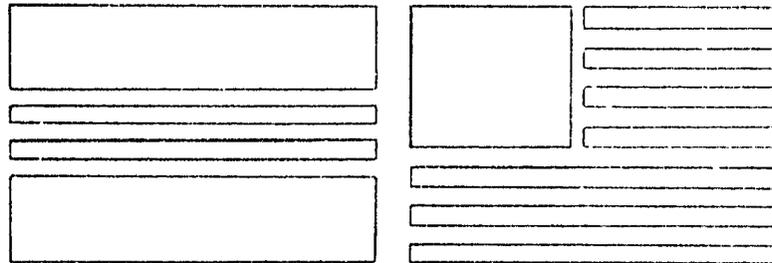


PN-
ARE- 716



LEGAL PROJECT
VIETNAM



LOUISIANA STATE UNIVERSITY

LEGAL PROJECT - VIETNAM

A COMPARATIVE STUDY OF THE STRUCTURE AND
ROLE OF COURTS OF APPEAL IN CIVIL LAW
SYSTEMS

BY

Mrs. Nina N. Pugh

A COMPARATIVE STUDY OF THE STRUCTURE AND
ROLE OF COURTS OF APPEAL IN CIVIL LAW
SYSTEMS

Ever since the principle of appellate review emerged from the bureaucratic legal developments of Empirical Rome and evolved into a well-established practice with intricate procedures under Justinian, legal systems in the Roman tradition, or Civil Law systems as they are known today, have included courts of review. Practices of appellate review vary widely among the different Civil Law jurisdictions, often reflecting basically different juridical and political philosophies, which are based on national Constitutions and local traditions.

A comparative study of the salient features of the structures of the appellate courts of the representative civil law jurisdictions of France, Italy, Spain, Germany, and Louisiana plus the effect of these courts' decisions will be presented. Study has been limited to these countries in the belief that they will give insights into practices of the vast majority of Civil Law jurisdictions throughout the world. France has been used as a model by Belgium and Quebec; Germany, by Switzerland, Greece, and Japan. Switzerland in turn has served as a model for Turkey, while Austria has shared in the legal development of Germany. Although thoroughly Romanist in character, the Netherlands stand somewhat apart from the countries whose appellate systems are presented herein. A study of the appellate court system of this Romanist country has been omitted therefore. Scotland, which used the Netherlands as a model for its civil law system, and the Union of South Africa also following the Netherlands,

are so strongly influenced by "common law" principles of England as to be considered, it is hoped, pardonably omitted from a limited study of civil law appellate structures and their law-making function. It is most regrettable that limitations of time and space prevent an adequate presentation of the appellate courts of Latin America, all of which have departed from their European ancestor-models to form courts of much originality and great potential influence in the "New World." Only a very general comment was possible, but comprehensive study of the legal structures of these countries should be undertaken at the earliest possible date, with an orientation toward the profit to be derived from their developmental experiences and possibly even from the adoption of some of their unique institutions.

Not even a general comment was possible in the case of the "emerging nations" of Africa, but certainly their development should prove most interesting and worthy of future study as they proceed to codify custom and join the ranks of the nations of the world classified as "Civil Law" countries.

Ethiopia, by the promulgation in 1960 of its Civil Code drafted in the Continental manner, best illustrates the portent of things to come in Africa.

I. FRANCE

- §1. Introduction.
- §2. Cour d'appel.
 - §2.1. Composition.
 - §2.2. Role.
 - §2.3. Judicial Interpretation.
 - §2.4. Original Jurisdiction.
 - §2.5. Procedure.
 - §2.6. Decrees.
- §3. Cour de Cassation.
 - §3.1. Composition.
 - §3.2. Role.
 - §3.3. Judicial Interpretation.
 - §3.4. Original Jurisdiction.
 - §3.5. Audiences ordinaires, Assemblée Plenièrè civile, and Audiences solennelles.
 - §3.6. Procedure.
 - §3.7. Decrees.
 - §3.8. Effect of Judgment.
- §4. Administrative Courts.
 - §4.1. Conseil d'Etat.
- §5. Tribunal Conflits.
- §6. Conseil Constitutionnel.
- §7. Judges.

I. FRANCE

§1. Introduction

In France there is a system of appellate review in two levels which is basically the same as that adopted in 1790 in response to the demands of the French revolutionaries. There is an intermediate appellate tribunal, the Cour d'Appel, as well as a court of last resort, the Cour de Cassation. Attached to these courts of appeal, as indeed to all regular courts in France, are members of the Ministere Public, who are said to be representatives of the executive branch before the courts.¹

There is also a system of administrative courts from which there is an appeal to the Conseil d'etat. This system of courts is said to represent the greatest difference between the judicial systems of the United States and of France.

§2. Cour d'Appel

§2.1. Composition:

There are twenty-seven judicial districts in France, with a Cour d'Appel situated in each, presided over by a president, and including at least two other judges per chamber, as required. These judges are called conseillers. The majority of Cours d'Appel have more than one division, while that in Paris has seventeen.

The Cours d'Appel are divided in turn into four chambers as

¹See Herzog, Civil Procedure in France, Nijhoff (The Hague 1967) §§3.06-3.10, cited hereafter as "Herzog."

follows:

- (1) Chambre correctionnelle, which hears criminal appeals from courts of first instance, regarding juvenile and related matters of a lesser criminal nature.
- (2) Chambre d'accusations, which hears appeals from orders of investigating magistrates (juges d'instruction), decides on extradition questions, exercises disciplinary control over judicial police, and decides whether a trial for felony is proper, based upon the report of the investigating officer.
 - (a) A decree of this court (arret de renvoi) would transfer this case to the assizes court (criminal court of first instance for serious offenses), wherein the one charged (l'inculpe) would be transformed into the one accused (l'accuse).
- (3) Chambre Sociale (organized 1958), which hears appeals from cases involving social security questions, labor contracts, and the application of the social welfare laws.
- (4) Chambre Civile, which hears appeals from courts of first instance, as well as cases remanded by the Cour de Cassation, which originated in another Cour d'appel. In the latter case the Cour d'appel sits in solemn session (audience solennelle, "en robes rouges") with at least four judges, plus the president.

There is also attached to each Cour d'appel a Procureur Général, who heads the staff of the Ministère Public for that court. The senior assistants at each Cour d'appel are called avocats généraux, who are similar in rank to the presidents of the Chambers. The other assistants are called substituts généraux and are similar in rank to the judges. The Procureurs Général for the Cours d'appel report directly to the Minister of Justice, but are in turn hierarchical superiors to the Procureurs Général to the members of the

Ministere Public attached to the courts of first instance.

§2.2. Role:

The function of the Cour d'appel is to provide an appellate hearing of right from any judicial decision of courts of first instance.² It is a hearing de novo, in which the entire record is brought before the court for consideration and review, both the facts and the law. New evidence may be introduced at this level which presents facts ascertained since the previous hearing. The French refer to the Cour d'appel as a "double degré de juridiction," which indicates that they regard this hearing as a right to a second trial before a different judge, and not just an examination of specific errors. The appellant may restrict his appeal to only certain designated issues, however, and only as much of the record as is necessary will be taken up on appeal.³

Inasmuch as the Cours d'appel tend to decide cases on facts rather than on law so that their decisions will escape review by the Cour de Cassation, which decides cases only on law, the Cour d'appel is gradually assuming more importance than it initially held.

§2.3. Judicial Interpretation:

The Cours d'appel may interpret all acts of a legislative nature,

² See Herzog, §8.02, for modification of right of appeal by the parties.

³ See Herzog, §8.16.

including decrees and regulations of administrative authority. In theory the Cours d'appel are free, as are all other judicial tribunals, and may decide cases without any obligation to follow analogous decisions made by the same tribunals, nor decisions of a higher court. It must act, however, in accordance with a decision of the Cour de Cassation when committed to it on a second renvoi by the Chambres réunis.

§2.4. Original Jurisdiction:

The Cours d'appel have original jurisdiction to try civil actions brought against judges of industrial councils and judges of the courts of first instance. They may also try actions against individual judges of the Cours d'appel for recovery of damages caused by intentional unlawful acts committed in the performance of judicial duties. Such actions are known as "Prise a partie," and derived ultimately from the Roman law.

§2.5. Procedure:

For the details of procedure in the Cours d'appel, see the Code de Procedure Civile, arts. 443-473, and Herzog, Civil Procedure in France, Nijhoff (The Hague 1967) §§8.04-8.22.

§2.6. Decrees:

The final adjudications of the Cours d'appel, known as arrets, are per Curiam opinions, usually handed down one to four weeks following hearing, and are usually read in court. They are brief statements which embody the reasons for the decision. If they affirm the lower court, they may simply adopt the opinion of the lower court, even though the Cours d'appel, like all

other French courts, are required to give their reasons for judgment. On occasion the arret may be of an interlocutory nature, but more often it is a final adjudication which supplants the decision of the lower court. It is nonetheless subject to review by the Cour de Cassation.

§3. Cour de Cassation

§3.1. Composition:

The Cour de Cassation is a single court at the head of the judicial structure of France, sitting in Paris, and composed of a president, the "premier president," five chamber presidents, the "presidents de chambre," and sixty-three other judges, of "conseillers."

The Cour de Cassation sits in divisions or chambers with fifteen judges in each civil chamber, and seventeen in the criminal chamber. Seven judges constitute a quorum, which makes it possible for the criminal chamber to meet in two sub-panels. The judges do not rotate, as they do in the lower courts, which practice makes for a greater specialization and stability of jurisprudence. The chambers are organized as follows:

1. Chambre civile, 1. section civile, which handles cases involving questions of nationality, personal status, property, non-commercial contracts, liens and mortgages, successions, donations, copy-right, separation of powers, war damage claims, and disciplinary proceedings against avocats and officiers ministeriels.

It acts also as a chambre d'accusation against magistrates who commit crimes in their official capacity.

2. Chambre civile, 2. section civile, which reviews torts cases, divorce and separation, civil procedure, elections, and some few social security cases.

3. Chambre civile, section sociale, which reviews questions of labor law, land rents, and the bulk of the disputes concerning social security.
4. Chambre civile, section commerciale et financiere, which reviews commercial and financial matters.
5. Chambre criminelle, which reviews all questions of criminal law.

In addition the Cour de Cassation has a large judicial staff to assist it in its work.⁴

§3.2. Role:

The Cour de Cassation, which was organized in 1790 as a part of the Constituent Assembly to assure the exact application of its laws, was given the name of "Cassation," because the Assembly feared that the word "cour" might inspire the court to assume such ambitious powers as those held by the old Parlements. It is truly a reviewing or regulating court, rather than a Supreme Court. --It receives petitions of review from all parts of France and all remaining French possessions. The Cour de Cassation does not give an appellate review in the ordinary understanding of the term, nor does it give any new judgment. It merely "breaks" (casses) the judgment appealed, or leaves it intact, which in effect affirms it. For further discussion see infra.

It was not until 1837 that the Cour de Cassation was given the authority to impose its authority upon other courts so that it might assure uniformity of law, which is seen to be one of its major functions today.

⁴See Herzog, §3.32 e-i.

Its other major function is to try to keep the law pure by assuring that the lower courts do not diverge in their decisions from the law as found in the codes and other legislation.

The Cour de Cassation reviews cases which come to it from the Cours d'appel and other courts of last resort on petitions called "pourvoi." Although the Cour de Cassation reviews only questions of law, and is said to judge judgments, it may consider whether or not questions of fact furnish justification for the application of the rule of law upon which the decision is based. The Cour de Cassation considers nothing that was not in the original petition.

The Cour de Cassation labors today under a very congested docket.⁵

§3.3. Judicial Interpretation:

Whereas the Cour de Cassation is free to interpret all legislative and regulatory acts, it suffers, in the opinion of many scholars, from the lack of authority for constitutional review, which still remains in the legislative body. It is not bound by any previous decisions either.

§3.4. Original Jurisdiction:

The Cour de Cassation has original jurisdiction only in prise a partie actions against courts of appeal, assizes courts and individual members of the Cour de Cassation, which actions must be tried before the Chambres Réunies.

⁵ See Herzog, §3.32 k.

§3.5. Audiences ordinaires, Assemblée plénière civile and Audiences, solennelles.

The Audiences ordinaires are those sessions held by each of the chambers to review the petitions for pourvoi en cassation. Deliberations are held in the public courtroom in cases of moderate length, but in Chambres de Conseil otherwise. The arrets are rendered by the absolute majority, with the conseillers giving their opinions in order of seniority; first, the reporting judge; then the other judges in order of seniority; and finally the presiding judge. The decisions are later read aloud in a public hearing.

On the appellate levels the principle of "collegiality" prevails, which means that a judge never sits on the bench alone as he does in the tribunals of first instance. At least three judges always sit on the Cour de Appel; at least seven on the Cour de Cassation. This principle of collegiality is followed throughout most of the Civil Law world.

The Assemblée plénière civile, which was organized in 1947, consists of at least fifteen of the judges of the civil panels, plus the premier president, the presidents de chambre, and the doyens, or senior associate judges. The Assemblée plénière civile hears cases referred to it by the premier president on the recommendation of the presiding judge of the panel to which the case had been assigned originally, as a case involving a principle or one in which there is danger of inconsistent decisions unless the Assemblée plénière considers it. If the Procureur général⁶ requests it

⁶The representative of the Ministère Public attached to the Cour de Cassation who has a large staff of avocats working under him. For role of Procureur Général in procedure of Cour de Cassation, see Herzog, §§9.19-9.23.

in writing, or if the judges of the panel to which the case was assigned originally are evenly divided, the premier president must transfer the case to the Assemblée plénière. Decisions of the Assemblée plénière civile are automatically accorded more weight and respect than those of an individual panel.

The Chambres Réunies, which is the Cour de Cassation sitting en banc is said to sit in audience solennelle. The judges of all the panels sit together, but the quorum is only thirty-five. They sit together twice a year: on solemn occasions, and to hear cases coming to the Cour de Cassation for a second pourvoi based on the same grounds as the first. If the Chambres Réunies adheres to the position of the individual panel which first reviewed the case, the decision becomes binding upon the court to which the case is remanded, and in that case only. These decisions have a special authority, however, and tend to stabilize the jurisprudence.

§3.6. Procedure:

For proceedings in the Cour de Cassation see Code de Procédure Civile, art. 516, and Herzog, ch. 9.

§3. 7. Decrees:

When petitions for review are submitted to the Cour de Cassation several alternatives are available as follows:

1. After hearing the case the Cour de Cassation may dismiss the petition on the basis that the law was correctly applied below, in which case the decision of the lower court becomes final. The Cour de Cassation has issued a rejet de pourvoi.

2. The Cour de Cassation may set aside or "break" the judgment of the court below ("casse de jugement" or "annule de jugement"), if it feels that the court was in error, and remand the case to another court of the same rank as the one from which the case originated. In rare instances there may be nothing further to decide on the merits and the Cour de Cassation merely reverses the case without remanding it (cassation sans renvoi). More often the case is remanded (renvoi) to a Cour d'appel for consideration of the point reviewed on pourvoi, as well as any other points which may come up for decision.

If the court to which the case is remanded agrees with the Cour de Cassation, the case ends, and the decision becomes final. If it does not, it may send the case back to the Cour de Cassation on a second pourvoi, which will be considered by the Chambres Réunies, as set forth above.

The decisions of the Cour de Cassation are very brief and follow a pattern, which includes the heading, giving the names of the parties, the capacity in which they were acting, and the decision under review by court and date; then the opinion and the decree (dispositif), the names of the presiding judge, the reporting judge, the other judges, the members of the Ministère public and counsel participating. The opinion (motif) begins with the words "La cour," and proceeds with deductive logic to give the reasons for the judgment, introduced in separate clauses beginning with "Attendu," but gives no precedent for decision. There is some slight variation among decisions of affirmance and those of reversal.

It may be said in general that the decisions of the Cour de Cassation reflect the traditional Romanist approach of codification and principles integrated and coordinated in a systematic manner.

§3.8. Effect of Judgment:

Traditionally in France the judicial branch of the government has been considered less important than the executive or legislative. The Cour de Cassation has served its purpose well, however, in bringing stability to the jurisprudence of France and giving more importance to the judiciary function. Very seldom is there any departure by other courts from the arrets of the Chambres Réunies. Although France does not adhere to the principle of stare decisis, its judges and lawyers display a remarkable tendency to abide by the rather general principles of law announced in the brief reports from the Courts of Appeal, adapting them to the needs of the times.

§4. Administrative Courts⁷

By act of 1953⁸ courts were established outside the regular court system to handle review of almost all types of administrative action. As a result of legislation during the French Revolution⁹ the judiciary in France

⁷See Koch, op. cit., 377-381, for these and other Administrative courts.

⁸Décret No. 53-934 of September 30, 1953, J. O. September 30, 1953, p. 8593, [1953] D.L. 376.

⁹Law of August 16 and 24, 1789, 1 Bull. Ann. des Lois 221 (1834).

have been forbidden to interfere in any matter with administrative officials. Although these Administrative courts exercise a judicial function, they are a part of the executive branch of the government. So great is the division between the two court systems (ordres) that a regular civil court trying a case in which an administrative matter is raised incidentally will have to stay proceedings in its own court until a ruling in an Administrative Tribunal can be had on the matter.

These administrative tribunals handle acts in proceedings referred to as "recours pour excès de pouvoir." They may exercise their powers in the following situations: (1) where the administrative agency fails to observe procedural rules; (2) where there is an error of law; (3) where the agency uses its power for an improper purpose; and (4) where no proper basis for the decision is given (défaut de motif légal). The administrative tribunals also try cases to determine government liability whether in contract or in tort, but the rules applicable to these trials differ from those used in ordinary courts. By special statute many cases go to regular civil courts which would normally be tried by the Administrative courts.¹⁰

§4.1. Conseil d'Etat:

Appeals from the Administrative Courts go directly to the Conseil

¹⁰ See Herzog, §3.01.

d'Etat,¹¹ except in the case of social security problems which to go the Cour d'Appel and thence to the Cour de Cassation.

The Conseil d'Etat was first established by Napoleon as First Consul to handle appeals from administrative departments. When administrative activities were extended so greatly in recent years, the Conseil d'Etat became completely overwhelmed with cases, and the Administrative courts were established as a relief measure. The Conseil d'Etat remains as the court of last resort for the administrative tribunals.

§5. Tribunal des Conflits

As can easily be understood, the presence of two different systems of courts, the administrative and the regular, soon produced the necessity for an additional body to determine the competence of the two different systems. Accordingly, in 1872,¹² the Tribunal des Conflits was established to expedite the conflicts between the two courts.

It consists of three judges of the highest regular court, the Cour de Cassation, and three judges of the highest administrative court, the Conseil d'Etat. If this court is evenly divided, the Minister of Justice sits with the other judges and casts the deciding vote, but this happens very rarely.

¹¹For structure and function in general see Hamson, C. J., Executive Discretion and Judicial Control, Stevens (London 1954); Lagrange, Maurice, "The French Council of State (Conseil d'Etat)," 43 Tu. L. R. 46 (1968).

