**Louisiana Law Review**

Volume 35 | Number 5
*Special Issue*
*1975*

# The Structure and Role of Courts of Appeal in Civil Law Systems

Nina Nichols Pugh

# THE STRUCTURE AND ROLE OF COURTS OF APPEAL IN CIVIL LAW SYSTEMS

*Nina Nichols Pugh**

Ever since the principle of appellate review emerged from the bureaucratic legal developments of Imperial 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 structure of the appellate courts of the representative civil law jurisdictions of France, Spain, Italy, and Louisiana will be presented herein. As the oldest of the post-revolutionary appellate courts, the French system will be presented first, and the others compared to it. The roles of these various appellate courts will be seen in the effects of their decisions. This selective study has been limited to the countries above named, in the belief that this will also give insights into practices of most other civil law jurisdictions.

Judicial decisions, the work-product of the courts, must be interpreted against the framework of the legal systems from which they evolve. In civil law systems, the main source of the law is legislation; with codes occupying a primary position in judicial decision-making. Codes are not merely collections of statutes but carefully arranged and integrated compilations of general principles which provide bases for decision.

In a civilian system when a decision has been made at the trial court level, an appeal usually follows to a higher court. The appellate courts allow sober second thoughts on the original decisions and help avoid victimization of human error. In the civil law tradition the right of appeal is of primary importance as a fundamental safeguard of justice. In exposition of its importance emphasis will be placed herein on the structure and role of the various courts of appeal, the decrees

* Member of the Louisiana and Baton Rouge Bar Associations. This article is based on parts of a report that was prepared under the auspices of the Institute of Civil Law Studies of the Louisiana State University Law School for submission to the Louisiana State University Legal Project-Vietnam, and this publication is with permission of the AID Contracting Officer.

issuing from such courts, and the function and impact of judges in interpreting the law.

## I. FRANCE

In France the appellate review in two levels 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 *ministère public,* who are said to be representatives of the executive branch before the courts.[1]

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

### *Cour d'appel*

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 follows:

(1) *Chambre correctionelle,* 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 (*arrêt de renvoi*) would transfer this case to the assizes court (criminal court of first instance for serious offenses), wherein the one charged (*l'inculpé*) would be transformed into the one accused (*l'accusé*).

1. *See* P. HERZOG, CIVIL PROCEDURE IN FRANCE, §§3.06-3.10 (Nijhoff 1967) [hereinafter cited as HERZOG].

(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 Généraux* for the *Cours d'appel* report directly to the Minister of Justice, but are in turn hierarchical superiors to the *Procureurs Généraux* of the *ministère public* attached to the courts of first instance.

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. At this level, there may be introduced new evidence 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 certain designated issues, in which case 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.

The *Cours d'appel* may interpret all acts of a legislative nature, including decrees and regulations of administrative authority. In theory the *Cours d'appel* are free, as are all

2. *See* HERZOG § 8.02 for modification of right of appeal by the parties. For the details of procedure in the *Cours d'appel,* see the French C. PRO. CIV. arts. 449, 459, 461, 472; HERZOG §§8.01-8.22.

3. *See* HERZOG §8.16.

other judicial tribunals, and may decide cases without any obligation to follow analogous decisions made by the same tribunals, or 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 réunies.*

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 à partie,"* and derive ultimately from the Roman law.

*Decrees.* The final adjudications of the *Cours d'appel,* known as *arrêts,* are *per curiam* opinions, usually handed down one to four weeks following hearing, and 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 *arrêt* 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.*

*Cour de Cassation*

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 (*premier président*), five chamber presidents (*présidents de chambre*), and sixty-three other judges (*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; this makes for a greater specialization and a stability of the jurisprudence. The chambers are organized as follows:

1. *Chambre civile, 1^e section civile,* which handles cases involving questions of nationality, personal status, property, non-commercial contracts, liens and mortgages, successions, donations, copyrights, separation of powers, war damage

claims, and disciplinary proceedings against *avocats* and *officiers ministériels*. It acts also as a *chambre d'accusation* against magistrates who commit crimes in their official capacity.

2. *Chambre civile, 2e section civile*, which reviews torts cases, divorce and separation, civil procedure, elections, and some 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 financière*, 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]

The *Cour de Cassation*, was organized in 1790 as a part of the Constituent Assembly to assure the exact application of its law, and 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 review a case in the ordinary understanding of the term, nor does it give any new judgment. If it disagrees, it merely "breaks" (*casse*) the judgment appealed; otherwise, that judgment is left intact, which in effect affirms it.

