they are inadequately paid. The fatal outcomes are, It becomes impractical for the Bar to provide with such abundant supply of skilled men for judicial offices, at the same time it is not feasible for the State to sufficiently pay numerous judges.¹⁹ Thus, the result would be that a substandard quality of men are consigned in such situations as the salaries of the French Judges are entirely inadequate to attract men of eminence from the Bar.²⁰

They are not excluded from the legislature and political sphere, rather they are obliged to take as judges a political part. Judges are not prevented from being representative of the district over which they judicially preside.²¹ If he's a candidate for that representation, he has the freedom to canvass the votes of those whose cases he decides on regular basis. Without any qualms, this results in exploitation of the power.²² Consequently, for election purposes the sacred office of the Judge will be made an instrument of corrupt revenge as it is unrealistic to presume such a man to hold a balance between the government and the people. The chances of biases arise in cases of opposite parties.²³ These kinds of cases may however be uncommon, but the French system essentially has undermining effects on the judicial character. Also, the judges in France

¹⁸ *Supra* Note 11..

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

are quite conservative in striking down legislations as ‘unconstitutional’ as they are more sympathetic to the political views.

In this light, the incredible fact about Indian Judicial system is that the Legislature has consistently excluded the judges from the seats in the house of the Parliament, for their better functioning and effective delivery of justice.²⁴



²⁴ *Id.*