¹²Law of May 24, 1872, [1872] Bull. des Lois No. 1160, [1872] D. 4.88.

The Tribunal des Conflits does not, as a general rule, decide cases on the merits. It merely decides which system should handle a particular case, but, in the event of inconsistent decisions in the two different systems, the Tribunal des Conflits may establish the right doctrine.¹³

§6. Conseil Constitutionnel

Although no court in France has the power of constitutional review, the French Constitution did provide in 1958 for a Conseil Constitutionnel, composed of nine members, three of whom are appointed by the president of the Republic, and three each by the presiding officers of the two houses of the legislature, whose function is to review all newly-enacted "organic law" before promulgation. Laws dealing with the organization of the government and requiring a qualified majority, and all rules adopted by either house of the legislature must be submitted to the Conseil Constitutionnel. If declared unconstitutional, laws may not be promulgated; legislative rules will not be applied; and international agreements which may be submitted also by the president, will not be ratified. Once promulgated, the Conseil Constitutionnel may not review a statute, legislative rule, or international treaty.

§7. Judges

The judges of the Cour d'Appel and Cassation come, for the most

¹³See also Herzog, op. cit., §3.03.

part, from the lower echelons of judicial service. They are magistrates of the bench (de siege) who have been promised independence from the government of the day by the Constitution. Although the judges are promised freedom from interference by the executive and legislative branches, they are closely supervised by the Ministry of Justice¹⁴ and disciplined by the Conseil Superieur de la Magistrature¹⁵ (High Council on the Judiciary), which is composed of eleven members: the president of the French Republic as an ex officio member, the Minister of Justice as the vice-president, two judges and an avocat général of the Cour de Cassation, three judges from other courts, a member of the Conseil d'Etat, and two members of the general public. The President of the French Republic selects all members except those from the Conseil d'Etat from a list of twelve persons submitted to him by the Cour de Cassation; the members of the Conseil d'Etat, from a list of three persons submitted to him by the Conseil d'Etat.

Appointments to the Cour de Cassation and to the presidency of the Cour d'Appel are made by the president of the French Republic on the recommendation of the Conseil, and not of the Minister of Justice. Requirements as to prior experience must be observed in regard to Cassation appointments, however.

In France the magistrats, including both the judges and the members

¹⁴Herzog, §§3.05, 3.20, 3.21

¹⁵Id, at §3.16.

of the Ministère public are appointed for life from among the graduates of the Centre National d'Etudes Judiciaires established in 1958 to provide additional education for those law students interested in a judicial career. Candidates for admission to the Centre must be French Nationals of good health. They may obtain scholarships based on very difficult competitive examinations. About 60 candidates are admitted each year to the Centre out of the three or four times that number of applicants. No more than one-sixth of the number of applicants admitted after examination may be admitted each year without examination. These may be chosen from among assistants on the faculties of the law schools for two years with degrees of doctor of laws, avocats, avoués, notaires, greffiers (court clerks) with three years' experience, and civil servants with the degree of licencié en droit who have unusual experience in the legal or economic field. Appointments to the Bench or other positions in the Judiciary are made by the president of the Republic, on the recommendation of the Minister of Justice from among the graduates of the Centre, those with the highest ranking in their class receiving the best appointments.¹⁶

The rules for promotion of judges are very complex.¹⁷ A great deal of emphasis is placed upon examinations which test the candidate's powers of logical reasoning rather than his judgment and experience. Judges in the French system, therefore, have more in common with their colleagues on

¹⁶See Herzog, §3.12, for information on Centre training program.

¹⁷Herzog, §§3.13-3.15.

the bench and with law professors than with lawyers, from whom they are removed by education and experience. They tend to be quite theoretical and analyze problems in terms of general principles and conceptual abstractions, but with an over-all view toward rendering fairness and justice in the particular case.

Judges in France hold a respected, but not exalted position; the salaries are modest with good fringe benefits. Due to the fact that all cases are decided by panels with no dissenting opinions, and due to the fact that even the court's opinions are brief and written in a standard style, there is little opportunity for a French judge to gain any personal fame.

Judges may be appointed to the bench from law faculties, and from high executive or administrative offices, as well as from among successful law graduates. Some of the highest positions in the judicial hierarchy are filled by direct presidential appointment. With promotion slow at best and with the possibility of direct presidential appointment always present, there is a great deal of pressure felt by members of the judiciary to conform and particularly to accept opinions of the Cour de Cassation as precedent.

SELECTED BIBLIOGRAPHY

France

Code de Procédure Civile, especially articles 116-148, 443, 473, and 516. See also Appendice au Code de Procédure Civile (Dalloz, 1969), 411-481.

Herzog, Peter. Civil Procedure in France. The Hague, Netherlands, Martinus Nijhoff, 1967. This is the leading work on the subject. See particularly pp. 151-65 and Ch. 8 - Proceedings on Appeal, pp. 376-420; Ch. 9 - Proceedings before the Cour de Cassation, pp. 421-466. See also the Bibliography in §§1.36-1.38.

Kock, Gerald L. "The Machinery of Law Administration in France," 108 U. of Penna. L. R. 366, at 373-77 (1960).

Planiol, M. et Ripert. Traite Elementaire de Droit Civile, 12th ed., I, §§ 202-207, Paris, 1939.

Solus et Perrot, Droit Judiciaire Prive, I, §§524-548, 605-618, 678-702, Sirey, Paris, 1961.

II. ITALY

- §1. Introduction.
- §2. Pretori.
- §3. Tribunali.
- §4. Courts of Appeal.
 - §4.1. Introduction.
 - §4.2. Composition.
 - §4.3. Role.
 - §4.4. Original Jurisdiction.
 - §4.5. Procedure.
 - §4.6. Decrees.
- §5. Corte di Cassazione.
 - §5.1. Introduction.
 - §5.2. Composition.
 - §5.3. Role.
 - §5.4. Procedure.
 - §5.5. Decrees.
 - §5.6. Effect of Judgment.
- §6. Constitutional Courts.
- §7. Consiglio di Stato.
- §8. Judges.

II. ITALY

§1. Introduction

The present Italian judicial organization and procedures derive in large part from French Revolutionary sources; therefore, there is a great similarity to be seen between the appellate procedures of the two countries in the two upper levels of the judicial organization. In Italy where there is a much higher percentage of attacks upon judgments (impugnazione) than in France, there are also two lower levels of appeal (appello), which is the favorite means of attacking judgments. Italian litigiousness¹⁸ and the lack of juries, facilitating appeals, have been suggested as leading reasons for the extraordinary number of appeals in Italy. The fact that judgments do not become final and usually not executory until all ordinary means of attack have been exhausted or prescribed, also have their persuasive effect in the promotion of impugnazione. The two lower courts which have the right of hearing appeals are the conciliatori and the pretori.

§2. The Pretori

The Pretori are career members of the judiciary, subject to the general rules of regulatory supervision and promotion which govern all judges. Although their primary function is to serve as single member judges of criminal cases with a penalty of three years' imprisonment or

¹⁸Cappelletti & Perillo, Civil Procedure in Italy (The Hague 1965) p. 257, n. 7, hereafter referred to as Cappelletti & Perillo.

less, and civil cases involving amounts of \$1,200 or less, the Pretori also hear appeals from the judgments of the conciliatori, who are at the bottom of the court organization. [The Conciliatori handle civil cases only, involving \$80 or less. They serve for reasons of prestige and without pay. Very often the Conciliatori do not even have legal training or background.]

There are about 1,000 Pretori, each presiding over a jurisdiction which encompasses several communes, as a general rule. Due to the large volume of work of these courts a limited number of Vice-pretori are appointed, usually for three years, and without pay, from practicing attorneys and notai, who may continue to practice while serving on the court. Occasionally a Vice-pretore is appointed for a six-months period with pay, but in this case, he would not continue to practice while serving on the court.

§3. The Tribunali

The Tribunali are three-judge courts which hear appeals from the Pretori in their circondari zone, in criminal and civil cases, on both the law and the facts. (In addition the Tribunali have a broad jurisdiction in serious criminal matters. They handle civil cases above the limits of the Conciliatori and Pretori, enjoying exclusive jurisdiction in tax matters. They also handle cases concerning the status and capacity of persons or honorific rights, proceedings to test the authenticity of a document in cases of an undeterminable monetary value, and proceedings to levy execution

on immovable property.)

The Tribunali are assigned to one hundred fifty-five different circondari. They are further divided into sub-sections which vary in number of judges and types of cases from circondari to circondari, often specializing in particular subject matters. Laymen serve on these panels, too, as "popular" or "expert" judges. Although assignments are made to the various sub-sections each January 1, some judges may acquire such expertise in certain fields that they will be retained on their respective panels. Each section has a chief judge, or president. The chief judge of the Tribunali usually presides over the first section.

§4. Courts of Appeal

§4.1. Introduction:

Consistently with the principle that each court in the Italian judicial system has the exclusive right to hear appeals from the court immediately below it, the Court of Appeals hears appeals only from the Tribunali rendering judgment in the district in which the particular Court of Appeals sits.

§4.2. Composition:

The twenty-three courts of appeal sit in areas known as districts. They sit in panels of five judges, which may soon be reduced to three. Most of these panels have lay judges sitting with ordinary judges, however. They are divided into sub-sections for the purposes of specialization, often

on a permanent basis, as follows:

- (1) Minorenni - criminal cases involving minors under eighteen years of age. Appeals in these cases are heard by panels of three ordinary judges and two social workers, one man and one woman.
- (2) Lavoro - controversies involving labor laws.
- (3) Agrarian Problems - declared to be unconstitutional in 1962, largely because of method of selecting lay judges, reorganized with constitutional guarantees by Law of March 2, 1963, No. 320.
- (4) Tribunali Regionali delle acque pubbliche - regional tribunals of public waters are attached to some of the courts of appeal, adjudicating cases involving water rights in public streams, springs, and lakes, these cases being heard by panels of two judges and one technician. There is an appeal to a superior tribunal of public waters, which consists of five ordinary judges, four councilors of state, and three experts, all of whom sit in panels of five or seven, depending upon the subject matter involved.

§4.3. Role:

Just as in France the Italians consider it a fundamental element of justice that they have a complete readjudication of a case on appeal. The Courts of Appeal, therefore, provide trial de novo of all judgments in law

(not in equita) appealed from the Tribunali, the jurisdiction of which is so much more broad than that of the conciliatori and pretori, that the Court of Appeal is actually the first court in Italy with a large appellate jurisdiction. It is the first court level in which the appellate jurisdiction is greater than its original jurisdiction. Sometimes the appellant may only complain of procedural or substantive errors below. He may introduce new defenses and new evidence on appeal, but no new claims. Partial judgments as well as those completely disposing of a case may be appealed, which gives the litigant a maximum concentration of proceedings.

§4.4. Original Jurisdiction:

The Courts of Appeal have a quite limited original jurisdiction, the most important area of which is in proceedings to obtain recognition of foreign judgments.

§4.5. Procedure:

Essentially the same rules of procedure prevail in the Courts of Appeal as are used in courts of first instance.

See Codice di Procedura Civile arts. 339-359.

Cappelletti & Perillo, §§10.06c, d-1.

§4.6. Decrees:

Since the Courts of Appeal may exercise substitutionary as well as revisionary power, they may give the following judgments (sentenze):

- (1) Affirmance of the judgment from below on the merits.

- (2) Judgment upholding the appeal and rendering judgment in favor of the appellant, which displaces the judgment from below.
- (3) Dismissal of appeal, by declaring appeal
 - (a) Inadmissible, if judgment from below were not appealable, or if the time for the commencement of an appeal (10-60 days; see Codice di Procedura Civile, art. 325) had expired.
 - (b) Improcedibile, which means that, although properly taken, the appeal was not properly prosecuted.
 - (c) Discontinued, in which case the sentenze of the lower court become final and are not subject to attack by ordinary means.
- (4) Sentenza parziale, which disposes of the issue appealed, such as that of jurisdiction. By an ordinanza the case would then be remanded to the examining judge for proof-taking on the merits.
- (5) Annulment of judgment appealed from and remand to a court of first instance, which is done only in certain instances specified by statute¹⁹. This satisfies the fundamental right to adjudication on two levels, but remand is not permitted except where there has not been a complete adjudication below.

The judgments which are usually brief are required to be in writing and to set forth the prayers of the parties and the reasons of fact and

¹⁹See Capelletti & Perillo, §10.06m.

law upon which the judgment was grounded (motivazione). No relief but that demanded may be granted. After the court has reached its conclusion, the ordering part (dispositivo) is drafted by the president of the court and then turned over to another judge, usually the examining one, for the reasons for judgment. Other necessary data will be added by a clerk, but no legal writings may be cited. The completed judgment is signed by all judges under penalty of nullity if any omits to sign. It has no legal effect until it is filed with the clerk, which is required within 30 days after argument. As a general rule appellate decisions may be enforced despite the pendency of proceedings in the Corte di Cassazione.

§5. Corte di Cassazione

§5.1. Introduction:

At the apex of the Italian court system sits the Corte di Cassazione, a single court since 1923. Prior to that time there were five Corti di Cassazione at Turin, Florence, Rome, Naples, and Palermo, which were consolidated into one at Rome in an effort to promote uniformity of interpretation of law. The Corte di Cassazione is quite similar to the French Cour de Cassation, born of the same revolutionary forces and based upon the same distrust of the judiciary. It differs in certain important respects, however, as will be seen below.

§5.2. Composition:

The Corte di Cassazione is divided into three civil and four criminal sections, each of which is presided over by a president. Each section sits as a seven-man panel, but this may soon be reduced to five. In case of

conflict between two different civil panels, the president may require a joint civil panel of fifteen judges to hear the case.

§5.3. Role:

Like the French Cour de Cassation the Corte di Cassazione is limited to reviewing errors of law, and not of fact. Only certain statutorily-defined types of error may be reviewed, however (C.P.C. art. 360). There is the additional provision that only appellate judgments, which include partial judgments, and non-appealable judgments from courts of first instance may be reviewed. The process of review is initiated by application (ricorso in Cassazione), which must be made within sixty days after service of judgment in the lower court. No new evidence may be introduced on review.²⁰

Although there are some few special courts over which the Corte di Cassazione can exercise the power of review only in questions of jurisdiction,²¹ it is generally referred to by the Italians as their Supreme Court. It serves the basic purpose of promoting exact observance and uniformity of interpretation of law. For reasons mentioned previously²² there is frequent recourse to the Corte di Cassazione, and its caseload is unduly heavy.

²⁰See Cappelletti & Perillo, p. 280, at nn. 186, 187, for exception.

²¹See Cappelletti & Perillo, §10.07a.

²²n. 1.

§5.4. Procedure:

For further information on details of procedure in the Corte di Cassazione, see Codice di Procedura Civile, arts. 360-394.

§5.5. Decrees:

The Corte di Cassazione, like the Cour de Cassation, is lacking in substitutionary power. It may only "break" the decision appealed by annulling or quashing it. For any further proceedings in accordance with its judgment the Corte di Cassazione must remand the case. Unlike the French court, however, the Corte di Cassazione remands a case only once, and the court to which it is remanded is bound to follow the rules specified. Even if the case is discontinued, any subsequent claims on the same substantive grounds must follow the decision of the Corte di Cassazione. The Corte di Cassazione takes action as follows:

- (1) Dismisses an appeal on grounds that the application was procedurally improper (inadmissible or improcedibile) or ill-founded, in which case the judgment becomes ²³res iudicata.
- (2) Affirms a judgment in part where the lower court had reached the right result for the wrong reason. The reasoning portion of the judgment (motivazione) is corrected, while the portion of the judgment which

²³ See Cappelletti, Merryman & Perillo, Italian Legal System, §4.18, hereafter referred to as "Cappelletti, Merryman & Perillo."

disposes of the case (dispositivo) is left intact and made res iudicata.²⁴ Error in such a case is considered harmless.

(3) Breaks the judgment being reviewed (cassa). If the judgment were attacked only in part, it is reversed only in part, but the judgment is effective nonetheless for any other portions dependent on the part reversed. When breaking a decision, the court may reverse and remand or simply reverse, as follows:

(a) Reverses only, where the court holds that the case was decided in an improper court and indicates which is the proper court. In this case the parties may subsequently activate the case themselves in the court indicated, but only in that court.

The court may even decide that there is no Italian court competent to decide the case, or that the action has no basis in law.

(b) Reverses and remands, under a broad discretion (C.P.C. art. 383), to a court on the same level as that from which the judgment originated, usually geographically close to it. Remand is permitted to another section of the same court of appeal from which a case originated, however.

If the case came to the Corte di Cassazione with a stipulation to by-pass the court of appeal, the case may be remanded to a court on its original level, or instead to the Court of Appeal to which the case would have gone if it had not by-passed the Court of Appeal.

Since proceedings in the Corte di Cassazione do not prevent

²⁴See Cappelletti, Merryman & Perillo, §4.18.

execution of the judgment in the Court of Appeal or court of first instance, a judgment of reversal in the Corte di Cassazione will give the successful party the right to be placed in the status quo he held prior to execution through whatever method of restitution or remedial action is necessary to reverse the effects of the enforcement.

Although oral argument on the application for review is in public, deliberation is in chambers, with the pubblico ministero participating, but not voting. Voting is in secret, with the reporting judge (consigliere relatore) voting first, and the others in inverse order of seniority. The President votes last. The majority vote becomes the opinion of the court. One of the judges voting with the majority is assigned to draft the opinion. Contrary to French practice Italian judges very often write elaborate doctrinal opinions, sometimes even at the expense of careful weighing of the evidence.²⁵

§5.6. Effect of Judgment:

The principal effects of judgment are res judicata and enforceability as already pointed out,²⁶ but the ultimate effect is broader. Although committed to the civil law tradition that a judgment is binding upon the parties and the court only for that particular case, Italian judges do in fact give great respect to the decisions of the Corte di Cassazione

²⁵See Cappelletti & Perillo, p. 75, n. 41.

²⁶Cappelletti, Merryman & Perillo, §4.18.

and do not knowingly differ from its interpretation. With the burden of uniformity placed upon the Corte di Cassazione by Article 65 of the 1941 law there is great pressure to conform. Unlike practices by the Cour de Cassation, Italian judges do cite and apply the decisions of lower courts and of the Corte di Cassazione in their opinions. They make frequent use of the massime, which are general rules of law that state the solution of the court for the instant case and for all similar ones. This is the normal form of publication of Italian decisions. They are made to look like statutes, and in this form often assume the persuasive force of precedent. Their use by judges is not unlike the use of cases by judges in common-law jurisdictions.²⁷

§6. Constitutional Courts

As a result of a mandate in the 1948 Constitution, a Constitutional Court was established in Italy in 1956 which stands outside the ordinary and special courts system. In violation of traditional civil law principles of complete separation of power which still prevails in France, it rules upon the constitutionality of legislation in actual cases. It was probably in reaction to unchecked Fascist legislation that this court was established, but it was thought necessary to establish one which would have more prestige and importance than any other court in Italy. Previously ordinary courts could rule only on the formal validity of a statute.

²⁷Cappelletti, Merryman & Perillo, The Italian Legal System, §7.11.

There was no real judicial review.