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 as one of its major functions today. 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 a petition called a "*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 jus-

4. *See* HERZOG §3.32 e-i.

tification 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]

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 its own previous decisions.

The *Cour de Cassation* has original jurisdiction only in *prise à partie* actions against courts of appeal, assizes courts and individual members of the *Cour de Cassation;* these actions must be tried before the *chambres réunies.*

The *audiences ordinaires* are those sessions held by each of the chambers to review the petitions for *pourvoi en cassation.* The *arrêts* are rendered by the absolute majority, and the decisions are read aloud in open court. There is no report or record of any dissents.

The *assemblée plénière civile,* which was organized in 1947, consists of at least fifteen judges of the civil panels, plus the *premier président,* the *présidents de chambre,* and the *doyens,* or senior associate judges. The *assemblée plénière civile* hears cases referred to it by the *premier président* 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 civile* considers it. If the *procureur général*[6] requests it in writing, or if the judges of the panel to which the case was assigned originally are evenly divided, the *premier président* must transfer the case to the *assemblée plénière civile.* Decisions of the *assemblée plénière civile* are automatically accorded more weight and respect than those of an individual panel.

The *audience solennelle* consists of the *chambres réunies,* which is the *Cour de Cassation* sitting *en banc.* The judges of all the panels sit together, but the quorum is only thirty-five. They do this 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*

5. *See* HERZOG §3.32 k.

6. The representative of the *ministère public* attached to the *Cour de Cassation* has a large staff of *avocats* working under him. For the role of *procureur général* in procedure of *Cour de Cassation,* see HERZOG §§9.19-9.23.

*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.

*Decrees.* On petitions for review 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* issues a *rejet de pourvoi.*

The *Cour de Cassation* may set aside or "break" the judgment of the court below (*"casse le jugement"* or *"annule le 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*, that is the end of the matter 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, including: the decree (*dispositif*), the names of the judges, the members of the *ministère public* and participating counsel; and the opinion (*motif*) which begins with the words *"La cour"* and proceeds with deductive logic to give the reasons for the judgment, introduced in separate clauses with the word *"Attendu"* (whereas) 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 traditonal Romanist approach of codification with principles integrated and coordinated in a systematic manner.

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

and increased significance to the judicial function. Very seldom is there any departure by other courts from the *arrêts* 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.

*Judges*

The appellate judges come, for the most part, from the lower echelons of judicial service. They are magistrates of the bench (*de siège*) who have been promised independence from the government by the Constitution. However, they are closely supervised by the Ministry of Justice[7] and may be disciplined by the *Conseil Supérieur de la Magistrature*[8] (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 eight members from a list of twelve persons submitted by the *Cour de Cassation*, and the member of the *Conseil d'Etat* from a list of three persons submitted by that body.

Appointments to the *Cour de Cassation* and to the presidency of a *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.

In France the *magistrats*, including both the judges and the members 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 graduates 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. In addition, one-sixth of the number admitted *after* examination, may be admitted each year *without* examination. These may be chosen from among

7. HERZOG §§3.05, 3.20, 3.21.
8. *Id.* §3.16.

assistants on the faculties of the law schools with two years service and with degrees of doctor of laws, from *avocats, avoués, notaires, greffiers* (court clerks) with three years' experience, and from civil servants with a 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.[9] Judges may also be appointed to the bench from law faculties, and from high executive or administrative offices. Some of the highest positions in the judicial hierarchy are filled by direct presidential appointment.

The rules for promotion of judges are very complex.[10] 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 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.

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. This results in a more stable jurisprudence.

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.

## Conclusion

On the appellate levels the principle of "collegiality" pre-

9. HERZOG §3.12 (information on *Centre* training program).
10. HERZOG §§3.13-3.15.

vails, 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 d'appel;* at least seven on the *Cour de Cassation.*

Besides the *Cour d'appel* and the *Cour de Cassation,* there are other courts which handle various appeals, usually of an administrative or constitutional nature. These courts are the Administrative Courts, the *Conseil d'Etat,* the *Tribunal des Conflits* and the *Conseil Constitutionel.* The most important appellate courts in France are of course the *Cour d'appel* and the *Cour de Cassation* whose decisions now have a greater impact upon French law by creating a balance between the seeming tyranny of legislation and an unchecked judicial power such as existed and was abused by the *parlement* in the *ancien régime.* This "*double degré de juridiction*" provided by the *Cour d'appel* and *Cour de Cassation,* which is a complete readjudication of the case with a new court, greatly enhances the fair administration of justice in France.

## II. SPAIN

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 (*Tribunal Supremo*) 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 court 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 its standards and those of the Nationalist Movement, making the entire judicial system highly subject to political influence.

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. These are the Court of First Instance and Instruction, the Labor Tribunals, and Tribunals for the Protection of the Syndical Organization, and the Military Courts; however, these will not be discussed in further detail.

The *Audiencias* constitute the courts of second instance in Spain and 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.*

*Audiencias Territoriales*

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.

The *Audiencias* are similar in composition to the *Tribunal Supremo,* they follow its general lines: and are presided over by a president.

The *Sala de Gobierno* consists of the president of the *Audiencia,* the president or presidents[11] of the *Sala* (chamber) and the president of the *Audiencia Provincial,* jointly with the attorney-general of the *Audiencia.* This body is basically administrative in nature and similar or identical to the corresponding *Sala* of the *Tribunal Supremo.* The *Sala de Gobierno* may constitute itself into a *Sala de Justicia* in certain exceptional cases prescribed by law for disciplinary jurisdiction.

The *Pleno* comprises all the *magistrados* of the *Audiencia* when called together by the president of the *Audiencia.* When the *Pleno* meets 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 is sufficient. The functions of the *Pleno* are:

(1) to act upon questions of jurisdiction arising between

11. For method of election of presidents, *see* E. JIMENEZ-ASENJO, ORGANIZACION JUDICIAL ESPANOLA 187-88 (Madrid 1952) [hereinafter cited JIMENEZ-ASENJO].

the Judges of Instruction and the Judges of the Municipal Judiciary within the territorial division;

(2) 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* within the territorial division;

(3) 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.

The *Salas de Justicia* consist of the following:

(1) *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;

(2) *La Sala de lo Criminal* exists with this specific name only in the *Audiencia Provincial* where it meets by special dispensation of the *Ley Adicional* to the *Audiencia Territorial;*

(3) *Tribunal Contencioso-Administrativo* is composed of the president of the appropriate *Audiencia Territorial* and four magistrates, two of whom are professional and the other two are *vocales* (voters) designated by the president according to law.

Both the *Sala de lo Civil* and the *Tribunal Contencioso-Administrativo* handle appeals[12] in civil and administrative matters,[13] respectively, from the courts of first instance. They have no authority to exercise original or criminal appellate jurisdiction.

*Audiencias Provinciales*

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

12. For specific grounds of appeals, *see* JIMENEZ-ASENJO 186-87. For details of procedure, particularly in regard to judgments and their effect, *see* LEY DE ENJUICIAMIENTO CIVIL arts. 840-902.

13. For exceptions to judicial review, largely political, *see* SPAIN AND THE RULE OF LAW 27-28 (Int. Comm. Jurists, Geneva 1962).

14. For duties of the President, *see* JIMENEZ-ASENJO at 193-95.

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

The *Sala de Gobierno* has the same composition and administrative function as the *Sala de Gobierno* in the *Audiencia Territorial.*

The *Pleno* is likewise similar to the counterpart of the *Audiencia Territorial;* here a majority of the *magistrados* is sufficient except when acting as a *Sala de Justicia.* The *Pleno* has authority to act in the following matters:

(1) on appeals and petitions alleging error against resolutions of the Courts of Instruction (courts of first instance processing criminal matters) within the province;

(2) decisions regarding the exercise of jurisdiction which arise within the province;

(3) challenges for cause directed against the judges of the Courts of Instruction of the province;

(4) challenges for cause directed against the *magistrados* of the *Audiencia Provincial;* and

(5) 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.

The *Sala de Justicia* of the *Audiencia Provincial* is a single body but is composed of as many sections as are considered necessary in view of the criminal caseload and the population of the province. Thus, Madrid has eight sections, Barcelona has 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. The principal function of the *Sala de Justicia* 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.

*El Tribunal Supremo*

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.[15] It sits in Madrid. 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*.

The *Sala de Gobierno* is the administrative arm of the *Tribunal Supremo;* it is composed of the president of the *Tribunal Supremo*, and the presidents of six *Salas de Justicia*, all of whom are assisted by the chief *fiscal*, or government attorney. This body[16] is principally responsible for the administration of the court, but it also takes disciplinary action against *magistrados* and other judges who violate the ethical rules of their profession. In addition, it renders legal opinions (*informes*) as requested by the Government on (1) matters relating to the administration of justice, (2) internal organizational matters of the tribunal, and (3) budget issues arising from its operations.

The *Pleno* is composed of the president of the *Tribunal Supremo* and a minimum of thirty *magistrados* (there must be a minimum of five *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* composing the *Pleno* constitutes a quorum. Its functions[17] are:

(1) to hear non-judicial appeals and petitions alleging error in diverse matters;

---

15. For details of procedure, *see* LEY DE ENJUICIAMIENTO CIVIL arts. 1689-1795.

16. *See* JIMENEZ-ASENJO at 175.