The Constitutional Court consists of fifteen judges who serve for twelve years. Five are chosen by the President, five by the Parliament in joint session, and five by the judges of the supreme ordinary and administrative courts. (Corte di Cassazione, Council of State, and Court of Financial Claims). Judges of the high courts, law professors, and lawyers who have practiced twenty years are eligible. The President of the Court is elected by its members.

Constitutional questions may be referred to this court by a party or by the Court in any civil, criminal, or administrative proceeding, if the court initially hearing the case makes a preliminary finding that the constitutional issue is not groundless. The Corti di Cassazione frequently in the past have found constitutional issues groundless, which forecloses any further consideration by the Constitutional Court.

This court may also determine issues that arise between two regions, between a region and the state, and between higher organs of the state such as the President of the Republic, the Parliament, the Council of Ministers, the Corte di Cassazione, and the Constitutional Court itself. It also serves as a court of impeachment of the President of the Republic and of cabinet ministers. At the beginning of each year Parliament compiles a list of persons, sixteen of whom will be chosen to sit with the Court in impeachment proceedings.

All proceedings are suspended until the Constitutional Court makes its ruling. If it decides that the legislation is unconstitutional, the

Constitutional Court annuls it. The decisions of this court are binding on all persons and on all other courts and organs.

§7. Consiglio di Stato

There are literally hundreds of special courts in Italy, most of which are administrative courts established by the law of 1865²⁸ designed to protect individuals from the arbitrariness of the executive. The most important of these are the Consiglio di Stato (Council of State) and the Provincial Administrative Juntas.

The Councilors of State are appointed by the President of the Republic upon the recommendation of the Council of Ministers. They enjoy considerable independence, however. The Consiglio di Stato has three judicial sections,²⁹ each of which requires a quorum of seven members. They are actually a part of the executive branch of the government, not the judiciary, but their procedure is quite similar to that of ordinary courts. The judicial sections hear cases against national organs. Cases against local organs are heard by the judicial sections of the provincial executive committees, but their decisions may be appealed to the Consiglio di Stato.

The Consiglio di Stato protects the legitimate interests of persons, as distinguished from their rights which the ordinary courts protect, but

²⁸ Law of March 20, 1865, No. 2248, Allegato E.

²⁹ See Cappelletti, Merryman & Perillo, p. 82, n. 143 for other sections.

only by giving money damages.³⁰ Unlike the ordinary courts the Consiglio di Stato may revoke or modify any executive acts considered to be illegal.

§8. Judges³¹

Judges are drawn by competitive examination from law graduates between the ages of 21 and 30, who are members of families of unquestionable moral reputation. If successful in the examination the law graduate becomes a judicial auditor (uditore giudiziario) and serves an apprenticeship for one year. Often he becomes a judge after only one year as an auditor, but after eighteen months he takes another examination, and, if successful, becomes a temporary Tribunal Magistrate. After three years of service in this position, the District Council of Judges attached to each Court of Appeal, which is elected by the judges of the district and presided over by the President of the Court of Appeal, reviews the apprentice's service and decides whether or not he has the aptitude to be appointed to permanent service as a tribunal magistrate. An adverse decision removes the apprentice from judicial service. Approval confers the title of tribunal magistrate upon the candidate, as well as tenurial rights. He cannot be transferred without his consent or removed from office without legal cause duly proved. As a tribunal magistrate he may, however, actually serve as a pretore, as a judge in the tribunali, or as a public prosecutor

³⁰See Cappelletti & Perillo, §4.36c for further discussion of distinction between rights and legitimate interests.

³¹For general discussion of Italian judges see Cappelletti, Merryman & Perillo, §§3.07-3.09.

attached to a tribunal. The law provides for 4,173 ordinary judges of tribunali, 1,780 on the courts of appeal, and 579 on the Corti di Cassazione. In addition, 350 judicial auditors are provided for. Since 1963 women have been authorized to serve as judges and as other public officials.³²

As suggested above, many judges are assigned to duties with the Ministry of Justice and other executive bodies, performing duties which would not be considered judicial in common law jurisdictions.

Promotion is based upon a complex system of seniority and evaluation of merit, gauged by the candidate's written opinions and report of the president of his panel as to his education, diligence, and reputation. The candidate's publications and non-judicial record, as well as all aspects of his entire judicial career, are considered, but promotion is heavily weighted in favor of seniority. It is of note here that judges in Italy are held to a much higher standard of public and private conduct than are ordinary citizens. More rapid promotion may be had through competitive oral and written examinations, which are conditioned initially upon the recommendation of merit by the local judicial council. Only one-tenth of these candidates will be recommended for promotion, however.

For outstanding merit avvocati with fifteen years' experience and professors of law may be appointed members of the Corti di Cassazione (Const., art. 106), but this possibility has been implemented rarely.

Judges are appointed until retirement at the age of 70 or until

³²Law of February 9, 1963, No. 66.

removed from office for misconduct which is extremely rare.³³ They are promised complete independence in office, free from any executive control. Judges are appointed, supervised, and promoted by other judges. Like French judges, the Italian ones are almost entirely removed from any contact with the bar and do in fact sustain a certain amount of friction with it. While enjoying positions of great prestige and social prominence, Italian judges actually receive less financial remuneration than moderately successful lawyers.

³³See Cappelletti & Perillo, §3.06.

SELECTED BIBLIOGRAPHY

Italy

- Cappelletti, Mauro, Merryman, John Henry, and Perillo, Joseph M., The Italian Legal System, Stanford, (University Press, 1967).
- Cappelletti, Mauro, and Perillo, Joseph M., Civil Procedure in Italy, Nijhoff (The Hague, 1965).
- Codice di Procedura Civile, especially articles 69-73, 163-408. See also Disposizione di Attuazione del Codice di Procedura Civile e Disposizioni Transitorie [Regio decreto 18 dicembre 1941, n. 1368] arts. 1-3; 54-77, 128-144; Appendice al Codice di Procedura Civile [Nicolo-Leone, 1957] arts. 30-59, 65-96.

III. SPAIN

- §1. Introduction.
- §2. Audiencias.
- §3. Audiencias Territoriales.
 - §3.1. Composition.
 - §3.1 a Sala de Gobierno.
 - §3.1 b Pleno.
 - §3.1 c Salas de Justicia.
- §4. Audiencias Provinciales.
 - §4.1. Composition.
 - §4.1 a Sala de Gobierno.
 - §4.1 b Pleno.
 - §4.1 c Sala de Justicia.
- §5. El Tribunal Supremo.
 - §5.1. Introduction.
 - §5.2. Composition.
 - §5.2 a Sala de Gobierno.
 - §5.2 b Pleno.
 - §5.2 c Salas de Justicia.
 - §5.3. Jurisdictional Conflicts.
 - §5.4. Constitutional Review.
 - §5.5. Procedure.
 - §5.6. Decrees.
- §6. Special Courts.
 - §6.1. Introduction.
 - §6.2. Courts of First Instance and Instruction.
 - §6.3. Labor Tribunals.
 - §6.4. Tribunals for the Protection of the Syndical Organization.
 - §6.5. Military Courts.
- §7. Judges.

III. SPAIN

§1. Introduction

Inspired by the French Revolutionary ideas of the nineteenth century Spain in due time developed a two-level appellate system headed by a Supreme Court and similar in purpose and function to the French system with its Court of Cassation, but with important differences. The Judiciary in Spain enjoys even less prestige as a separate branch of government than the Judiciary in France. Whereas the Judiciary in France must not interfere with the executive or legislative branches of the government, in Spain the Judiciary is not only subject to executive and legislative control, but also must perform certain non-judicial functions. In France and Italy there are separate Administrative Courts systems, but in Spain appeals and reviews of governmental-administrative decisions are tried in separate divisions of the regular court systems.

There is another important difference, too, in that the Executive intervenes at any judicial level to dictate judgments consistent with his standards and those of the Nationalist Movement, making the entire judicial system highly subject to political influence.

§2. Audiencias

The Audiencias which constitute the courts of second instance in Spain exist in two different classes which possess different competencies and functions. One has civil jurisdiction, and the other criminal, the

Audiencias Territoriales and the Audiencias Provinciales.

§3. Audiencias Territoriales

§3.1. Composition:

There are fifteen Audiencias Territoriales created from the formerly-existing fifty-four provinces of the Spanish nation. They have names corresponding to the capitals in which they sit. Each is composed of three, five, or more judges, who regard themselves as a universitas personarum in which all individual personality is lost. As in France the name of the judge is less important than his membership on that particular court. Similar in composition to the Tribunal Supremo, they follow its general lines. They are presided over by a president and are composed as follows:

§3.1.a. (1) Sala de Gobierno:

Composed of the president of the Audiencia, the president or presidents³⁴ of the Sala, or court, and the president of the Audiencia Provincial, jointly with the attorney-general of the Audiencia.

Functions: Fundamentally administrative in nature and similar or identical to the corresponding Sala of the Tribunal Supremo, the Sala de Gobierno constitutes itself into a Sala de Justicia in certain exceptional

³⁴For method of election of presidents see Jiminez-Asenjo, Enrique, Organization Judicial Espanola (Madrid 1952) 187-188.

cases prescribed by law for disciplinary jurisdiction.

§3.1.b (2) Pleno.

Composed of all the magistrados of the Audiencia when called together by the president of the Audiencia. When the Pleno meets together as a Sala de Justicia for the purpose of exercising criminal jurisdiction, all the magistrados are required by law to be present. In all other cases a majority of the magistrados is sufficient.

Functions:

- (a) To act upon questions of jurisdiction arising between the Judges of Instruction and the Judges of the Municipal Judiciary within the territorial division.
- (b) To handle challenges for cause directed against the president of the Audiencia Territorial or the president of any Audiencia Provincial or two or more Magistrados of the same within the territorial division.
- (c) To handle cases involving criminal offenses allegedly committed by fiscales (government attorneys), in which cases it must act as a Sala de Justicia and in accordance with the regulations of the Department of Government Attorneys, a department within the Ministry of Justice.

§3.1.c (3) Salas de Justicia:

Composition:

- (a) La Sala de lo Civil is composed of a president and at least three magistrados, although four magistrados sit on most occasions. The Civil Salas exist in number according to the volume

of civil litigation in each Audiencia. In Madrid, for example, there are three; while there are only two in Barcelona.

- (b) La Sala de lo Criminal which does not exist with this specific name except in the Audiencia Provinciales where it meets by special dispensation of the Ley Adicional to the Audiencia Territorial.
- (c) Tribunal Contencioso-Administrativo which is composed of the president of the appropriate Audiencia Territorial and four magistrates, two professional and the other two vocales (voters) designated by the president by means of public lottery between two persons as required by law.

Function: Both the Sala de lo Civil and the Tribunal Contencioso-Administrativo handle appeals³⁵ in civil and administrative matters,³⁶ respectively, from the courts of first instance. They have no authority to exercise original or criminal appellate jurisdiction.

§4. Audiencias Provinciales

§4.1. Composition:

Created by a law of October 14, 1882, the Audiencias Provinciales are composed and function like the Audiencias Territoriales with their president,³⁷ their Salas de Gobierno, Plenos, and Salas de Justicia. Their responsibilities,

³⁵For specific grounds of appeals see Jimenez-Asenjo, op. cit., 186-187.

³⁶For exceptions to judicial review - largely political - see Spain and the Rule of Law (Int. Comm. Jurists, Geneva, 1962), 27-28.

³⁷For duties of the President see Jimenez-Asenjo, op. cit., 193, 195.

however, are limited to matters arising within the province within which they sit.

§4.1.a. Sala de Gobierno:

The composition and administrative function of this Sala de Gobierno are like those of the Sala de Gobierno in the Audiencia Territorial.

§4.1.b. Pleno:

Composition: like that of the Pleno of the Audiencia Territorial, the Pleno of the Audiencia Provincial consists of the Magistrados of the Audiencia when called together by the president. A majority of the Magistrados is sufficient except when the Pleno is acting as a Sala de Justicia.

Function: The Pleno has authority to act in the following matters:

- (a) on appeals and petitions alleging error against resolutions of the Courts of Instruction (courts of first instance processing criminal matters) within the province;
- (b) decisions regarding the exercise of jurisdiction which arises within the province;
- (c) challenges for cause directed against the judges of the Courts of Instruction of the province;
- (d) challenges for cause directed against the Magistrados of the Audiencia Provincial; and
- (e) issues as a Sala de Justicia relating to criminal proceedings against the Chief Delegates of the Armed Forces, treasurers and secretaries belonging to the National Movement within the province. When sitting as a Sala de Justicia, the attendance of all the Magistrados of the Pleno is mandatory.

§4.1.c. Sala de Justicia:

Composition: Although there is only one Sala de Justicia in the Audiencia Provincial, it is composed of as many sections as are considered necessary in view of the criminal caseload and the population of the province. Madrid has eight sections, for example, while Barcelona has only four. Unless provided otherwise by law, each section consists of at least three Magistrados. Where the fiscal (government attorney) has asked for the death penalty, five Magistrados are required to hear the case.

Function: The principal function of the Sala de Justicias of the Audiencias Provinciales is to hear, reach findings, and pass sentence on all criminal cases involving delitos, which are criminal offenses punishable by imprisonment in excess of one month.

Inasmuch as the Spanish Law of Criminal Procedure, art. 100, authorizes a civil action for damages as a result of a criminal offense, the trial of this action with the delito constitutes a secondary function of the Sala de Justicia of the Audiencia Provincial.

Audiencias Provinciales, located in territorial capitals have additional authority as follows:

- (a) To handle questions of jurisdiction arising between the judges of the Courts of First Instance and Instruction of one province and judges of the departments of the municipal judiciary of another province, provided that the provinces are within the territorial division concerned.
- (b) To handle challenges for cause against the presidents of the Audiencias Provinciales located in other provinces within the territorial division.

Procedure: For further information and details of procedure, particularly in regard to judgments and their effect, see Ley de Enjuiciamiento Civil, arts. 840-902.

§5. El Tribunal Supremo

§5.1. Introduction:

At the summit of the Spanish judicial system is the Tribunal Supremo, created in 1812 as the successor of the Consejo Real, whose history extends back into the era of the Visigoths. Established originally to supervise all judges, the Tribunal Supremo has a jurisdiction which is absolute, unica, and unappealable. It sits in Madrid.

§5.2. Composition:

The Tribunal Supremo is constituted as a tribunal colegiado composed of at least thirty-three magistrados, who function in the familiar divisions of the Sala de Gobierno, the Pleno, and the Salas de Justicia.

§5.2.a. Sala de Gobierno: the administrative arm of the Tribunal Supremo.

Composition: La Sala de Gobierno is composed of the president of the Tribunal Supremo, the presidents of six Salas de Justicia, all of whom are assisted by the Chief Fiscal, or government attorney.

Function:³⁸ The Sala de Gobierno is principally responsible for the administration of the court, but it functions also to take disciplinary action

³⁸See also Jimenez-Asenjo, op. cit., 175.

against Magistrados and other judges who violate the ethical rules of their profession. Thirdly, it renders legal opinions (informes) as requested by the Government on (a) matters relating to the administration of justice, (b) internal organizational matters of the tribunal, and (c) budget issues arising from its operations.

§5.2.b. Pleno: the court meeting in full, at the direction of the president.

Composition: The "pleno" is composed of the president of the Supremo Tribunal and a minimum of thirty magistrados (there must be a minimum of four magistrados from each of the six Salas de Justicia) assisted by the Secretary of the Government, or his Vice-secretary. The presence of a majority of magistrados is sufficient.

Functions:³⁹

- (1) To hear non-judicial appeals and petitions alleging error in diverse matters.
- (2) To act as a Sala de Justicia on criminal cases involving members of the Spanish Royalty and other eminent governmental functionaries. The presence of all magistrados is required when the Pleno acts as a Sala de Justicia.
- (3) To hear challenges for cause directed against the president of the court or the presidents of any of the six Salas de Justicia, or against more than two magistrados of any of the six divisions.

§5.2.c. Salas de Justicia:

Composition: There are six Salas de Justicia, composed each of far more than the minimum requirement of five magistrados, due to the increasingly-

³⁹See also Jimenez-Asenjo, op. cit., 174-175.

heavy caseload. The quorum of magistrados varies according to the subject matter.⁴⁰ They are denominated as follows:

- (1) Sala de Justicia Civil, composed of a president and eleven magistrados (as of 1952). The president is empowered to establish an additional section in the Sala whenever the caseload warrants it.

Function: The Civil Sala functions primarily in casación of civil matters resolved in the second instance by the Audiencias Territoriales on two grounds: (a) infraction of law or legal doctrine, and (b) error in form. It also reviews arbitration decisions and cases of notorious injustice by sentences of the Audiencias Territoriales resolving appeals from judges of first instance in matters of urban rents.

As a part of its regulatory functions, the Civil Sala resolves substantive jurisdictional matters which arise between or among different Audiencias; one reviews challenges for cause directed against Magistrados of the Audiencias or Governmental administrative heads; takes appeals concerning revisions in civil matters; reviews the force of civil matters interposed against the Nunciatura and the Superior Ecclesiastical Tribunals; completes sentences pronounced by foreign tribunals with regulation by treaties and existing laws; and hear recusations of Magistrados of the Sala.

- (2) Sala Segunda or Sala Criminal is composed of a president and at least five magistrados.

Function: The Criminal Sala's primary function is appellate, to act

⁴⁰Jimenez-Asenjo, op. cit., 172.

as a tribunal of casación, hearing (a) appeals from decisions of the Audiencias Provinciales based on procedural errors and irregularities, in which pleadings and motions have been admitted; (b) appeals by the accused requesting review or alleging error; (c) questions of jurisdiction between Magistrados of criminal courts who do not have a common superior authority; (d) challenges for cause directed against Magistrados of the division except the president; and (e) appeals from the force interposed against the Tribunal of the Rota of the Nunciatura.

The Criminal Sala also has original jurisdiction in certain cases involving governmental authorities, ecclesiastical authorities, provincial governors, and others. See Jiménez-Asenjo, Organización Judicial Española (Madrid, 1952) 176.

- (3) Salas Tercera, Cuarta, y Quinta, o de lo Contencioso-Administrativo: composed of a president for each Sala and as many more than the minimum five Magistrados necessary to handle the work of the Salas.

Function:⁴¹ The primary function of these administrative Salas is to review resolutions of the Administración Central. Secondly, they hear appeals against the sentences of the Salas de Contencioso-Administrativo of the Tribunales Provinciales based on law and not on political, personal, or other grounds.

- (4) Sala Sexta o de lo Social: composed of a president and two Magistrados (as of 1952).

⁴¹For further discussion and particularly exceptions to judicial review, which are primarily in the political realm see Spain and the Rule of Law (Int. Comm. Jurists, Geneva 1962), 26-28.

Function: Created by act of May 6, 1931, the Sala Social was established principally for review by casación of sentences by the Magistraturas of Labor organized according to laws of August 27, 1938, and June 30, 1939. Differing from the jurisdiction of the Ministry of Labor within the Ministry of Justice, this Sala tries cases for infraction of law and error of form.