17. *Id.* at 174-75.

(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.

The *Salas de Justicia* are six in number, and generally each has far more than the minimum requirement of five *magistrados*, due to the increasingly-heavy caseload.[18] They are denominated in the following manner.

(1) *Sala de Justicia Civil* is composed of a president and eleven *magistrados* (as of 1952), and the president is empowered to establish an additional section whenever the caseload warrants it. The Civil *Sala* functions primarily in *casación* of civil matters resolved in the second instance by the *Audiencias Territoriales* on two grounds: infraction of law or legal doctrine, and 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. In addition, as a part of its regulatory functions, the Civil *Sala* (a) resolves substantive jurisdictional matters which arise between or among different *Audiencias;* (b) reviews challenges for cause directed against *magistrados* of the *Audiencias* or governmental administrative heads; (c) takes appeals concerning revisions in civil matters; (d) reviews the force of civil matters interposed against the *Nunciatura* and the Superior Ecclesiastical Tribunals; (e) completes sentences pronounced by foreign tribunals with regulation by treaties and existing laws; and (f) hears recusations of *magistrados* of the *Sala.*

(2) *Sala Segunda* or *Sala Criminal,* is composed of a president and at least five *magistrados.* Its primary function is appellate, to act 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

18. *Id.* at 172.

the *Rota* of the *Nunciatura*. The Criminal *Sala* also has original jurisdiction in certain cases involving governmental authorities, ecclesiastical authorities, provincial governors, and others.[19]

(3) *Salas Tercera, Cuarta, y Quinta, o de lo Contencioso-Administrativo* are composed of a president for each *Sala* and as many more than the minimum five *magistrados* as are necessary to handle the work. Their primary function[20] is to review resolutions of the *Administración Central*. They also 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* was created by act of May 6, 1931, 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 infractions of law and errors 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.

*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. 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.

*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

19. *Id.* at 176.

20. For further discussion and particularly exceptions to judicial review, which are primarily in the political realm, *see* SPAIN AND THE RULE OF LAW 26-28 (Int. Comm. Jurists, Geneva 1962).

pure separation of powers and by the political influence which pervades the entire government.[21]

*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.*[22]

*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*) drafts the opinion for the court. It is then approved by the entire court, signed, and read in open court as 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 cases. They are divided into sections as follows: (1) *Vistos*—the first section presents the facts of the case in elaborate detail; (2) *Considerando*—the second section applies the law to the above-stated facts; and (3) *Parte Dispositiva*—the final section of the opinion 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.[23] By the process of legal doctrine, which is an original concept of Iberian law, two consistent decisions of the *Tribunal Supremo* become authoritative and have the effect of quashing contrary decisions of the lower courts.[24]

*Judges (Magistrados)*

Judges of the higher courts in Spain 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

21. *See* JIMENEZ-ASENJO at 172-74.

22. *Id.* at 172. *See also id.* chapters 23 and 24.

23. *See* LEY DE ENJUICIAMIENTO CIVIL arts. 359-68.

24. *Cf.* Tete, *The Code, Custom and the Courts: Notes toward a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1 (1973) [hereinafter cited as Tete].

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 cumulative 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, 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 determines 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. They have usually held political posts previous to selection.[25]

## III. ITALY

The present Italian judicial organization and procedures derive in large part from French Revolutionary sources; therefore, there is a great similarity 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 litigiousness[26] and the lack of juries, which facilitates 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 has its persuasive effect in the promotion of *impugnazione*.

There are two lower courts, the *conciliatori* and the *pretori* which have the right of hearing appeals in lesser civil and criminal cases; these minor courts will not be considered here. The three most important and significant appellate courts in Italy are the *Tribunali*, the Court of Appeal and the *Corte di cassazione*.

### *Tribunali*

The *tribunali* are three-judge courts which hear appeals from the *pretori* in their *circondari* or zones, in criminal and civil cases, on both the law and the facts. In addition, the *tribunali* have a broad original jurisdiction in serious criminal matters; they handle civil cases above the limits of the

25. 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). *See also* JIMENEZ-ASENJO, chaps. 16-21.

26. M. CAPPELLETTI & J. PERILLO, CIVIL PROCEDURE IN ITALY 257, n. 7 (1965) [hereinafter cited as CAPPELLETTI & PERILLO].

*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.

*Courts of Appeal*

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 Appeal hears appeals only from the *tribunali* rendering judgment in the district in which the particular Court of Appeal sits. In areas known as districts, the twenty-three courts of appeal sit in panels of five judges. Most of these panels have lay judges sitting with ordinary judges. They are divided into subsections for the purposes of specialization, often on a permanent basis, including the following: criminal cases involving minors, labor law, agrarian problems, and public waters. Essentially the same rules of procedure prevail in the Courts of Appeal as are used in courts of first instance.[27]

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 equità*) appealed from the *tribunali*, the jurisdiction of which is much broader than that of the *conciliatori* and *pretori*. Thus, 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. The appellant may 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; this gives the litigant a maximum concentration of proceedings.

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

27. *See* ITALIAN C. PRO. CIV. arts. 339-54; CAPPELLETTI & PERILLO §§10.06 c-1.

*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 the appeal

(a) inadmissible, if judgment from below was not appealable, or if the time for the commencement of an appeal (10-60 days) had expired;

(b) *improcedible,* which means that, although properly taken, the appeal was not properly prosecuted;

(c) discontinued, in which case the *sentenze* of the lower court becomes final and is not subject to attack by ordinary means;

(4) *sentenza partiale,* 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 prooftaking 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 statute.[28] 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 are usually brief and are required to be in writing; they set forth the prayers of the parties and the reasons of fact and 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, to fill in the reasons. Other necessary data is 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 rendition. As

28. *See* ITALIAN C. PRO. CIV. arts. 353-54; CAPPELLETTI & PERILLO §10.06 m.

a general rule appellate decisions may be enforced despite the pendency of proceedings in the *Corte di cassazione.*

*Corte di Cassazione*

At the apex of the Italian court system is 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; these 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. There are, however, certain important differences.

The *Corte di cassazione* is divided into three civil and four criminal sections. Each has a president, and sits as a seven-man panel. In case of conflict between two different civil panels, a joint civil panel of fifteen judges hears the case.

As in France, the *Corte di cassazione* does not review errors of fact, but only certain statutorily-defined types of error of law.[29] Furthermore only appellate judgments (including partial judgments) and non-appealable judgments from courts of first instance may be reviewed. The process of review is initiated by application (*ricorso per cassazione*), which must be made within sixty days after service of judgment in the lower court. No new evidence may be introduced on review.[30]

Although there are some special courts over which the *Corte di cassazione* can exercise the power of review only in questions of jurisdiction,[31] 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 previously[32] there is frequent recourse to the *Corte di cassazione,* and its caseload is unduly heavy. Although not considered here, there may be recourse, also, to the Constitutional Court (established in 1956) which gives rulings on constitutional questions, and to

29. ITALIAN C. PRO. CIV. art. 360. For details of procedure in the *Corte di cassazione, see* ITALIAN C. PRO. CIV. arts. 360-94.

30. For exception, *see* CAPPELLETTI & PERILLO, 280, nn. 186-87.

31. *See* CAPPELLETTI & PERILLO §10.07a.

32. *Id. See* text at note 26, *supra.*

the *Consiglio di Stato* (Council of State) which protects individuals from arbitrary executive action.

*Decrees.* The *Corte di cassazione*, like its French counterpart, 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 case must be remanded. 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 *improcedible*) or ill-founded, in which event the judgment becomes *res judicata.*[33]

(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 disposes of the case (*dispositivo*) is left intact and made *res judicata.*[34] 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) reverse only, where the court holds that the case was decided in an improper court and indicates which is the proper court. In this situation 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) reverse and remand, under a broad discretion,[35] to a court on the same level as that from which the judgment

33. For effects of *res judicata, see* M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, THE ITALIAN LEGAL SYSTEM §4.18 (1967) [hereinafter cited as CAPPELLETTI, MERRYMAN & PERILLO].

34. *See* CAPPELLETTI, MERRYMAN & PERILLO §4.18.

35. C. PRO. CIV. art. 383.

originated, usually geographically close to it. Remand is permitted to another section of the same court of appeal from which a case originated. 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 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.

Oral argument on the application for review is in open court; 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, and the president last. The majority vote becomes the opinion of the court and one of 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.[36]

The principal effects of judgment are *res judicata* and enforceability as already pointed out,[37] 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* 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.* 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

36. *See* CAPPELLETTI & PERILLO at 75, n.41.