This Sala also tries cases where there has been notorious injustice and fracture of the forms essential to justice in sentences of the Audiencias in matters of rural leases.

Finally it resolves jurisdictional questions which arise between Magistraturas of Labor.

§5.3. Jurisdictional Conflicts:

In addition to the functions which the Tribunal Supremo exercises through its various divisions, it acts as a Supreme Court to resolve questions of conflicts of jurisdiction between ordinary courts and special courts, assigning the cases to the Sala de Justicia to which its subject matter corresponds. The president of the Tribunal Supremo presides.

When the jurisdictional conflict is between an ordinary court and a military court, the question will be assigned to a special court composed of the President of the Tribunal Supremo, a Magistrado of the Sala Segunda, and a councillor of the Supreme Council of Military Justice, freely designated by the president.

§5.4. Constitutional Review:

Although the Tribunal Supremo theoretically has the power of

Constitutional review in collaboration with the respective legislative commissions which prepare codes and laws, it has been severely hampered in implementation of this principle by the civilian tradition of pure separation of powers and by the political influence which pervades the entire government.⁴²

Fiscalia and Secretarias: The work of the Magistrados of the Tribunal Supremo is aided by the existence of government attorneys belonging to the Ministerio Fiscal Nacional and secretaries assigned to each Sala from the Secretaria de Gobierno.⁴³

Procedure: For further information and details of procedure see Ley de Enjuiciamiento Civil, arts. 1689-1795.

Decrees: All judicial decisions (sentencias) should be clear, concise, and responsive to the complaint and all allegations relative to it. In the Audiencias and in the Tribunal Supremo a reporting judge (ponente) to whom the task had been assigned, drafts the opinion for the court. It is then approved by the entire court, signed, and read in public hearing. It is a per Curiam opinion. The Magistrados, with the exception of the president, rotate the duty of reporting judge. If the Sala is composed of only three Magistrados, the president also takes his turn as reporting judge.

The opinions contain the facts, the law, and also citations to other

⁴²See Jimenez-Asenjo, op. cit., 172-174.

⁴³Id., at 172, and also chs. 23 and 24.

cases. They are divided into sections as follows: (1) Vistos - the first section which presents the facts of the case in elaborate detail; (2) Considerando - the second section which applies the law to the above-stated facts; and (3) Parte Dispositiva - the final section of the opinion which sets forth the judgment of the court in that particular controversy.

The Spanish appellate courts are not courts of cassation; therefore their judgments, when published by the Secretario, are final.

See also Ley de Enjuiciamiento Civil, arts. 359-368.

§6. Special Courts

§6.1. Introduction:

In addition to the two upper levels of the regular court system in Spain which have appellate function, there are several other courts which also have appellate review. This will be mentioned in very brief detail below.

§6.2. Courts of First Instance and Instruction:

Courts of First Instance and Instruction are located in the more heavily populated cities of Spain, each court consisting of one judge who acts as a Court of First Instance, when hearing civil matters, and as a Court of Instruction when hearing criminal matters.

Among their several functions are the following:

- (a) To hear appeals from decisions rendered by the various municipal courts in the district, all cities of over 20,000 population having these municipal courts. (The

Municipal Courts⁴⁴ are composed of judges assigned by the Ministry of Justice on the basis of competitive examinations. These judges are attorneys, but not graduates of the Judicial School to be discussed later herein.)

- (b) To decide issues of jurisdiction among the various departments of the municipal judiciary.
- (c) To hear challenges for cause presented against the various judges of the municipal judiciary; and in exceptional cases.
- (d) To handle offenses involving a violation of Spanish procurement law.

§6.3. Labor Tribunals:

A large judicial machinery known as the Magistrature del Trabajo was founded in 1940 upon the doctrinal principles which form the basis of the Spanish syndicalist organization. The tribunals which form a part of this organization are totally different in structure and in operation from the tribunals of the regular court system. The judges of these tribunals are professional judges who form a separate judicial corps, recruited by competitive examination from the Bench and from among Public Prosecutors who have served at least five years. Successful candidates are appointed by the Minister of Labor for life, but their activities are carefully controlled by inspectors. The Labor Tribunals are considered to be tribunals of high intellectual and moral standing. Their proceedings which are free to employees are principally oral in nature and much more informal than regular civil courts.

⁴⁴See also Jimenez-Asenjo, Organización Judicial Española (Madrid, 1952), ch. 22.

Their structure parallels that of the regular courts in certain respects. At the highest level of the Tribunals sits the Central Labor Tribunal, presided over by a Director-General appointed by the Minister of Labor without a competitive examination. It is the function of this tribunal to hear appeals from labor disputes between employees and employers, other employees, insurance companies, etc., previously decided in a lower level. As a last resort and only in rare cases there is an additional appeal to the Tribunal Supremo.

For further information, see Law of October 17, 1940, on labor tribunals; and the Decree of November 14, 1958, on labor tribunal judges and registrars.

§6.4. Tribunals for the Protection of the Syndical Organization:

In the field of labor, the Spanish judicial system also affords the Tribunals for the Protection of Syndical Organization. These Tribunals hear appeals from decisions of the syndical hierarchy which controls the economy of the country in large measure. Whereas persons who felt aggrieved by the refusal of permission to start a new business, for example, might have grounds for a civil lawsuit in damages, they would usually prefer to appeal the decision to the Tribunales de Amparo de la Organización Sindical rather than to a regular court for fear of later difficulty with the syndical organization.

The Central Protection Tribunal in this system is chaired by the national secretary of the syndical organization who is not a professional judge.

§6.5. Military Courts:

Occupying a position in the country, unusually important for peacetime is the system of Military Courts existing in Spain. In addition to the ordinary penal law matters handled by military courts, those in Spain have extended their jurisdiction into areas normally foreign to military courts, particularly into that of the political arena.

At the upper level of these courts sits a Supreme Court of Military Justice, whose members are appointed by governmental decree. Although this court enjoys an appellate function, there is no appeal to it, nor to any other court, by defendants tried in courts martial in summary procedures which are available for a large number of offenses against the State and the regime.

For further information see Decrees of March 22 and November 23, 1957, creating a special system of dealing with offenses which either directly or indirectly affect the Chief of State, the political regime, or State Security; and the Decree of September 21, 1960, assimilating to military penal law many common law offenses and political offenses committed by civilians.

§7. Judges (Magistrados)

Judges of the higher courts in Spain today are selected from the graduates of a Judicial School established by the Government and operated by the Ministry of Justice. Admission to the school is open by competitive examination to all male graduates of a law school, twenty-one years of age

or older. Candidates must be of good moral character and must be able to prove their support of and sympathy for the Nationalist Movement. Approval for admission is by the Ministry of Justice.

Students in the Judicial School have a training period of three six-month terms. Competitive examinations are frequent, and students are ranked according to accumulative grade averages, appointments upon graduation being largely determined by ranking of candidates in their respective classes.

Judges are appointed directly by the Minister of Justice to the Courts of First Instance and Instruction from among the graduates of the Judicial School. Graduates are also appointed to the Audiencias Territoriales and Provinciales (Courts of Appeal) by the Council of Ministers, but on the advice of the Minister of Justice.

Judges, or Magistrados, are also appointed by the Council of Ministers to the Tribunal Supremo on the advice of the Minister of Justice. The Judges for the First, Second, and Sixth (the Civil, Criminal, and Labor) Salas are chosen from among the Magistrados of both Audiencias. Judges for the Third, Fourth, and Fifth Salas (the Administrative Disputes Divisions which control the legality of the administration's actions) are chosen, one-third from among career judges, one-third from among magistrates who are permanent members of the lower Administrative Disputes divisions and who have been sitting on these tribunals for ten years, and one-third from among law graduates who belong to the administration or who are members of the Bar.

The Judges swear before God to obey unconditionally the commands of the Caudillo of Spain with no other motive than the accomplishment of the good of Spain. Since the judiciary is very jealous of its tradition of independence, it has managed to preserve a measure of independence which inures to the impartial administration of justice despite the efforts of the Nationalist Government to recruit judicial candidates loyal to the government and subject to its influence. The Government has succeeded only in the upper ranks of the judiciary in establishing a judiciary completely loyal to it.

Promotion of judges is theoretically by seniority. Particularly in the Audiencias of Madrid and Barcelona there is added to the seniority requirement a provision that approval for promotion must come from a special body, the Council of Justice, composed of the President and Public Prosecutor of the Tribunal Supremo, and the president and one other judge of each Supreme Court division. This body controls not only promotion, but also incapacity for service. The appointment of the president and the public prosecutor of the Supreme Court are entirely within the discretion of the government. The presidents of the various Supreme Court divisions are selected from among the Magistrados of the Supreme Court. Today they have usually held political posts previous to selection.

For additional information see the Decree of November 2, 1945, approving the regulations governing the Judicial School; the Law of December 18, 1950, concerning the re-organization of the Judicial School; the Law of

December 20, 1952, providing for the inspection of Justice, of the Public Prosecutor's Department and of the Supreme Court; the Decree of December 11, 1953, providing for the inspection of courts and tribunals; the Decree of February 10, 1956, promulgating organic regulations governing career judges; and Article IX of the Fundamental Principles of the National Movement (Law of May 17, 1958). Jimenez-Asenjo, Organización Judicial Española, (Madrid, 1952) chs. 16-21.

SELECTED BIBLIOGRAPHY

Spain

Country Law Study for Spain (U. S. Country Rep. for Spain, Wiesbaden, 1964).

Jimenez-Asenjo, Enrique, Organizacion Judicial Espanola (Madrid, 1952).

Ley de Enjuiciamiento Civil, arts. 359-368, 376-400, 840-902, 1686-1810.

Spain and the Rule of Law (Int. Commission of Jurists, Geneva, 1962).

IV. LATIN AMERICA

Steeped in the legal traditions of Europe, but heavily influenced by factors of geography, economics, social structure, and even racial structure, the twenty countries of Latin America, during the course of their several centuries of history, have developed legal and judicial structures uniquely their own. These Latin American countries have defied classification by European standards. Each country differs from the next in noteworthy regard. Unfortunately, considerations of time and space and lack of sufficient materials and commentaries in some instances prevent the thorough study which each one of the Hispanic American countries deserves.

Around the beginning of the nineteenth century, at the time of the French Revolution, the Latin American countries, along with the rest of the world, began to look toward France. French codification became a model for the Latin American countries, particularly in the area of private law. The Chilean Code of 1855 drafted by Andres Bello was the first of these codes and became the prototype for subsequent Latin American codes. For procedure, Latin America continued to look toward Spain and Portugal whose procedures derived from canonical sources. During the latter part of the nineteenth century, Germany had a tremendous impact upon legal development in Spain. Similarly there was a German impact upon Brazil with the result that it experimented, though unsuccessfully, with German and Austrian law. For commercial law, Latin America looked toward Italy, which had always possessed an incomparable commercial law science, and which had always served

as a model for civil law jurisdictions in the realm of commercial law. Some of the Hispanic American countries like Colombia, Cuba, and Puerto Rico, were influenced by North American legal institutions in this early stage, but, for the most part, these countries continued to be influenced by European traditions and models. Despite the fact that social evolution did not advance as rapidly as the legal institutions adopted might indicate, Latin America was enabled through the various foreign law models it followed to proceed from the colonial stage into emancipation without endangering its traditional structures.

Law as a traditional element in Latin American life has never achieved the status or served the purpose of the Anglo-American "common law" as a "higher law" embodying constitutional limitations on government action, nor of the "natural law" of Spain as expounded in the Partidas⁴⁵ which recognized the monarch as subject to it. "The Hispanic American legal tradition is a blend of formal adherence to representative democracy and respect for written law isolated from social factors; of realistic preference for executive dominance and reliance on the kin-organized [societies headed by strong leaders] to insure at least a minimum of internal stability; of habitual non-cooperation in the processes of government and willingness to resort to violence to make necessary changes."⁴⁶

⁴⁵Part. 3.18.31.

⁴⁶de Vries, Henry P., and Rodriguez-Norás, José. The Law of the Americas. (Dobbs Ferry, New York, 1965), 168.

Nevertheless the Latin American countries continued to develop during the nineteenth century in the area of legal and judicial institutions. In addition to the European models to which Latin America looked for its private and commercial law, it began to look toward Anglo-America for its public law. One of the most important results was that as the Latin American countries emerged from colonialism, all of them, with the exception of Brazil until 1899, adopted Constitutions modelled upon the Federal Constitution of the United States. These first Constitutions were a means of defining the territorial limits of the emerging political units rather than instruments of government or of legal protection of individual rights; yet they became the base both of the private and of the public law of Latin America.

With the adoption of these Constitutions, Latin America also adopted the principle and structures of Federalism, largely due, it should be noted, to the influence of French legal writers like Rousseau and the Encyclopediasts. Federalism, in which Argentina, Brazil, and Mexico have taken the leadership, has had a profound influence upon all of Latin America and prevails in almost all of its countries today.

In North American jurisdictions the constitutionality of law is influenced and controlled by the judiciary in a manner totally unknown to European countries where a pure separation of powers is proclaimed, if not always explicitly followed in practice. In earlier provisions of the Latin American constitutions legislative review of constitutionality was established in accordance with the prevailing French Revolutionary doctrine,

replacing the formerly held concept of executive interpretation inherited from Spain. Gradually the North American principle of judicial review of constitutionality, which is a natural concomitant to Federalism, was introduced into Latin America. This principle has developed and spread steadily from one country to another, even into the twentieth century. Of minor importance perhaps in the governmental structures of Latin America, judicial review, nevertheless, has had an immense effect upon its legal and judicial development.

Mexico, which adopted its Constitution in 1841, and which introduced the unique concept of "amparo," an injunction for the protection of individual rights, probably should be credited with the introduction of judicial review into Latin America.⁴⁷ Argentina, with its Judiciary Act of 1863, is the country which has adhered most closely to the practice of judicial review as exhibited in the United States. In these and in all of the countries in which the principle of judicial review has been introduced, it was adopted as a provision of its Constitution, unlike the situation in the United States, where judicial review became an accepted principle only by the authority of Marbury v. Madison.⁴⁸

Brazil, which opened the door to judicial power with its first Republican Constitution in 1891, eventually developed (1934) the quite original writ of security ("mandado de segurança")⁴⁹ which has no parallel

⁴⁷The germ of the idea was introduced earlier, but not acted upon. See Eder, op. cit., n. 7.

⁴⁸5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

⁴⁹For present form see Const. of Brazil (1946), art. 141 (24). C.C.P., arts. 319-331, amended by Law 1533 of Dec. 31, 1951.

anywhere else in the world, and which embodies the American principles of writs of mandamus, prohibition, quo warranto, and injunction.

Colombia in 1910 finally adopted an amendment to its Constitution⁵⁰ which provided two innovations widely copied: judicial review by Executive Reference prior to promulgation, and the "popular" or public action to declare the unconstitutionality of statutes.

Uruguay was the last of the Latin American countries to adopt the principle of judicial review in 1934. Only Peru, Ecuador, and the Dominican Republic, which abolished it in 1947, do not use the principle of judicial review today. It is this principle and practice of judicial review, which probably more than any other factor sets the Latin American courts apart from those of the other jurisdictions of the Civil Law world. Judicial review has been an instrument by which creativeness has been added to traditional forms of legal and judicial practice in Latin America.

In general and in recapitulation, it may be said that it is the variety of models which Latin America has used in its legal development which has made possible its originality. It has looked to France for codification, which has been a dominant influence; to Germany for the superiority of technical modes of expression; to Italy for doctrine due to the similarity of conditions under which judicial authors who are not practitioners of the law live and write; and to North America for public

⁵⁰Art. 41 of Amendment No. 3 of 1910 (now art. 214 of the Const. of Colombia.) See also Eder, op. cit., 591.

law, federalism, and constitutional principles, particularly that of judicial review. All of these influences have made possible a rich legal development for Latin America, which has been reflected subsequently in its appellate court structures and procedures. The usual civil law principle has prevailed that a decision of an appellate court is binding only for the particular case in which rendered. As the appellate courts have grown in authority and become stabilized in procedure, and as court proceedings have been reported more widely, the decisions of appellate courts in Latin America have come to be more persuasive in subsequent cases and have begun to constitute a creative jurisprudence. For the operation of its appellate court systems, Latin America, unlike European Civil Law jurisdictions, depends upon a professional judiciary appointed to the Bench for life from among the ranks of law school graduates and members of the Bar. At its best this judiciary is independent from executive interference.

SELECTED BIBLIOGRAPHY

Latin America

- David, Rene, L'Originalité Des Droits de L'Amerique. Latine, U. of Paris (Paris, 1958).
- Deener, David, "Judicial Review in Modern Constitutional Systems," 46 Am. Pol. Sci. Rev. 1079 (1957).
- de Vries, Henry P. and Rodriguez-Novás, The Law of the Americas, Oceana (Dobbs Ferry, N. Y., 1965), especially the Bibliography on pages 324-327.
- Eder, Phanor J., "Judicial Review in Latin America," 21 Ohio State L. J. 570-615 (1960).
- Kunz, Josef L., "Contemporary Latin-American Philosophy of Law," 3 Am. J. Comp. Law 212 (1954).
- Wagner, W. J., The Federal States and Their Judiciary, Mouton, (The Hague, 1959). See particularly Bibliography on pp. 377-390.

V. WEST GERMANY

- §1. Introduction.
- §2. Oberlandesgerichte (State Appellate Courts).
 - §2.1. Introduction.
 - §2.2. Composition.
 - §2.3. Role.
 - §2.4. Procedure.
 - §2.5. Decrees.
- §3. Bundesgerichtshof (Federal Court).
 - §3.1. Introduction.
 - §3.2. Composition.
 - §3.3. Role .
 - §3.4. Original Jurisdiction.
 - §3.5. Procedure.
 - §3.6. Decrees.
- §4. Special Courts.
 - §4.1. Introduction.
 - §4.2. Decrees.
 - §4 A. Verwaltungsgerichte (Administrative Courts).
 - §4 A-1. Introduction.
 - §4 A-2. Composition.
 - §4 A-3. Role.
 - §4 A-4. Appellate Jurisdiction.
 - §4 B. Arbeitsgerichte (Labor Courts).
 - §4 B-1. Introduction.
 - §4 B-2. Composition.
 - §4 B-3. Role.
 - §4 B-4. Appellate Jurisdiction.
 - §4 C. Finanzgerichte (Tax Courts).
 - §4 C-1. Introduction.
 - §4 C-2. Composition.
 - §4 C-3. Role.
 - §4 C-4. Appellate Jurisdiction.
 - §4 D. Sozialgerichte (Social Courts).
 - §4 D-1. Introduction.
 - §4 D-2. Composition.
 - §4 D-3. Role.
 - §4 D-4. Appellate Jurisdiction.

- §5. Constitutional Courts.
- §5.1. Introduction.
- §5 A. Landesverfassungsgerichte (State Constitutional Courts).
- §5 B. Bundesverfassungsgericht (Federal Constitutional Court).
- §5 B-1. Composition.
- §5 B-2. Role.
- §5 B-3. Decrees.
- §6. Decrees.
- §7. Judges.
- §7.1. Introduction.
- §7.2. Professional Judges.
- §7.3. Lay Judges.
- §7.4. Rechtspfleger (Judicial Clerks).

V. WEST GERMANY

. §1. Introduction

West Germany today is a Federal Republic established by the German Constitution of 1949 (Grundgesetz, cited as GG), with all powers of the state emanating from the people. It is a representative and not a direct democracy, a social federal state. The foremost task of the Bonn Constitution was to set basic rights and their preservation⁵¹ in order to uphold the dignity of man as inviolable. Anyone may have recourse to the courts any time that his rights are infringed by the exercise of public authority. It is the general impression of the observer that the basic rights of the German people are guaranteed today, largely due to the courts, particularly the Federal Constitutional Court, which will be discussed further herein.

The present legal and judicial development of Germany must be understood against the background of foreign influences which originally transformed the independent character of the German legal system. The most important example of the new basis for domestic law-giving which grew out of the ready acceptance of foreign ideas and ideals was the medieval "reception" of the Roman law in the form in which the Glossators of the Northern Italian Schools had developed and established it. Further independent growth of what might be called German law was effectively broken off at this point, and German law, particularly German private law,

⁵¹
GG, arts. 1-15.

was decisively shaped by the reception of Roman law. Both judicial usage and legal science continued to develop the received Roman law, at the same time retaining some Germanic legal institutions, also.

The next most important influence upon the development of the German law was that of the ideas of the French Revolution and the French Codification at the beginning of the nineteenth century which contributed substantially to German procedural and criminal law. These French influences, with some English ones to a lesser degree, made lasting impressions upon German constitutional and administrative law, particularly in such matters as rights of freedom, the principle of division of powers, self-government and its practical implementation, the modern procedural principles of oral hearings, public trials, and free evaluation of evidence.

German unity attained in the latter part of the nineteenth century was followed by the great German codifications of commercial law, civil law, and procedure. The attempt at unitary law, under the principle of codification, has somehow survived the complete breakdown of the German Empire and all the ravages of time, including Naziism, to reemerge in post World War II Germany embodied in relatively few statutory instruments. The protection of the rights of the citizenry under these instruments is entrusted to the courts of the Länder and the Bund.

The administration of justice in Germany is divided into three

principal spheres: ordinary jurisdiction (Justizgerichtsbarkeit),⁵²
administrative jurisdiction (Verwaltungsgerichtsbarkeit),⁵³ and
constitutional jurisdiction (Verfassungsgerichtsbarkeit),⁵⁴ which are
in turn divided among different courts. The ordinary jurisdiction is
divided into the regular courts and the labor courts. The adminis-
trative jurisdiction is divided into the general administrative court,
and the special administrative courts for tax and finance matters
and the special administrative courts for social matters such as social
security and social insurance. In each of the five spheres there is the
same hierarchy of courts: the court of first instance, the intermediate
courts, and the highest, or Supreme Court. "

The administration of justice is further divided between state
courts and federal courts. The Federal Courts exist only as the
highest courts of the land, while all other courts, with the exception
of federal disciplinary courts and military courts, are courts of the
states or Länder. Theoretically the federal courts adjudicate as supreme

⁵² The law dealing with the organization of ordinary jurisdiction is the Gerichtsverfassungsgesetz (Cited CVG) of January 27, 1877, as published in the law of September 20, 1950.

⁵³ Administrative jurisdiction is based on the Military Govt. Order No. 165 (British Zone) and is now regulated by several laws on administrative jurisdiction (Gesetz über die Verwaltungsgerichtsbarkeit), Law No. 35 of September 25, 1946 in Bavaria, Law of August 5, 1947, in Bremen, Law of October 31, 1946, in Hessen, Law No. 110 of October 16, 1946, in Wurttemberg-Baden.

⁵⁴ Regulated by the Gesetz über das Bundesverfassungsgericht (Cited BVverf-CG) of March 12, 1951, and Basic Law.

courts only matters involving federal law, but by state legislation they may acquire jurisdiction finally to determine questions of state law. The State Courts, meanwhile, apply both state and federal law.

The administration of justice centers in the Länder, which are in the comparatively more powerful position. All courts of first instance and almost all courts of second instance - the appellate courts - are filled by state judges. The Länder governments control the public prosecutors, the legal professions, the police, and also the power of pardon. The decisions of the Länder court have full faith and credit and must be enforced in all other Länder.

§2. Oberlandesgerichte. (State appellate courts)

§2.1. Introduction.

The Oberlandesgericht (cited OLG) has exclusive jurisdiction over appeals (Rechtsmittee) from the Landesgerichte, the ordinary courts of first instance, which in turn have an appellate jurisdiction in cases appealed from the Amtsgericht, the office court which deals with matters of minor importance, but of a wide range covering both civil and criminal matters.

§2.2. Composition.

The Oberlandesgerichte are divided into several chambers called "senates," which are either civil or criminal. Each civil chamber is composed of a Senatspräsident (presiding judge) and two associate judges called "Rat."

The Criminal senate sitting in exceptional cases as a court of first instance is composed of five judges.

Although only one Oberlandesgericht exists in some Länder, there are several in most Länder. In the latter case a Land may establish an Oberstes Landesgericht to handle appeals in lieu of the Bundesgericht (Federal Supreme Court) for the few kinds of private law matters which involve no question of federal law. Only Bavaria has created such a court, however, which is called the Bayerisches Oberstes Landesgericht.

§2.3. Role.

The primary function of this court is to review the work of the several Landesgerichte within a district. These state courts have jurisdiction of civil matters involving amounts of 1,000 DM or over and criminal matters of a serious nature. The review of their decision ordinarily takes the form of Berufung,⁵⁵ which is a reconsideration of the case to the extent that the parties request changes in the lower court's judgment. It is an appeal on both the facts and the law. A complete new trial, with or without the introduction of additional evidence, is held by the Court of Second Instance unless this court rejects the Berufung by an informal decision (Beschluss) on a formal ground. New evidence will not be admitted, however, if the parties could have been expected to have pleaded it in the original trial court.

⁵⁵ The other forms of appeal besides Berufung are Revision and Beschwerde. Berufung and Revision are appeals from judgments (Urteil); while Beschwerde (complaints) are appeals from orders (Beschluss) or directions (Verfügung).

§2.4. Procedure:

For a brief discussion of judicial procedures in German courts, including appellate procedures, see Bibliography of German Law, Peterson, Courtland H., trans. Müller (Karlsruhe 1964), 11-50-59. For procedure in civil courts and in criminal courts see ZPO §§511-577 and StPO §§296-358.

§2.5. Decrees:

The decisions of the Oberlandesgerichte are definitive between the parties involved if not appealed by Revision to the Bundesgerichtshof.

§3. Bundesgerichtshof (Federal Court)

§3.1. Introduction:

The Bundesgerichtshof (cited BGH) is the highest court in the ordinary court system for appeal in civil and criminal matters. It is a federal court, however, which sits in Karlsruhe.

§3.2. Composition:

The Bundesgerichtshof is composed of a president and eight civil and five criminal senates. Each senate consists of a presiding judge (Senatpräsident) and four associate judges (Räte) which is the quorum required for decision.

There are also Great Senates (Grossen Senate) which will be discussed herein under "Decree."

§3.3. Role:

The Bundesgerichtshof is principally a court of review for the various Oberlandesgerichte of the Länder. Sometimes, where the parties both agree to it, however, it is possible to take a Langesgericht judgment directly to the Bundesgerichtshof, without appealing first to the Oberlandesgericht. The primary purpose of the Bundesgerichtshof is to preserve legal uniformity.

Today the Bundesgerichtshof acts as a Supreme Court, also, in limited instances for courts such as the Bundespatentgericht, established by an Act of October 1, 1968.⁵⁶ This court hears appeals in patent cases from the Patentamts (Patent offices). It sits in Munich and is composed of a president, senatspräsident, and other judges as selected by the Bundespräsident, who sit for life. The number of the senates within this Patensgerichtshof is determined by the Ministry of Justice.

The procedure for appeal to the Bundesgerichtshof is usually by means of a Revision, which, unlike the Berufung, is limited to a consideration of errors of law as distinguished from errors of fact. Although the Bundesgerichtshof is forbidden to reexamine the lower court's finding of fact, it sometimes reclassifies items as matters of law so that it may consider whether or not in the light of logic and experience the findings of fact are tenable, or whether the facts furnish proper basis for the application of law made to them. It may well reexamine the interpretation

⁵⁶Patentgesetz, §36B.

of a contract, for example, although it will not overturn findings of fact as to trade customs or commercial practice. When the Bundesgerichtshof has reviewed a decision, it remands the case to the lower court for disposition in accordance with its decision. Only in certain exceptional cases will it render a final decision.

The authority of the precedents of the Bundesgerichtshof is emphasized by the fact that procedural rules require that the Bundesgerichtshof grant a Revision wherever other rules require an appellate court to secure permission for appeal before filing for one. This permission is required whenever an appellate court wishes to depart from a ruling of the Bundesgerichtshof.

§3.4. Original Jurisdiction:

The Bundesgerichtshof has original jurisdiction only in the case of a very few serious criminal matters, such as cases of high treason, and felonies of a political nature involving the public security.⁵⁷

§3.5. Procedure:

For a brief discussion of judicial procedures in German courts, including appellate procedures, see Bibliography of German Law, Peterson, Courtland H., trans.["]Muller (Karlsruhe 1964), 11-50-59. For procedure in civil courts and in criminal courts see ZPO§§511-577 and StPO§§296-358.

⁵⁷GVG §134.

§3.6. Decrees:

Since the purpose of the Bundesgerichtshof is to preserve judicial uniformity, and since each senate meets as a court of last resort, it has developed a special machinery for use when one senate proposes to depart from a point of law in a previous decision of another senate. A senate can always depart from its own previous decision. If a senate has already departed from a previous decision, the senate presently considering the same point can simply ignore the earlier decision. It may do the same, of course, if the other senate upon inquiry indicates that it is willing to abandon the earlier decision in question.

If the two senates do not reach agreement, the legal issue is referred for decision to a larger unit of the Bundesgerichtshof, called the "Grosse Senat" (Great Senate), composed of the president of the court and eight other judges. The decision of this court which must be obtained in advance, will be binding upon the referring senate. Although quite persuasive, it will not be binding upon lower courts, however.

There are both a Grosse Senat für Zivilsachen (Great Civil Senate) and a Grosse Senat für Strafsachen (Great Criminal Senate). If a civil senate proposes to depart from a decision of another civil senate or of the Great Civil Senate, the decision is referred to the Great Civil Senate. If the decision in question is from another criminal senate, or the Great Criminal Senate, the decision will be referred, of course, to the Great Criminal Senate.

If, on the other hand, a civil senate wishes to depart from previous decisions rendered in the opposite chambers of the Bundesgerichtshof, the Criminal senates or Great Senates; or if the Criminal Senate wishes to depart from a decision rendered in the Civil Senate or Great Civil Senate, the decision must be referred to the Vereinigten Grossen Senate (Combined Great Senates), which is composed of the president of the Bundesgerichtshof, and the members of both the Great Civil Senate and of the Great Criminal Senate, selected by the senate president. They serve two-year terms. The presiding judge is chosen by seniority and decision is rendered by majority vote. By a law of June 19, 1968 the combined Great Senate now occupies the position of importance authorized by Art. 95 of the Constitution of 1949 which was to have been enjoyed by the Supreme Federal Court at such time as it should have been established.

The senates also may refer to the proper great senate any questions of fundamental importance involving the development of the law, particularly where they wish to insure the uniformity of the jurisprudence.

The Great Senates decide only the issues of law presented to them. They do so entirely on the basis of written pleadings and the record of the case. There is no oral hearing and no presentation in court by the parties. It naturally follows that the decisions of the Great Senates have a far more persuasive effect than those of the senates, and will be respected far beyond the case in which rendered. Particularly where the Great Senates

render decisions supplying deficiencies in the written law, their decisions will be almost tantamount to judicial legislation. Although there is no provision for the consequence of a departure from a decision of a Great Senate or of the Combined Great Senates, there has been no such departure, and there is very little likelihood of such an event.

When there is no further possibility of appeal a decision becomes res iudicata and enforceable. In the case of criminal decisions this is always true; in other types of proceedings there are some few exceptions.⁵⁸

For a general treatment of the method and force of judicial decisions in Germany, see post, §6.

§4. Special Courts.

§4.1. Introduction:

In each of the four other realms of law in West Germany, the administrative, labor, social, tax, there is a separate hierarchy of courts, also, which includes an appellate level.

§4.2. Decrees:

The decisions of the highest courts of these special court systems, while not as authoritative as those of the Bundesgerichtshof, nevertheless enjoy a quite persuasive influence over other courts and

⁵⁸See Bibliography of German Law, op. cit., p. 56.

authorities involved. The fact that the published decisions of the Administrative Appellate Courts can be departed from only by a full court (§4 A-4 infra) is illustrative of the persuasiveness of the decisions of these courts. Just as in the case of the Bundesgerichtshof discussed earlier (§3.3) most of the federal (Bund) special courts are obliged to accept applications for Revision made to them by the state (Länder) appellate courts in the special system, where the state courts anticipate departing from decisions of the highest courts in that system, whether state or federal. A strong desire for unification and stabilization of jurisprudence within the Special Courts is quite apparent.

§4.A. Verwaltungsgerichte (Administrative Courts).

§4.A-1. Introduction:

The Verwaltungsgerichte (Cited VGV) or the Administrative Courts, are independent courts which have developed over the last one hundred years in Germany, designed to give protection to the citizen in relation to the administrative agencies. They provide a redress similar to that offered by the Administrative courts in France, a redress which in the United States would probably be handled by an appeal to superior officials within the executive branch of the government. The Administrative Courts in Germany are separated from the administrative authorities, however, and are subject only to the law. Their judges have the same position as judges in the ordinary courts.

§4.A-2. Composition:

The Administrative Courts consist of three levels of courts: the Verwaltungsgericht, which is a court of first instance, and two other appellate levels which will be discussed below.

§4.A-3. Role:

The Administrative Courts function in specific areas of the public law: the field of activities and regulation of all public bodies and offices at all levels; public law disputes, challenges to administrative acts, and the questioned validity of subordinate legislation with relation to its conformity to its parent act; the activities of communes, municipalities and other public corporations; the organization of road traffic, post and railways, electricity, water supply, taxes, public education, cultural activities, customs, excise, relief for the poor, and the regulation of trade and industry. The statutory authority for the administrative-judicial function of the Administrative Courts is the Code of Administrative Courts, adopted January 21, 1960.

§4.A-4. Appellate Jurisdiction:

There are two appellate levels of jurisdiction within the Administrative Courts, one a state court, and the other and higher one, a federal court.

a. The intermediate appellate level is called the Oberverwaltungsgerichte, or sometimes the Verwaltungsgerichtshöfe. It is primarily

an appellate court, which convenes in senates of five judges each. When considering a decision involving a judicial order, only three judges are necessary for the senate. If the senate wishes to depart from prior published decisions, however, it must convene a session of the full court, consisting of all regular judges (Vollversammlung).⁵⁹

b. The court of third instance is the Bundesverwaltungsgericht (cited BVerwg), which is the general administrative court of the federation and also the highest administrative review court for all the states. It sits in Berlin. The Bundesverwaltungsgericht is composed of a president, senate presidents, and judges (Bundesrichter). It sits in senates of five judges each, but only three judges are necessary in matters concerning ex parte orders. The Bundesverwaltungsgericht exercises jurisdiction as follows:

- (1) As a review court to hear appeals, taken by Revision from the Oberverwaltungsgerichte. The consent of the highest state court, the Oberlandesgericht, is not necessary for appeal when only a procedural defect forms the basis for the complaint; but in the following instances the consent of the Oberlandesgericht is necessary to the appeal: where the decision appealed is a question of principle; where the Federation is represented as

⁵⁹ The selection for publication is made by the Prasidium, which is composed of the president of the court, the presidents of the senates, and the two senior judges. If a senate does depart from such a published decision without resorting to the decision of the full court, this does not render its decision ineffective, however, nor permit a rehearing of the case.

a party through federal authorities or institutions in the dispute; and where the decision departs from an earlier decision of the Bundesverwaltungsgericht.

- (2) As a review court over the decisions of the state courts of first instance if one of the parties is the federal government or a federal institution and the other party consents to it.
- (3) As a court of first and last instance in a number of cases, especially where there are appeals against the highest federal authorities, for example: cases which seek avoidance of an administrative act by the highest federal authorities in the field of consular service, exchange, control, trade control, control of insurance, in food forestry, or lumber trade, communications and water-law; cases seeking a declaratory judgment concerning the existence or absence of a public law relation contested by the federal authorities and concerning the cases mentioned above; public law disputes between the federation and the states or between several states, if not of a constitutional nature; matters concerning the illegality of associations based on Art. 9, par. 2 GG; complaints against acts of the federal authorities which have their seat outside the jurisdiction of BVerwG; and all other cases expressly assigned to this court by federal statute (Art. 9, GG).

§4.B. Arbeitsgerichte (Labor Courts).

§4.B-1. Introduction:

Another very important set of special courts with a history of over fifty years and with a very interesting contemporary development⁶⁰

⁶⁰ See Dainow, Joseph, "The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems," 37 Ind. L. J. 1, 32-34 (1961). Note particularly success of mediation processes and other innovative factors resulting from operation of these courts.

is the Arbeitsgerichte (cited ArbG) or Labor Courts, established to decide disputes involving employment contracts, collective bargaining agreements and similar labor law questions of both an individual and a collective nature called "Arbeitssachen."

§4.B-2. Composition:

The Arbeitsgerichte, like the Verwaltungsgerichte, consist of three different judicial levels, two state courts, and the highest, a federal court. The court of first instance is called Arbeitsgericht, and as in the case of the Verwaltungsgerichte is characterized by the use of lay judges as well as professional ones. The lay judges in the Arbeitsgericht are drawn from both labor and management. The two appellate levels will be discussed below.

§4.B-3. Role:

Originally a part of the ordinary court system, labor disputes (arbeitssachen) gradually became so numerous and so important that they were separated from the regular court system and transferred to the special Arbeitsgerichte stabilized by the Labor Court Act of 1926 and founded presently upon the Labor Court Act of 1953 in order to achieve a quicker, more certain, and less expensive settlement of labor disputes between employer and employee, and also of claims against fellow employees such as those concerning delicts committed in the course of common employment. Appropriate legal safeguards were added to the procedures.

§4.B-4. Appellate Jurisdiction:

a. The intermediate Labor court, which is an appellate court known as the Landesarbeitsgerichte, a state court, is composed of a president, several judges, and also laymen (Landesarbeitsrichter) selected in equal numbers from employers and employees. The Landesarbeitsgerichte hear cases in senates of three, consisting of one judge and two laymen.

b. The highest tribunal is a federal court known as the Bundesarbeitsgerichte, which hears appeals by Revision from the Landesarbeitsgerichte. The Bundesarbeitsgerichte sits in Kassel. It is composed of a president, a number of senate presidents, and judges, some of whom are trained judges and some of whom are lay judges trained in a certain trade or profession, Beisitzer or Bundesarbeitsrichter. The Bundesarbeitsgerichte decides cases in senate, composed of a president, two professional judges, and two laymen.