37. CAPPELLETTI, MERRYMAN & PERILLO §4.18.

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.[38]

*Judges*

Judges[39] are drawn by competitive examination from law graduates between the ages of 21 and 31, 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; 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 (elected by the judges of the district and presided over by the President of the Court of Appeal, to which it is attached) reviews the apprentice's service and decides whether or not he has the aptitude to be approved for permanent service as a tribunal magistrate. If he is appointed, 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 attached to a tribunal. Since 1963 women have been authorized to serve as judges and as other public officials.[40] 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. Judges in Italy are held to a much higher standard of public and private conduct than ordinary citizens. 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. More rapid promotion may be had through competitive oral and written examinations which are conditioned initially upon the recommendation of merit by the

38. *Id.* §7.11.

39. For general discussion of Italian judges, *see* CAPPELLETTI, MERRYMAN & PERILLO §§3.07-3.08.

40. Law of February 9, 1963, No. 66.

local judicial council. Only one-tenth of these candidates will be recommended for promotion.

For outstanding merit *avvocati* with fifteen years' experience and professors of law may, under article 106 of the Constitution, be appointed to the *Corti di cassazione* but this possibility has rarely been implemented.

Judges serve until retirement at age 70, or until removed from office for misconduct which is extremely rare.[41] 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.

## LOUISIANA

Characterized as a civil law jurisdiction, Louisiana is more properly described as a "mixed" jurisdiction; its judicial structures combine the institutions and practices of both the civil law and 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 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.

It is noteworthy that, at the time of the Constitution of 1812, Louisiana had already adopted the Anglo-American principle of trial by jury in criminal cases; this meant the subsequent and inevitable adoption of common law rules of evidence.[42] In civil cases a compromise was reached later, illustrative of the mixing of the civilian and common law

41. *See* CAPPELLETTI & PERILLO §3.06.

42. *See* State v. McCoy, 8 Rob. 545, 547 (La. 1844).

principles and usages in Louisiana, that jury findings of fact are subject to review on appeal.

Anglo-American influence on the Louisiana judicial system is also evident in that its courts and judges enjoy prestige and respect more in accordance with English and American judges than the comparatively anonymous professional judges of the civil law world. In addition, Louisiana judicial decisions are considered a more authoritative source of law than decisions in the civilian tradition where they have only persuasive authority.[43]

*Courts of Appeal*

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, which has always had control of the courts of appeal. In 1960, after study and recommendation by the Judicial Council of the Supreme Court, a major reorganization greatly enlarged the substantive jurisdiction of the appellate courts, thereby again relieving the over-burdened Supreme Court. With the exception of the appellate court for the Parish of Orleans, the courts of appeal were peripatetic until 1960. The decisions of the courts of appeal have been reported regularly and completely since 1924.

Today the courts of appeal exist in four circuits. The First has six judges; the Second has four; the Third consists of five judges; and the Fourth, which sits in the more populous area of New Orleans, consists of nine judges. The Legislature has the power to increase the number of judges whenever necessary.[44] The presiding judge of each court is determined by seniority. Each court sits in panels composed of at least three judges, selected according to court rules.[45] Details of the operation of the panel system are further determined by each court under its own rules. The 1921 Constitution provided that in extraordinary cases the judges could sit *en banc*.[46] Each Circuit of the

43. *See* Tete at 1, n.24.

44. *See* LA. CONST. art. V, §9; La. Const. art. VII, §21 (1921), *as amended by* Acts 1968, Nos. 676, 696.

45. *See* LA. CONST. art V, §8.

46. La. Const. art. VII, §23 (1921): "However, in exceptional cases, or when deemed necessary or expedient by the judges thereof, a court of appeal may sit *en banc*." This provision is not retained in the 1974 Constitution. As a matter of regular practice the Court of Appeal of the Third Circuit sits *en*

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

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 V, Section 10 of the 1974 state constitution: (a) all civil matters decided within its circuit, and (b) all matters appealed from the family and juvenile courts, except criminal prosecutions against persons other than juveniles. 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 their unavoidable delays the Courts of Appeal in 1958 were given discretionary supervisory jurisdiction, subject of course 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 also given "supervisory" jurisdiction to intervene in the proceedings of the lower courts, 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 writ,[47] 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 render a decision accordingly. The format of applications for these writs is prescribed in the respective Rules of the Appellate and Supreme Courts.[48]

*banc* for all re-hearings. It also decides all requests for supervisory writs *en banc*.

47. For further delineation of the use of writs by the Appellate Courts and the nature of writs themselves *see* Tate, *Supervisory Powers of the Louisiana Courts of Appeal*, 38 TUL. L. REV. 429 (1964); Comment, *Supervisory Powers of the Supreme Court of Louisiana over Inferior Courts*, 34 TUL. L. REV. 165, 171 (1959).

48. *See* LA. S. CT. R. 10 and La. Uniform Rules Cts. of Appeal 12.

The "writ of *mandamus*" is the order of a higher court to an inferior one to act;[49] 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;[50] 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.[51] If the writ of *certiorari* is issued as a writ of review, the case in question goes up as if an appeal; if it is issued as a supervisory writ the court is free to furnish whatever relief seems justified by the exigencies of the case.

The courts of appeal decide all questions on the law and the facts,[52] unless limited to questions of law only by some section of the State Constitution. The Louisiana appellate review of the facts of the case, which has been challenged as discriminatory inasmuch as it is the only state of the Union to allow such a practice, has been upheld as constitutional.[53] This takes the form of an examination of the case record transmitted to the appellate court for a determination as to whether or not the record supports the decision rendered. The appellate courts are given the power then 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. This competence to review facts as well as law and to render a final decision, without a necessity for a remand, has the great advantage of providing a more speedy and less expensive judicial process, as distinguished from France and Italy where the appellate courts merely "break" the decisions of lower courts.

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 mentioned above. The court in this case, rather than the parties them-

49. Tate, *Supervisory Powers of the Louisiana Courts of Appeal*, 38 TUL. L. REV. 429, 440 (1964).

50. *Id.*

51. *Id.* at 439.

52. LA. CONST. art. V, §10 (B). *See* Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 LA. L. REV. 78 (1968).

53. Cheramie v. Dept. of Highways, 410 U.S. 931 (1973).

selves, 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.

The Courts of Appeal have no original jurisdiction. 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 in which panels, the assignment of cases to particular panels, days for oral arguments, and so forth). 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 procedure for appeals, applications for writs, and other matters of general legal concern to the public. These Rules of Court for the Courts of Appeal as well as those for the Supreme Court are promulgated under the rule-making authority of the courts; they are not presented to the Legislature for approval and do not form any part of the Code of Civil Procedure, as is usually the case in civil law jurisdictions.[54]

*Decrees.* Except in instances where the courts of appeal have certified questions of law to the Supreme Court for review, their decisions are final, unless stayed for the taking of writs to the Supreme Court. No judgment can be rendered in a case until a 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 is signed by all concurring judges. Separate concurring opinions and dissenting opinions are often rendered.

These judicial opinions are highly original and personal in style. They follow no prescribed format, as do the judicial opinions in typical European civil law jurisdictions. Despite the intention of the original law makers in Louisiana to guard against *stare decisis*,[55] prior appellate decisions are

54. For further details of the procedure of the courts of appeal in general *see* LA. CODE CIV. P. arts. 2081-2201; LA. S. CT. R., and La. Uniform Rules Cts. of Appeal. *See also* Tate, *Proceedings in Appellate Courts*, 35 TUL. L. REV. 585 (1961).

55. *See* LA. CIV. CODE art. 1.

frequently cited as a basis for judgment. They have proved to have so persuasive an effect, that a *jurisprudence constante* tends to develop in accordance with civilian tradition. When different circuits disagree, the Supreme Court grants a writ in order to encourage jurisprudential uniformity. Opinions of the courts of appeal are published *in toto* and distributed widely, which in itself facilitates the establishment of a *jurisprudence constante*.

*Judges.* Judges of the courts of appeal must be citizens of the United States and qualified electors of the State,[56] licensed to practice law for at least five years immediately preceding election. They must reside in the circuit or district for at least two years immediately preceding election. They may not practice law after taking their places upon the bench. 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 Louisiana. In fact it was not until 1965 that lawyers had to be graduates of accredited law schools as well as successful examinees of the State Bar examination.

Appellate court judges in Louisiana are often elected to the appellate bench from the ranks of the district judges, as well as from the practicing lawyers. As compared with European judges of civilian tradition, the Louisiana appellate judge may be somewhat more practical in his approach. He probably enters upon a judicial career as an older and more mature man,[57] with a broader background of experience, than his European counterpart. He reached the bench by virtue of election or of political appointment, and he holds this office subject to the will of the people. It is not suprising that the Louisiana bench, like typical Anglo-American courts, tends to attract more forceful personalities than the European civil law systems. The marked traditional and institutional encouragement for strong judicial personalities in turn results in judges who will be likely to show more leadership in judicial law-making. The Louisiana judge 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

56. These qualifications were specified in La. Const. art. VII, §19 (1921). Although they were not provided expressly in the 1974 Constitution, it is presumed that they will still be observed.

57. *See* BIOGRAPHIES OF LOUISIANA JUDGES (Frugé ed. 1971).