The Bundesarbeitsgerichte also has a Great Senate consisting of the president of the whole court, the senior senate president, four professional judges, and two Bundesarbeitsrichter, each one representing management and labor, respectively.

Appeals to the Bundesarbeitsgericht are usually limited to questions of law with an amount in dispute of 6,000 DM or more. If the seriousness of the question at issue justifies it, and the Landesarbeitsgericht consents to it, which it usually does, appeal may be made to the Bundesarbeitsgericht even when a smaller amount is involved. Appeal will also lie to the Bundesarbeitsgericht if the Landesarbeitsgericht has

rendered a decision conflicting with previous decisions of the same court or with those of the federal or Bundesarbeitsgericht.

§4.C. Finanzgerichte (Tax Courts).

§4.C-1. Introduction:

Since 1950, tax matters and finance have been separated from the general Administrative Courts and handled by special Finanzgerichte, or Tax Courts.

§4.C-2. Composition:

The Finanzgerichte in the first instance meets in senates, consisting of three judges and two laymen.

§4.C-3. Role:

The Finanzgerichte were established to give legal protection to the individual in matters of taxation, excise duties, and levies. It is anticipated that the provisions regulating these courts will soon be replaced by the Federal Fiscal Courts Code.

§4.C-4. Appellate Jurisdiction:

There is only one level of appellate review in tax and finance matters. An appeal lies to the Bundesfinanzhof from the Finanzgerichte. The Bundesfinanzhof meets now in Munich and sits as a bench of five judges.

§4.D. Sozialgerichte (Social Courts)

§4.D-1. Introduction:

In 1953 another set of special courts was established when it was decided to relieve the Administrative Courts of matters concerning social insurance. These matters were assigned to the Sozialgerichte, or Social Courts.

§4.D-2. Composition:

The Sozialgerichte are a three-level court system similar to most of the other court systems, with two levels in the Länder, and a federal court as the court of last resort. The Sozialgericht on the first level sits in senates of one judge and two laymen (Sozialrichter) each. The composition of the other two levels will be discussed below under "Appellate Jurisdiction."

§4.D-3. Role:

Since Article 20 of the Bonn Constitution declares that Germany adheres strongly to a social democracy, the state accepts as its responsibility the care of all persons in need. This tremendous responsibility is financed for the most part through a system of social insurance, which in turn gives rise to many legal disputes. It is the function of the Sozialgerichte to handle all of these disputes and also those which arise from programs of public assistance.

§4.D-4. Appellate Jurisdiction:

The Sozialgerichte have an intermediate appeal to the Landes-sozialgerichte, the state courts of second instance, which meet in senates of three judges and two laymen each.

There is also an appeal by Revision to the highest court, the federal court which meets in Kassel and which is known as the Bundes-sozialgericht (cited BSG). This court functions in senates of three judges and three laymen (Bundesgerichter).

The Bundessozialgericht serves as a court of first instance also to hear disputes between the federation and the states, or between the states themselves.

Similarly to the ordinary courts the Bundessozialgericht has a Great Senate to assist in the coordination of its own work. The Great Senate is composed of the President of the court, six judges, and four laymen.

The present statutory basis for the Sozialgerichte is the Social Courts Act of August 23, 1958.

§5. The Constitutional Courts.

§5.1. Introduction:

The development of the principle of judicial review has been very slow in Germany, not reaching a stage of full development until the adoption of the Bonn Constitution in 1949, as the basic law of the land.⁶¹

⁶¹For development of judicial review in Germany in general see Nagel, Heinrich, "Judicial Review in Germany," 3 Am. J. Comp. L. 233 (1954).

The tyranny of legislative supremacy was rejected in favor of judicial review, enacted in a very strong form. Unlike the practice prevailing in the United States, judicial review was assigned in Germany to a special set of Constitutional Courts similar to those in Italy. When Germany established its Constitutional Court in 1951, it extended judicial review even beyond the limits set by its counterpart in Italy.⁶² The system of Constitutional Courts was established in Germany to consist of state courts (Landesverfassungsgerichte) and a federal court (Bundesverfassungsgericht).

§5.A. Landesverfassungsgerichte (State Constitutional Courts).

A Landesverfassungsgericht or Constitutional Court is established in each Land to decide cases involving the Constitution of the Land. A stay in proceedings in the regular state court will be held until the constitutional question can be referred to the Landesverfassungsgericht, provided that the law in question is pertinent to a decision of the case.

A constitutional dispute within a Land may be assigned to a Federal Constitutional Court, also. If the Landesverfassungsgericht intends to deviate from a decision of the Federal Constitutional Court or from a constitutional court of another Land, it must obtain a decision

⁶² See Dietze, Gottfried, "America and Europe - Decline and Emergence of Judicial Review," 44 Va. L. R. 1233, 1258-59 (1958).

from the Federal Constitutional Court, prior to doing so.

§5.B. Bundesverfassungsgericht (Federal Constitutional Court).

§5.B.1. Composition:

The Bundesverfassungsgericht, or Federal Constitutional Court, which meets in Karlsruhe, is composed of two senates of twelve judges each with a quorum of nine. The twenty-four judges are elected by the two federal legislative bodies, the Bundesrat and the Bundestag, but eight of them must be selected from the high federal courts (Bundesgerichtshöfe) and have life tenure. The remaining sixteen judges, who probably reflect the political composition of the legislature, are elected for eight-year terms.

§5.B.2. Role:

The Bundesverfassungsgericht which is the highest court of the Federation is considered the "Keeper of the Constitution." As such it exercises jurisdiction in several large categories:

(1) Constitutional disputes between the states and the Federation, or disputes among the federal organs of the constitution regarding forfeiture of basic rights, suppression of political parties, validity of elections, or the impeachment of the President of the Republic or of a federal judge.

(2) Questions concerning the constitutionality of a law, incidental to a case to be decided by another court, a function referred to as the "control of legal norms" (Normenkontrolle). The matters coming

within this power are called Normenkontrollsachen.

(3) Disputes concerning the incompatibility of a state law with a federal law, or the incompatibility of either of them with the Constitution, upon the request of the federal government, or the state government, or one-third of the members of the Bundestag. This jurisdiction is called Abstrakte Normenkontrolle.

(4) Questions concerning whether or not another court is correct in considering as unconstitutional a law which is pertinent to its decision (Konkrete Normenkontrolle).

(5) Finally and most importantly, constitutional complaints (Verfassungsbeschwerde), which may be brought by any party, at no cost to the party, but only after all other legal remedies have been exhausted without success. Verfassungsbeschwerde raise the issue of whether or not the public authority has infringed a basic right of the person or any right guaranteed by the Basic Law, the Constitution. There have been very few reversals of lower court rulings under this attack, and they have been concerned, for the most part, with the right of a party to a fair trial.

§5.B.3. Decrees:

The decisions of the Constitutional Courts differ greatly from the decisions of the other appellate courts in Germany in that in certain cases they are binding upon all other courts and authorities in Germany with the exception of the Bundesverfassungsgericht itself, which may always depart from its own decision in the manner of the United States

Supreme Court. Sometimes decisions of the Federal Constitutional Court are made in areas which may be described as political.

In cases dealing with the relationship between state and federal laws or their constitutionality; the validity of a principle of public international law, or the continued validity of an earlier law as a federal law, the decision of the Constitutional Court is final. The Constitutional Court is authorized to declare either a statute or a particular provision of a statute void. In other words the decision of the Court in the instances named is not only binding, it actually becomes law. If in reaching such a decision, one senate of the Constitutional Court wishes to depart from the decision of another senate, it is necessary for the full court (Plenum), which requires a quorum of at least nine judges, to meet to decide the case. When the Court has reached its final decision, it acquires the force of law, as pointed out above, and will be published in the Federal Gazette just like a federal statute.

§6. Decrees.

Despite the fact that in Germany, legal science has been elevated to an exalted position, judicial decisions, nonetheless, enjoy more prestige and have more influence over its courts and its legal authorities, in all probability, than in any of the other countries whose judicial systems have been described herein, with the exception of Louisiana. Certainly judicial decisions are considered to have more importance in Germany than in France. They are even considered by the courts themselves in certain

instances to be sources of law,⁶³ and are frequently cited in their opinions.

Since Customary law (Gewohnheitsrecht), formerly of extraordinary importance in Germany, is still considered of equal importance with statutory law as a source of law, it is not surprising to find that a longstanding practice of the courts (Gerichtsgebrauch) may acquire the force of customary law.⁶⁴ When a certain principle has been established by decisions, as distinguished from practices, a iurisprudence constante is said to have been established (Ständige Rechtsprechung), which may eventually acquire the force of customary law (Gerichtsgebrauch).

Most of the creative function of the courts in Germany, however, is exercised through the "application" of the statute or customary law. According to the Constitution the courts are independent, but subject to the legislation and "the law," which is extended to include more than the statute law (Gesetz), as formerly. Distinction is usually made between two forms of application of law: the interpretation of the law proper (Auslegung, Rechtsauslegung) and the filling of gaps in the law in the course of the adjudicatory process by the finding of the required legal norm (Rechtsfindung), which process may be disguised by statements to the effect that existing rules are being applied. In the interpretation of

⁶³Szladits, Charles, Guide to Foreign Legal Materials, Oceana (New York City, 1959), 152.

⁶⁴Szladits, id at 133-135.

statutes two principal theories are used: the subjective theory, or theory of historical interpretation, which is founded upon the idea that the real intention of the legislator should be decisive in interpretation of a statute; and the objective theory based upon the assumption that the legislative act is conditioned by the requirements and valuations of the present. Although the historical theory has been used at times, the courts seem to favor the objective interpretation.

Interpretation⁶⁵ of a statute according to present social and economic conditions almost automatically leads to Rechtsfindung, which is the action of the court in filling the gaps left in the law. This is properly called supplementing the law (ergänzende Rechtsfindung), but sometimes the courts depart from the statutory language in order to develop the rule in accordance with the basic requirements of the law in the light of experience and practice. The court is said to project the intention of the legislator into situations he unintentionally left vacant. Sometimes the law is developed in the complete absence of legislative provisions, which is an even more "creative" process. Sometimes the development is by way of definition of such general legislative provisions as "good faith," "public morality," "due care," etc., which the legislator obviously intended for the court to specify. Sometimes the courts proceed even further in their interpretative process to a point which can only be described as judicial legislation.

⁶⁵For statutory interpretation in general see Szladits, op. cit., 154-165.

The filling in of the gaps (ergänzende Rechtsfindung) or the formation of new law (Rechtsvorbildung) takes place when the court realizes that there is no provision in the law for the situation before the court, or that a strict application of the statute would result in obvious injustice and a result contrary to the purpose of the law. The court will proceed by analogy, restriction, or argumentum a contrario to extend the provisions of the law or to derogate from its adverse effects. Although this process may be quite clearly the creation of new law, the court considers itself merely to be applying existing law. Even while seeking new rules, the court is very concerned that it remain within the existing legal framework and not be guilty of arbitrarily adopting new policy or inclining toward equitable considerations. The old rigidity of adhering absolutely to the written text has been relaxed considerably, but "positivism" still dominates the courts of Germany and is reflected in the earnestness with which the courts will strive to find justice within the statutes by various methods of interpretation. The creativeness of present-day judicial decisions is a fortuitous by-product of the ancient methods of legal science employed in the quest for the security and stability of legal order.

In applying the method of analogy to extend the scope of statutory provisions to unforeseen circumstances, the courts proceed by Gesetzesanalogie and Rechtsanalogie. In the former case a legal principle is deduced from a single provision or rule of law and applied to a

similar case not falling within that provision. In the method of Rechtsanalogie a more general provision is discovered out of several provisions by inductive reasoning, and the principle thus found is applied to cases for which no provision has been made. Many important principles of German law have been developed by the method of analogy.

The method of restriction (abändernde Rechtsfindung, Restriktion) consists of the limitation or correcting of a legislative provision to prevent an undesirable or impossible consequence of the law. This method is pursued usually only after efforts have been exhausted to interpret the statute in a desirable manner by analogy or argumentum a contrario. Although it is similar to restrictive interpretation, this method relies upon an interpretation of the spirit of the law in limiting its applicability, rather than upon an interpretation of the text of the law. Since the decision is binding only for the particular case involved, the court could very easily overlook the finding of "new law" in subsequent cases.

Where all else fails, and no positive legal provisions can be found upon which to ground a decision, even by the most extensive interpretation, the courts have in recent years displayed a tendency to base their decisions on rules and principles derived from indirect sources.⁶⁶ They may be derived from the legal system itself, but also from extra-legal moral sources, such as the sense of justice (Rechtsgefühl), and

⁶⁶For further discussion see Szladits, op. cit., 169-176, and authorities cited therein.

the nature of things (Natur der Sache). They may derive from the general principles of the law (allgemeine Rechtsgrundsätze), the general terms of business (allgemeine Geschäftsbedingungen), or the natural law (Naturrecht), which has been of increasing influence since 1945.

The authority of the judicial decisions of the appellate courts in Germany is persuasive rather than binding in most cases. As pointed out earlier herein (§5), the decisions of the Federal Constitutional Court have the force of law and are binding on all executive authorities and courts in Germany, except the Bundesverfassungsgericht itself, with respect to the compatibility of a statute with the Constitution, or the compatibility of a statute of one of the Länder with a federal statute. The decisions of the Great Senates or Combined Great Senates are binding upon the referring court on the point of law referred and have the force of law to that extent (§3.6 infra.). A decision of the Bundesgerichtshof is binding when rendered in a criminal matter upon the request of an Oberlandesgericht which wishes to depart from a question of law decided in an opinion of another Landesgericht or of the Bundesgerichtshof. In these few instances, and in these only, judicial decisions have the force of law in Germany.

In all other cases judicial decisions have only persuasive effect in Germany, but they do have a definite persuasive effect. Sometimes the lower court follows the decision of the appellate court, because it realizes that the point under question is one which the Court has already decided and to which it will probably adhere, with little to be gained by

raising a controversy. Sometimes it is respect for the quality of the judges on the appellate benches or for the correctness of their reasoning in analogous cases which compels the lower courts to follow the decisions of the higher courts. For a variety of reasons the lower courts tend to follow these appellate opinions, but they do not hesitate to depart from them if they feel that the higher courts have erred, and in so doing they have been known to persuade the higher court of the correctness of their own views.

Where the appellate decisions form a part of the constant jurisprudence which in turn becomes customary law, they certainly will not be departed from by the lower courts. Even in the instance of a single, novel judicial solution to a legal problem, a lower court will, as a matter of practice, be quite loath to deviate from the Supreme Court's decision. Deviation has even been considered professional negligence in some instances. In a country such as Germany with so many appellate courts, the preservation of the unity of the law assumes a tremendous, sometimes oppressive importance.

§7. Judges.

§7.1. Introduction:

The whole Judiciary system is presently undergoing extensive revision in Germany. Observations will be made as to qualification, tenure, and appointment of judges as these provisions existed in 1969, subject to the certain knowledge that they are likely to be changed substantially in the near future.

§7.2. Professional Judges:

As in most civil law jurisdictions except Louisiana, German professional judges in the Ordinary Courts, both federal and Länder, are required to have graduated from a special University course and to have been successful in two sets of examinations. The first is administered at the end of six semesters of University study; the second after three and one-half or four years of practical experience in courts of justice or training under public prosecutors or barristers, or in State or municipal departments. Most professional judges must serve a probationary period as an "assessor." They are, of course, expected to be German citizens, know the German language, and to be of blameless reputation. The oath which the Judges take reveals that they are expected to carry out their duties in a democratic spirit. Federal judges, in addition, are required to be thirty-five years of age.

Judges of the Länder Administrative or Tax Courts are required only to meet the "qualification for the higher administrative service," which is awarded on the basis of two examinations given at the end of a University course and after a period of practical qualification. Whereas the "qualification for higher administrative service" is usually considered the equivalent of "the qualification for the judgeship," federal judges in the Administrative and Tax Courts concerned with public law must have additional technical experience resulting from at least three years' administrative experience before appointment to the Bench. One-half of

these judges must have had three years' experience on an administrative tribunal. Similar requirements are imposed upon the federal judges in the Tax Courts. For one-half of them "qualification for judgeship" is sufficient; while "qualification for higher administrative service," or three years' experience as professional members of a finance tribunal is necessary.

In the case of the Länder Labor and Social tribunals the requirement of "qualification for judgeship" is replaced by all-around knowledge and experience during at least five years' activity. The judges of the Federal Labor Court must have the "qualification for judges," however, as well as additional special knowledge and experience in the field of labor law and working conditions.

Professional judges are generally appointed for life,⁶⁷ but with an age limit. They are guaranteed independence under the Constitution and are removable only in certain rare cases.⁶⁸

The appointment of judges of the Bundesgerichtshof is decided jointly by the Federal Minister of Justice and a special committee for the selection of judges, which consists of the Land Ministers of Justice and an equal number of members selected by the Bundestag. The selection is made by majority vote; the formal appointment is by the President of the Federal Republic. Appointments are made to the other Oberste

⁶⁷A rare instance of limited tenure is that of the Federal Constitutional Courts where some of the judges are appointed for eight years. For other instances see CVG, arts. 10, 70.

⁶⁸GG, arts. 97-98; BBG, arts. 77-78; BDO, arts. 1-2. See also The Rule of Law in the Federal Republic of Germany, Int. Comm. of Jurists (The Hague, 1958), pp. 27-29.

Bundesgerichtshöfe, with the exception that the committee includes the Ministers responsible for the particular field in question instead of the Land and federal Ministers of Justice.

Länder judges are appointed by order of the Land Minister of Justice who functions with a committee appointed by the legislature to make the selection. In the case of special tribunals such as Administrative Law, Labor, Tax, and Social Law, the Land Minister in charge of that particular field takes the place of the Land Minister of Justice in making the judicial selection. The Labor and Social Courts have their own special judicial selection committees, with prescribed personnel.

The judges of the Federal Constitutional Court are selected half by a committee of the Bundestag and half by a committee of the Bundesrat. Each legislative body must make its selection by a two-thirds majority. If a vacancy lasts for two months the Federal Constitutional Court must make a proposal by a simple majority of the full court, but this in no way affects the two-thirds requirement for the legislative bodies and is not binding upon them. Appointment will be by the Federal Republic President.

The judges of the Länder Constitutional Courts, who are partly professional judges and partly lay assessors are elected in a variety of ways in the different Länder courts. Primarily it is the prerogative of the Länder legislatures. Usually the judges have limited terms.

Promotion is not a problem in the Federal Courts since appointment to these courts is usually a culmination of a judicial career; however,

appointment to the position of presiding judge, or Chairman of a different Senate is made by the Federal President, without the necessity of committee concurrence. Promotion for Länder judges, who are quite numerous, is a major problem. Usually promotion of these judges is made by the same authority which appointed them, which varies from Land to Land.

Provision for the disciplining of judges was made by a special act of July 20, 1967, known as Bundesdisziplinarordnung (BDO).

In general it may be said that professional judges in Germany enjoy a position of prestige and financial remuneration commensurate with the position of respect enjoyed by the judicial system in Germany, which is much higher than that of France or Spain or Latin America, comparable to the position of esteem enjoyed by the judiciary in Louisiana and Italy. They exist in number in a much higher proportion of the regular population than in any of the other countries considered herein.

§7.3. Lay Judges:

Although lay judges are used primarily in the lower courts, where they take the place often taken by juries in common law countries of finders of fact, they have a position of importance on the appellate levels. They are seldom used in ordinary cases, but are frequently found in criminal, labor, administrative, and social legislation cases as indicated throughout the previous delineation of appellate court structures in Germany. They sit only on cases in conjunction with one or more

professional judges, however, In these instances they have the same voting rights in reaching decisions as do professional judges.

Lay judges take the same oath as professional judges and are considered personally independent in the same sense that they are subject only to the law. They are usually appointed for specified terms of a few years. During this term of office they cannot be removed except for the same reasons as a professional judge.

Selection of lay judges is made for a variety of reasons of special knowledge and experience, but the judges do not have to have any prescribed qualifications. Appointment is made by the administrations of justice in some cases, by the executive department or by the president or presidents of the courts, in other cases. Selection will be made according to the special knowledge and experience desired. Organizations and political parties have wide-ranging rights to propose candidates for selection as lay judges, and may be held responsible for the training of these judges. Their training may be left to the court, however.

§7.4. Rechtspfleger (Judicial Clerks):

In order to relieve their workloads judges may assign certain duties of a judicial nature to their clerks who are really administrative assistants. There is always an appeal to the judge from the judicial decisions of these clerks.⁶⁹

⁶⁹For additional information see Rechtspflegergesetz of Feb. 8, 1957.

SELECTED BIBLIOGRAPHY

West Germany

Bibliography of German Law, Peterson, Courtland H., Trans. Müller (Karlsruhe 1964).

Dainow, Joseph, "The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems," 37 Ind. L. J. 1 (1961).

Engelmann, Arthur, A History of Continental Procedure, Millar, R. W. trans. and ed., Little, Brown (Boston, 1927), particularly 509-627.

German Laws (Gesetze), published by Schönfelder, as of November, 1969, as follows:

Deutsche Richtergesetz.

Gerichtsverfassungsgesetz (CVG) (Law of the Constitution of the Courts).

Einführungsgesetz zum Gerichtsverfassungsgesetz (Introductory Law to the Law of the Constitution of the Courts).

Gesetz über Massnahmen auf dem Gebiet der Gerichtsverfassungspflerergesetz (Rechtspfllg).

Grundgesetz (GG) (Basic Law).

Strafprozessordnung (StPO) (Code of Criminal Procedure), §§296-358.

Zivilprozessordnung (ZPO) (Code of Civil Procedure), §§511-577.

Kern, Eduard, Gerichtsverfassungerecht, Beck (Munich and Berlin, 1965).

Model, Otto, Staatsbürger-Taschenbuch, Beck (Munich and Berlin, 1966).

The Rule of Law in the Federal Republic of Germany, Int. Commission of Jurists (The Hague, 1958).

Rupp, Hans G., "Judicial Review in the Federal Republic of Germany," 9 Am. J. Comp. Law 29 (1960).

Sartorius Bundesdisziplinarordnung (BDO) (December, 1969).

Sweigert, William T., "The Legal System of the Federal Republic of Germany," 11 Hastings L. J. 7 (1959).

Szladits, Charles, Guide to Foreign Legal Materials, French, German, Swiss, Oceana (New York City, 1959).

VI. LOUISIANA

- §1. Introduction.
- §2. Courts of Appeal.
 - §2.1. Introduction.
 - §2.2. Composition.
 - §2.3. Role.
 - §2.4. Original Jurisdiction.
 - §2.5. Procedure.
 - §2.6. Decrees.
 - §2.7. Judges.
- §3. Supreme Court.
 - §3.1. Introduction.
 - §3.2. Composition.
 - §3.3. Role.
 - §3.4. Original Jurisdiction.
 - §3.5. Procedure.
 - §3.6. Decrees.
 - §3.7. Judges.
 - §3.8. Non-judicial Personnel.
- §4. Appellate Jurisdiction of District Courts.
- §5. Judiciary Commission.
- §6. Federal Courts.

LOUISIANA

§1. Introduction

The influence of Anglo-American forces are more readily apparent in the judicial development of Louisiana which clings to its characterization as a civil law jurisdiction than in any other area of its legal history. Louisiana can hardly be designated as a "hybrid" in its legal and judicial development, for it lacks the originality of form and practice found in the Hispanic-American countries, for example. It is more properly described as having "mixed" judicial structures which combine the institutions and practices of both the Civil Law and that of the Common Law.

Civil procedure in the early period of Louisiana's statehood was based primarily upon the Spanish procedures in force during its earlier period of Spanish dominion. These procedures in turn derived from canonical sources. The judicial structure was headed by a superior court of the French and Spanish monarchical style. Although strongly influenced by principles of French codification like most of the countries of Europe and South America, Louisiana adopted in its Constitution of 1812 a system of courts which was definitely Anglo-American in character and not a product of the French Revolution. This court system has been under constant revision even up to the present day. In all but one of the ten Constitutions adopted by Louisiana since 1812, its judicial system has been completely revised. It has yet to reach any stage approaching acknowledged

perfection.

It is not of major concern in a comparative study of appellate court structures, yet noteworthy that Louisiana had already adopted in its Practice Act of 1805 the Anglo-American principle of trial by jury, which meant the subsequent and inevitable adoption of common law rules of evidence. The compromise arrived at later, which is illustrative of the mixing of the civilian and common law principles and usages in Louisiana, is the fact that jury findings of fact are subject to review on appeal. This accords with the usual civil law tradition of appeal of facts as well as law.

Anglo-American influence is evident in many areas of Louisiana's judicial life. Its courts and judges enjoy prestige and respect more in accordance with that enjoyed by English and American judges, as distinguished from the comparatively anonymous professional judges of the civil law world. Another notable Anglo-American characteristic of Louisiana's judicial life is the fact that from the viewpoint of sources of law its judicial decisions are considered by far a more authoritative source of law than decisions in the regular civilian tradition where they enjoy persuasive authority alone.

§2. Courts of Appeal

§2.1. Introduction:

Intermediate courts of appeal were not established in Louisiana until

provided for by the Constitution of 1879 to relieve the congested docket of the Supreme Court, under whose supervision and control the Courts of Appeal have always been. In 1960 the Courts of Appeal again underwent a major reorganization upon recommendation and much previous study by the Judicial Council of the Supreme Court. This time the substantive jurisdiction of the Appellate Courts was greatly enlarged, thereby again relieving the over-burdened Supreme Court.

Originally consisting of six circuits, the Courts of Appeal, in eclipse from 1898-1906,⁷⁰ were re-established in three circuits by the reorganization provided in the Constitution of 1906, and increased to four circuits in 1960. With the exception of the court for the Parish of Orleans, the Courts of Appeal have always been peripatetic until quite recently. Even though permanent seats were established by the Constitution of 1921 for the First Circuit in Baton Rouge, and the Second Circuit in Shreveport, these courts did not cease to go on circuit until 1960, when the Third Circuit was established with a seat in Lake Charles. The decisions of the Courts of Appeal have been reported regularly and completely since 1924.

§2.2. Composition:

Today the Courts of Appeal exist in four circuits. The First and Third Circuit Courts consist of six judges each; the Second of five; and

⁷⁰See Hood, John T., "History of Courts of Appeal in Louisiana," 21 La. L. R., 531, 537-541 (1961).

the Fourth, which sits in the more populous area of New Orleans, consists of seven judges. The Legislature has the power to increase the number of judges whenever necessary.

The presiding judge of each court is determined by seniority. Each court sits in rotating panels composed of at least three judges, with a quorum of two judges. Details of the operation of the panel system are further determined by each court under its own rules. In extraordinary cases the judges will sit en banc.

Each Circuit of the Court of Appeals has a Clerk, a Deputy Clerk, and such other personnel as is necessary to accomplish its business. In addition each judge of the Court of Appeals is furnished a law clerk and a secretary to assist him in his research and preparation of opinions.

§2.3. Role:

By Act 561 of 1958 the Courts of Appeal were given appellate jurisdiction over many matters formerly reserved to the Supreme Court. The Courts of Appeal now have appellate jurisdiction of the following cases of which the Supreme Court is not given jurisdiction under Article VII, Section 10 of the state constitution:

- (a) All matters appealed from the family and juvenile courts, except criminal prosecutions against persons other than juveniles.
- (b) All civil and succession matters of which the district courts throughout the state have original jurisdiction, including workmen's compensation cases, wrongful death claims, automobile injuries, insurance claims, and many other types of cases.

- (c) All civil matters involving more than one hundred dollars, exclusive of interest, of which the district courts throughout the state have concurrent jurisdiction.

Since 1960 appeals may be taken from a final judgment whether rendered after hearing or by default, and from an interlocutory judgment which may cause irreparable injury.

In an effort to alleviate the inflexibility of the appellate procedures with its unavoidable delays the Courts of Appeal in 1958 were given completely discretionary supervisory jurisdiction, subject to the general supervisory jurisdiction of the Supreme Court, over all inferior courts in all cases in which an appeal would lie to the Courts of Appeal. The supervisory jurisdiction is plenary, extending to all three "remedial" writs of mandamus, prohibition, and certiorari.

The Appellate Courts were given "supervisory" jurisdiction to intervene in the proceedings of the lower court, as a part of the Supreme Court's Constitutional supervisory jurisdiction in an effort to insure the dispensation of justice and the uniformity of decision. The method of exercising this supervisory jurisdiction is by the common law mechanism of the Writ, which is a written request from one of the parties to a suit, complaining of the action of the court in certain specific regards and asking the higher court to review the alleged errors and give a decision accordingly. The format for applications for these writs is prescribed in the respective Rules of the Appellate and Supreme Courts. The "Writ of Mandamus" is the order of a higher court to an inferior one to

act; the "Writ of Prohibition" is an order issued similarly from higher to lower court forbidding the lower court judge to proceed further in a particular case; the "Writ of Certiorari" is an order from the higher to the lower court directing that a certified copy of the proceedings in a particular case be forwarded to it so that its validity may be ascertained. If the Writ of Certiorari is issued as a writ of review, the case in question goes up as if on appeal. If the Writ of Certiorari is issued as a supervisory writ, however, the court is free to furnish whatever relief seems justified by the exigencies of the case.⁷¹

Each judge of the Appellate Courts has the constitutional authority to grant applications for writs subject to review by the majority of the particular court and in accordance with its own rules. A majority of the court sitting to hear the application must concur, however, before a writ application can be denied. Applications for supervisory writs will be granted only upon a showing of irreparable injury or inadequate remedy by ordinary appeal. Once granted, the matter is handled as if on appeal. The Appellate Court will usually order a stay in proceedings in the District Court, once it has granted application for supervisory writs. A judgment under a supervisory writ is executory immediately upon rendition, unlike the judgment under ordinary appeal.

⁷¹ For further delineation of the use of writs by the Appellate Courts and the nature of writs themselves see Tate, Albert, Jr., "Supervisory Powers of the Louisiana Courts of Appeal," 38 Tu. L. R. 429 (1964); and Brown, Jerry A., Comment: Supervisory Power of the Supreme Court of Louisiana over Inferior Courts, 34 Tu. L. R. 165 (1959).

The Courts of Appeal decide all questions on the law and the facts,⁷² unless limited to questions of law only by some section of the Constitution. The Appellate Courts are given the power to render any judgment or decree which is proper, just, and legal upon the record on appeal, regardless of whether a particular legal point or theory was argued or passed upon in the trial court.

Since 1898, the Courts of Appeal have had the power to certify to the Supreme Court any questions of law arising in cases pending before them for which they think they need proper instruction. The request for "instruction" is somewhat similar to the application for supervisory writs described above. The Court in this case, rather than the parties themselves, requests an opinion from the Supreme Court on a particular question of law, setting forth the facts involved and the legal point at issue. The Supreme Court either gives the instruction requested, which then becomes binding on the court, or requests that the whole record be transmitted to it for further consideration. In the latter instance, the Supreme Court will decide the case as though it had been appealed directly to it.

§2.4. Original Jurisdiction:

The Courts of Appeal have no original jurisdiction.

§2.5. Procedure:

Each Court of Appeal is highly individualized, operating under its own set of rules for the internal workings of the court, e.g., who sits

⁷²Robertson, David W., "The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana," 29 La.L.R. 78 (1968).

in which panels, the assignment of cases to particular panels, days for oral arguments, etc. In addition to the individual courts' rules for internal government the Courts of Appeal adopted a Uniform set of rules to be used for all of the Circuit Courts of Appeal after their reorganization in 1960. This set of Uniform Rules is similar to that adopted by the Supreme Court under constitutional authority and governs such matters as procedures for appeals, applications for writs, and other matter of general legal concern to the public. These Rules of Court for the Courts of Appeal and also those for the Supreme Court have never been presented to the Legislature for approval and do not form any part of the Code of Civil Procedure,⁷³ as is usually the case in civil law jurisdictions.

For further details of the procedure of the Courts of Appeal in general see the Louisiana Code of Civil Procedure, arts. 2081-2201; Rules of the Supreme Court (8 L.S.A.-R.S. 313); and Uniform Rules of the Courts of Appeal in Louisiana (8 L.S.A.-R.S. 383).⁷⁴

§2.6. Decrees:

Except in instances where the Courts of Appeal have certified questions of law to the Supreme Court for review, as set forth above, their decisions are final, pending the taking of writs to the Supreme Court.

No judgment can be rendered in a case until the majority of judges hearing the case have read the record and concurred in the decision. The opinion is written by the majority judge to whom it was allotted, but it

⁷³Authority for them is granted in La. C.C.P., art. 2201.

⁷⁴See also Tate, Albert T. Jr., "Proceedings in Appellate Courts," 35 Tu. L. R. 585 (1961).

will be signed by all concurring judges. Separate concurring opinions and dissenting opinions are often rendered also.

These judicial opinions are highly original and personal in style. They follow no prescribed format, as do those of typical European Civil Law jurisdictions. Although stare decisis has never been adopted in Louisiana, other cases, as well as legislative sources, frequently are cited as a basis for judgment and have a definitely persuasive effect.

§2.7. Judges:

Judges of the Courts of Appeal are required to be citizens of the United States and qualified electors of the state, licensed to practice law for at least six years immediately preceding election. They are required also to reside in and to have been residents of the circuit or district from which elected for at least two years immediately preceding election. They may not practice law. Judges of the Courts of Appeal are not required to be graduates of any special school for judges, nor do any such schools exist in the state of Louisiana. In fact, it was not until 1965 that lawyers were required to be graduates of accredited law schools as well as successful examinees of the state Bar examination; so it is only in the past few years that judges in Louisiana have been indirectly required to be graduates of an accredited law school. Appellate court judges in Louisiana very often are promoted by the electorate to the Appellate bench from the ranks of the District Judges. They may also have been successful practicing attorneys. As compared with European judges of civilian tradition, the Louisiana appellate judge will be less scholarly and more practical in approach. He will

nonetheless be bent upon "doing substantial justice" in each case he decides, and probably will play a more creative role in the development of the jurisprudence than his European counterpart.

The term of office for appellate court judges was increased from eight to twelve years by the Constitution of 1921. Judges of the Courts of Appeal are elected from the particular parish or district within the Circuit in which they reside. From 1879 until 1898 judges of the Courts of Appeal were elected by the two houses of the General Assembly in joint session. Judges for the Court of Appeals for Orleans have been elected by the voters of the area since 1898; for the other Circuit Courts, since the reorganization of the Court of Appeals in 1906. Although their term of office is twice as long as that of District judges, Appellate Court judges are still dependent upon the electorate for continuance in office. Incumbent judges are usually assured of re-election, but they remain politically sensitive nonetheless.

Salaries of Appellate Court judges occasionally are lower than those of the District judges within their own Circuit. In general their salaries may be said to be at the median of judicial salaries for the United States. They are well below those of Federal judges serving the same geographical area, however, Appellate Court judges' remuneration also may be well below that of practitioners of the law who have been admitted to the Bar for approximately the same length of time as these judges. Judges of the Louisiana Courts of Appeal, nevertheless, enjoy positions of respect.

The work-load of the Courts of Appeal is such that the judges can maintain current dockets without being unduly burdened.

A retirement system to which the judges do not contribute is available. Assuming that they manage to win sufficient re-elections and stay in office long enough, judges of the Courts of Appeal, like all other judges in Louisiana, may retire at two-thirds' pay after twenty years on the bench; but at full pay after thirty years on the bench. Retirement is mandatory at the age of seventy-five, except that any judge who has not served twenty years may remain on the bench until he does, or until he is eighty, whichever occurs earlier. Judges serving less than twenty years and leaving the bench before retirement age are not eligible for retirement or social security.⁷⁵

The widow of a judge who dies in office receives two-thirds of his pay at the time of his death, until she remarries.

§3. Supreme Court

§3.1. Introduction:

The Supreme Court was established by the Constitution of 1812, organized in 1813, and existed as the only appellate court until 1879 when the Courts of Appeal were established by the Constitution of that year to relieve the Supreme Court's congested docket. Curiously, the Supreme Court "rode circuit" just like the Court of Appeal until relieved of this necessity in 1898.

The Supreme Court's docket again became congested to the point where reorganization was demanded, and in 1960, by Acts 36, 37, and 38 of that

⁷⁵For further variations in the retirement act see La. Const., art. 7, §8, as amended by Act 592 of 1960.

year the appellate court system of Louisiana was reorganized to give to the Courts of Appeal vast appellate jurisdiction which had formerly belonged to the Supreme Court. With this reorganization the Supreme Court became in effect a "writ" court. With its caseload drastically reduced it was thought that the Supreme Court would be able to guide and stabilize the jurisprudence of the state without the necessity of haste imposed by the previously excessive workload. Rule XIII of the Supreme Court Rules provides for oral arguments on writs, which insures greater consideration of the writs for which applied.

§3.2. Composition:

First composed of three justices, the Supreme Court has consisted of seven justices since the Constitution of 1921. It is presided over by a Chief Justice who acquires his position by seniority. The title has existed since 1845.

The Justices sit by rotation in divisions, in which case three justices constitute a quorum, all of whom must concur to render judgment. The Justice oldest in point of service presides. In the event of their inability to concur the Chief Justice may assign one or more justices to sit with them, and decision will be rendered without further argument. At least two justices shall read each record, and the conclusions of the court shall be reached in consultation before the case is assigned for the writing of the opinion. The Court functions under such rules as it may formulate.

The Court may sit en banc, in which case four justices shall concur to render an opinion.

Applications for rehearing are heard by a division other than that which formerly rendered judgment. If granted, it is decided en banc, which requires the concurrence of four justices as mentioned above.

§3.3. Role:

The Supreme Court has control of and general supervisory jurisdiction over all inferior courts in the state of Louisiana. Since 1840 it has exercised this supervision under its appellate power but it was not until the Constitution of 1879 that it was given general supervisory jurisdiction through the issuance of writs.⁷⁶

The appellate jurisdiction of the Supreme Court was greatly reduced in the reorganization of the appellate court system in 1958-1960. Its appellate jurisdiction is now exclusively as follows:

- (1) Cases in which the constitutionality or legality or any tax, local improvement, assessment, toll, or impost levied by the state or by any parish, municipality, board, or subdivision of the state is contested;
- (2) Cases in which an ordinance of a parish, municipal corporation, board, or subdivision of the state, or a law of this state has been declared unconstitutional;
- (3) Cases in which orders of the Public Service Commission are in contest, as is provided in Article VI, Sec. 5 of the Constitution;

⁷⁶See Brown, Jerry A., op. cit., Comment: Supervisory Power of the Supreme Court of Louisiana over Inferior Courts, 34 Tu. L. R. 165 (1959).

(4) Appealable cases involving election contest, but only if the election district from which the suit or contest arises does not lie wholly within a court of appeal circuit; and

(5) Criminal cases in which the penalty of death or imprisonment at hard labor may be imposed, or in which a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed.

In civil cases the appellate jurisdiction of the Supreme Court extends to both the law and the facts; in criminal cases, only to questions of law.

If a case is properly appealed to the Supreme Court on any issue, the Supreme Court has appellate jurisdiction over all other issues involved in the case.

Unlike most European civil law jurisdictions the Supreme Court as well as the Courts of Appeal have appellate review of constitutional questions, which may first be brought in the trial court.

It is also to be observed that there are no special courts in Louisiana similar to those in many civil law jurisdictions. Administrative matters,⁷⁷ labor law questions, tax appeals, et al., are handled by the regular court process, with appeal either to the Courts of Appeal or to the Supreme Court, as set forth herein.

⁷⁷Merrill, Charles P., Comment: "The Scope of Judicial Review of Administrative Agencies in Louisiana," 33 Tu. L. R. 199 (1958).

§3.4. Original Jurisdiction:

The Supreme Court enjoys exclusive original jurisdiction of:

- (1) Disbarment cases involving misconduct of members of the Bar, with the power to suspend or disbar under such rules as the court may adopt;
- (2) Suits for removal from office of judges of courts of record as provided in the Constitution; and
- (3) Determination of questions of fact affecting its own appellate jurisdiction in any case pending before it, and to that end, it may make such orders and decrees as it may deem proper.

§3.5. Procedure:

The Supreme Court operates under rules provided by the Code of Civil Procedure, Arts. 2081-2201, and also under Rules adopted by itself for its own governance and published in 8 Louisiana Statutes Annotated Revised Statutes 313.⁷⁸

⁷⁸See also Tate, Albert Jr., "Proceedings in Appellate Court," 35 Tu. L. R. 585 (1961), and La. §2.5 infra.

§3.6. Decrees:

Opinions concurred in by a majority of the Supreme Court, as provided supra, are handed down and written in as original and individual a style as those of the Courts of Appeal. Although it is required by the Constitution that the reasons for judgment be given,⁷⁹ no formal style for the presentation of the law and the facts has ever been adopted. Justices tend to cite both the law and previous cases as authority for their judgments. Frequently separate concurring and/or dissenting opinions will be handed down and published in the same case. Opinions are signed by the reporting or concurring and dissenting judges and published with their signatures.

There has never been any stated departure from the time-honored civilian tradition that the judgments of the Supreme Court are binding upon the parties for the case in which rendered, only, but in actual effect the judgments of the Supreme Court have profound persuasion upon other courts and practicing attorneys, far beyond the case in which rendered.⁸⁰ In fact the Supreme Court on a number of occasions has reprimanded a lower court which deviated from the opinion of

⁷⁹ For history of this Constitutional requirement see Hood, John T., Jr., "The Louisiana Judiciary," 142 La. L. R. 811, 815 (1954).

⁸⁰ See Tate, Albert, Jr., "Techniques of Judicial Interpretation in Louisiana," 22 La. L. R. 727 (1962).

the Supreme Court in arriving at its own decision.⁸¹ The probability of being overruled on appeal has a coercive effect upon the District Courts and Courts of Appeal, which plays no small part in the stabilization of the jurisprudence of the state.

Since 1830 the Legislature has provided for all decisions of the Supreme Court to be published in toto, by contract to the best bidding private printing firm. They become immediately available to lawyers and legal scholars throughout the state and elsewhere.

§3.7. Judges:

The Justices of the Louisiana Supreme Court are required to be learned in the law, citizens of the United States and of the state of Louisiana, and thirty-five years of age or older. They shall have practiced law in the state for at least ten years preceding their election and they shall have resided within the district from which elected for two years immediately preceding election. The Justices are elected for terms of fourteen years and are eligible for re-election until they reach the age of retirement as pointed out in Louisiana, §2.7, infra.

⁸¹See e.g., Pringle - Assoc. Mtg. Corp v. Eanes, 254 La. 705, 226 So. 2d 502, 505 (1969); and Johnston v. St. Paul Mercury Ins. Co. (1970) La. Sup. Ct. Dkt. #49,732.

The state of Louisiana is divided into six Supreme Court Districts, with one Justice being elected from each of these districts, except the First which comprises Orleans Parish, St. Bernard, Plaquemines, and Jefferson Parishes, and from which two Justices are elected. The Justice oldest in point of service becomes Chief Justice and serves in this capacity until retirement.

Like their brothers on the Louisiana Courts of Appeal, the Justices of the Supreme Court are less scholarly and more practical than the typical judge of civil law jurisdictions. Usually they are elected from the ranks of the lower Court judges, although they need not have had previous judicial experience. Supreme Court Justices, like all the members of the Bench in Louisiana, must remain sensitive to the electorate to remain in office, which means that they lack a certain degree of independence usually found in civil law countries.⁸²

Supreme Court Justices are paid slightly more than the Judges of the Courts of Appeal, at a rate which is a median for judges in the United States. Their retirement plan is the same as that for all judges of any kind throughout the state of Louisiana. Their prestige is in excess of their financial compensation.⁸³

⁸²See also Louisiana, §2.7 infra for further characterization and description of judges.

⁸³See Hood, op. cit., 817.

§3.8. Non-judicial Personnel:

The Supreme Court has a Clerk and two Deputy Clerks to assist in the administration of its affairs. Each Justice has a law clerk and such other secretarial assistance as is necessary.

Very important to its supervisory responsibility for all inferior courts in the state was the creation in 1954 of the office of Judicial Administrator which became a Constitutional office by Act 542 of 1966.

It is the duty of this officer to assist the courts throughout the state in maintaining current dockets, even if it is necessary for the Supreme Court, usually upon recommendation of the Judicial Administrator to transfer a judge from one bench to another in the interests of judicial expediency.⁸⁴

The Judicial Administrator is assisted in his work by the advice of the Judicial Council, composed of representatives of the Bench and Bar, the Legislature, and others charged with the states' administration of justice as set forth in Rule XX of the Supreme Court Rules, who meet together regularly to confer upon judicial matters and to recommend changes and procedures which will enure to the ends of the greater dispensation of justice throughout Louisiana.

⁸⁴See also Rule XX, §§7-9. Supreme Court Rules.

§4. Appellate Jurisdiction of District Courts.

Under the Louisiana Constitution a very limited appellate jurisdiction is extended to the District Courts, the courts of first instance in Louisiana. District Courts may hear appeals as follows:

- (1) From civil cases tried in city or municipal courts within their respective districts where the amount in dispute or the value of the movables involved does not exceed one hundred dollars, exclusive of interest;
- (2) From orders of justices of the peace within their district requiring peace bonds; and
- (3) From sentences imposing a fine or imprisonment by a mayor's court, or by a city or municipal court within their district.

These appeals shall be tried de novo and without juries, but no evidence shall be admitted on appeal which was not offered in the lower court unless it is shown to the satisfaction of the court that, despite a reasonable diligence by the party offering it, such evidence could not have been produced at the trial in the court below.⁸⁵

⁸⁵La. Const. art 7, §36, as amended by Act 561 of 1958. See also Louisiana Code of Civil Procedure, arts. 4899-4901.

§5. Judiciary Commission.

By a Constitutional Amendment implemented by Act 152 of 1968, a Judiciary Commission was created, the chief executive officer of which is the Judicial Administrator.

The Commission is composed of representative judges from the whole state, appointed by the Chief Justice, who receive only necessary expenses, and not a per diem. They select a chairman from their own number and such other officers as they deem necessary. They may also employ attorneys, staff personnel, and other employees, as needed, and fix their duties and rate of pay. The Commission enjoys all investigatory powers required for its hearing.

Their duties are primarily concerned with the discipline of judges within the state.

Since the Judiciary Commission is so recently established, it is still too early to know exactly what its functions will be or what role it will play in the administration of justice in Louisiana. It may assume a position somewhat similar to the French Conseil Supérieur de la Magistrature.

§6. Federal Courts.

The Louisiana court system exists concurrently with that of the United States Federal court system. Although cases may be transferred

THE ROLE OF APPELLATE COURTS IN CIVIL LAW JURISDICTIONS:
DECISION MAKING

Statutory positivism is still the goal for legal order in civil law jurisdictions. The supreme authority of legislation as a source of law has tarnished, however, since its nineteenth century reign during the era of anti-judicial ideology born of the European revolutions. In countries such as Spain and some of the Hispanic-American countries the authority of legislation is challenged sometimes by the executive, but the principal challenge comes from the judiciary who have begun to exercise a more creative role in the legal order through the decision-making process.

The influence of the judicial system upon the legal order in civil law countries varies tremendously from France where legislation is still declared to be the sole source of law to Louisiana where the jurisprudence has almost as much de facto authority as in common law countries. There is no doubt that the appellate courts in all of the civil law jurisdictions can give final solutions to the legal disputes before them, barring an occasional act of executive interference as mentioned above; but the role of the appellate courts has extended far beyond this limited function into the actual developmental and law-making process. The time is long past when the traditional civil law judge who is the key figure in the judicial system could be described accurately in these terms: "Judicial service is a bureaucratic career; the judge is a functionary, a civil

from state courts to federal courts, where there is a diversity of citizenship among the parties, or a federal question involved, Louisiana, following the usual procedure of a federal state, allows no direct appeal from one system to the other, as is the case in Germany.

out of order
P. 123 a

BIBLIOGRAPHY

Louisiana

Brown, Jerry A., Comment: "Supervisory Powers of the Supreme Court of Louisiana over Inferior Courts," 34 Tu. L. R. 165 (1959).

Dart, Henry P., "The Law in Louisiana," 2 Loyola L. J. 1 (1921).

Hood, John T., "The Louisiana Judiciary," 14 La. L. R. 811 (1954).

Hood, John T., Jr., "History of Courts of Appeal in Louisiana," 21 La. L. R. 531 (1961).

Louisiana Code of Civil Procedure, arts. 2081-2201.

Louisiana Constitution, Art. VII, §§8-30.

Louisiana Revised Statutes, Title 13, arts. 311-392.

McMahon, Henry G., "The Louisiana Code of Civil Procedure," 21 La. L. R. 1 (1960).

Rules of Supreme Court of Louisiana (1968), 8 LSA-RS 313-382 (1968).

Tate, Albert Jr., "The Rule-Making Power of the Courts in Louisiana," 24 La. L. R. 555 (1964).

Tate, Albert Jr., "Supervisory Powers of the Louisiana Courts of Appeal," 38 Tu. L. R. 429 (1964).

Uniform Rules of Courts of Appeal (1968), 8 LSA-RS 383-413 (1968).

servant; the judicial function is narrow, mechanical, and uncreative."⁸⁶

Today the complete independence of judges is declared in all civil law jurisdictions and their independence guaranteed as a practical matter in most countries. An independent judiciary is necessary to a strict separation of powers in government which is a professed ideal in the civilian tradition, whereas a system of checks and balances such as that established in the United States presupposes a limitation of the complete independence of the judiciary. Despite the civilian's professed adherence to the doctrine of strict separation of powers, the establishment of Constitutional Courts in Italy and Germany, the beginnings of one in France (Conseil Constitutionnel), and the actual practice of judicial review by the ordinary courts of several countries in Latin America, indicate the increasing importance of judicial decisions. Even the establishment of Administrative Courts in France, Italy, and Germany to maintain the separation of powers between the executive and the judiciary have not been altogether successful in maintaining a strict separation, and there has been some overlapping of function.

The Civil Codes of most civil law jurisdictions contain provisions for interpretation of the Code and other statutes which serve as a "crack in the door" for the development and extension of the law by judicial

⁸⁶Merryman, John Henry, The Civil Law Tradition (Stanford 1969) p. 39. See also id., at 49, 91, 117-119.

interpretation in a manner, which very often can truthfully be described only as judicial law-making. Gény⁸⁷ has been a leader in exposing the fiction of statutory interpretation, particularly in France where a judge cannot refuse to decide a case due to the obscurity of the statute (F.C.C., art. 4).⁸⁸

Equité is commonly used as a basis for decision by civil law judges,⁸⁹ and natural law is regaining some of its former respect as a source of law.⁹⁰

In Germany⁹¹ and in Louisiana⁹² custom is admittedly a source of law. The problem begins when the courts try to define that custom which may have the force of law.

"General principles of law" may be resorted to for interpretation in Spain (Sp. C. C., art. 6), and the legal order of the state in Italy (It. C. C., art. 3), which is deliberately retreating from the natural law. In Switzerland which was not reviewed herein, the judge must decide

⁸⁷Méthode d'interprétation et Source en Droit Privé Positif (2d ed. 1954) Part III. See particularly La. Law Institute ed (1963), pp. xv-xxviii.

⁸⁸Access: Spain, L. L. C., art. 361.

⁸⁹La. C. C., art. 21; Dainow, Joseph, "The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico," 22 Rev. Jurid. de la U. de Puerto Rico 108, 113 (1959); Franklin, Mitchell, "Equity in Louisiana; The Role of Article 21," 9 Tu. L.R. 485, 505 (1935); Szladits, op. cit., pp. 157, 401.

⁹⁰Austrian C. C., art. 1; La. C.C., art. 21, See also Szladits, op. cit., pp. 174-175.

⁹¹Szladits, op. cit., pp. 133-135.

⁹²La. C.C., art. 3; Tete, William T., Introduction to the Civil Law of Louisiana, (unpublished materials for temporary student use, L.S.U., 1969), Book I, pp. 11-17, 37-50.

as a legislator when the statute is silent (Swiss C. C., art. 1). In all of these countries, as in most civil law countries, interpretation is delegated to the judge by the legislator, and only where the written law, which remains supreme, is insufficient or lacking. The resulting consequence, however, is "law-making" in many instances. Although it represents a minor portion of the bulk of the law as compared to the great body of written law, this "judicial law-making" nevertheless represents a growing and increasingly important portion of the whole body of law in the civil law countries.

Various methods of interpretation are employed by the courts, as set forth more explicitly in a section herein (V.6) describing the classic methodology of Germany, where statutory interpretation became an art. In applying the law judges also interpret it in three typical problem areas: (1) where the statute is unclear in the strict sense; (2) where there are lacunae or nonexistent provisions; and (3) where an evolutive interpretation is called for due to the fact that the meaning of the statute has changed while its terms have remained constant. There is no doubt that judges do have the power to interpret evolatively. It is just a question of justification and limits.

Often this creative judicial interpretation is a response to obvious social and economic demands. Classic examples, by no means rare, are the development of the whole body of delictual law in France and in Louisiana around Civil Code articles 1382 and 2315, respectively. The development of the body of Mineral law in Louisiana by analogy to servitudes

is another well-known example of creative judicial law-making in response to a need. In Germany the courts have expanded the interpretation of "good faith" in BGB, art. 242, to encompass a whole new body of law on the performance of obligation. Hopefully just solutions will be arrived at by judges as the occasions demand, against the background of their legal systems viewed as a whole, and against the values held by their respective societies.

Civil law judges are said to apply principles, not precedents. According to dogma only their decisions are binding only upon the parties before them and only for the case in which handed down, with the exception of some few decisions of the Constitutional Courts and Great Senates in Germany (V.5.B.3;3,6) and the Chambres Réunies in France (I.3.5); yet there is strong pressure upon lower courts in civil law countries today to conform to the decisions of their hierarchical superiors. In European countries where judicial promotion is along bureaucratic lines, there is a great tendency of lower court judges to conform to the decisions of their superiors on the bench. In all civil law countries, and especially in Louisiana, there is the additional pressure of probable reversal by the higher courts. In Europe where publication of judicial decisions is usually on a selective basis with the higher court making the selection, this reporting system, organized on a doctrinal basis, serves as another factor in producing conformity. Again it may be said that there is a wide variation among civil law countries in adherence to precedent, from France,

in which the Cour de Cassation seldom reverses itself, to Germany, where today, the new flexibility in the judicial system is reflected by the greater readiness of the various Supreme Courts to reverse themselves.

Over all the civilian legal systems there broods an anxiety and a deep-felt need for certainty,⁹³ probably emanating from their original distrust of judges. The tendency to conform despite an avowed rejection of precedent and stare decisis is doubtless a product of the emphasis in civil law countries upon the supreme value of certainty. Civilian countries do develop a jurisprudence constante, however. The respect accorded the decisions of the higher courts, whether because the lower court judges agree with the reasoning of the higher court or fear reversal, does result, as a practical matter, in a stabilization of the jurisprudence and the measure of certainty so coveted by civilians.

⁹³Merryman, op. cit., pp. 50, 88.

SELECTED BIBLIOGRAPHY

Role of Courts

- Dainow, Joseph, "The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems," 37 Ind. L. J. 1, 38-50 (1961).
- Geny, Francois. Methode d'Interpretation et Sources in Droit Privé Positif (2d ed. 1954) trans. by La. State Law Institute (1963).
- Henry, Robert L., "Jurisprudence Constante and Stare Decisis Contrasted," 15 A. B. A. J. 11 (1929).
- Kelsen, Hans, Reine Rechtslehre, 2d ed., Deuticke (Wien 1960). Eng. trans. Max Knight (Pure Theory of Law, 1967).
- Loussouarn, Yvon, "The Relative Importance of legislation, Custom, Doctrine and Precedent in French Law," 18 La. L. R. 235 (1958); particularly "Judicial Precedent" at pp. 255-262.
- Merryman, John Henry, The Civil Law Tradition (Stanford U. 1969).
- Razi, G. M., "Reflections on Equity in the Civil Law Systems," 13 Am. U. L. R. 24 (1963).
- Silving, Helen, "Stare Decisis in the Civil and in the Common Law," 35 Rev. Jurid. de la U. de Puerto Rico, 195 (1966).
- Stone, Julius, Recent Trends in English Precedent, Assoc. Gen. Pub. (Sydney, Australia, 1945) pp. 1-17.
- Tate, Albert, Jr., "Techniques of Judicial Interpretation in Louisiana," 22 La. L. R. 727 (1962); particularly "Precedents at 743."
- Von Mehren, "The Judicial Process: A Comparative Analysis," 5 Am. J. Comp. L. 197 (1956).
- Wetter, J. Gillis, The Styles of Appellate Judicial Opinions, Sythoff (Leyden 1960).