1921, and has since been reduced to ten years by the 1974 Constitution.[58] Incumbent judges are usually assured of re-election, but it can be readily understood that they remain politically sensitive. Since 1970, salaries for appellate court judges[59] have compared favorably with judicial salaries for the rest of the states of the United States, although they are well below those of federal judges serving the same geographical area. Appellate court judges' remuneration usually is below that of practitioners with approximately the same length of experience; yet they enjoy positions of greater, or at least equal, respect. The work-load of the courts of appeal now is such that the judges can maintain current dockets without being unduly burdened.

Judges are provided with a retirement system under the 1921 Constitution which provides for mandatory retirement at 75 and full pay if they have served 20 years. If a judge has not served 20 years upon reaching 75, he can serve until he reaches 80 years of age or serves 20 years, and then receive full retirement. Otherwise a judge receives an amount proportionate to the number of years he has served. Any judge serving 23 years or more may retire on two-thirds of his salary regardless of his age. All others retiring before 20 years of service receive an amount which is in the same proportion of his former salary as his years of service bear to twenty. The 1974 Constitution mandates that a new retirement system be adopted in two years but judges serving before adoption may elect to remain under the old system.[60]

*Supreme Court*

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. The Supreme Court "rode circuit" just like the courts of appeal until relieved of this duty in 1898.

58. LA. CONST. art. V, §8 (C).

59. *See* La. Acts 1970, No. 25.

60. For more complete details of the old retirement plan *see* La. Const. art. VII, §8 (1921) *as amended by* Acts 1960, No. 592. LA. CONST. art. V, §23, provides for a new retirement plan as follows: "(A) Within two years after the effective date of this constitution, the legislature shall provide for a retirement system for judges which shall apply to a judge taking office after the

The Supreme Court's docket again became excessively congested, and in 1960[61] the appellate court system of Louisiana was reorganized to give to the courts of appeal certain 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 considered that the Supreme Court would be able to guide and stabilize the jurisprudence of the state without the haste imposed by the previously excessive workload.

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 reaches this position by seniority. The Justices sit *en banc*, and four justices must concur to render an opinion.[62] The 1921 Constitution permitted them to sit in divisions,[63] with the senior Justice presiding in which case three Justices constituted a quorum, all of whom had to concur to render judgment. In the event that they did not all concur, the Chief Justice could assign one or more justices to sit with them and decision would be rendered without further oral argument. In all cases, at least two justices read each record, and the conclusions of the court are reached in consultation before the case is assigned for the writing of the opinion. The current Rules of Supreme Court of Louisiana became effective in 1974.[64]

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

---

effective date of the law enacting the system and in which a judge in office at that time may elect to become a member, with credit for all prior years of judicial service and without contribution therefor. The retirement benefits and judicial service rights of a judge in office or retired on the effective date of this constitution shall not be diminished, nor shall the benefits to which a surviving spouse is entitled be reduced. (B) Except as otherwise provided in this Section, a judge shall not remain in office beyond his seventieth birthday."

61. *See* La. Acts 1960, Nos. 36-38.

62. LA. CONST. art. V, §§3, 6.

63. La. Const. art. VII, §5 (1921). The 1974 Constitution has no such provision.

Except for a brief period from 1921-23 the Supreme Court has not sat in divisions. *See* 24 LA. B. ASS'N. REV. 14-58 (1923) for debate between Justices O'Neill and Dawkins as to wisdom of Supreme Court's sitting in divisions.

64. LA. CODE CIV. P. arts. 2081-2201.

1879 that it was given general supervisory jurisdiction through the issuance of writs.[65] In the reorganization of the appellate court system under the 1921 Constitution (art. 7 §10, as amended by Act 561 of 1958) the appellate jurisdiction of the Supreme Court was greatly reduced, and then in 1974 the new Constitution[66] further reduced this jurisdiction to the following: ". . . if (1) a law or ordinance has been declared unconstitutional; (2) the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed." Under the 1974 Constitution[67] the Supreme Court's exclusive original jurisdiction has been reduced to disciplinary proceedings against a member of the Bar.

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. 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.[68] Unlike most European civil law jurisdictions, the Supreme Court, as well as the courts of appeal, has appellate review of constitutional questions, which are first 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,[69] labor law questions, tax appeals, and so forth, are all handled by the regular court process, with appeal in specified cases to the courts of appeal or to the Supreme Court.

*Decrees.* Opinions of the Supreme Court are written in original and individual style like those of the courts of appeal. Although the 1921 Constitution required that the reasons for judgment be given,[70] there is no similar provision in the 1974

---

65. *See* LA. CONST. art. V, §§2, 5. *See* Comment, *Supervisory Powers of the Supreme Court of Louisiana over Inferior Courts*, 34 TUL. L. REV. 165, 171 (1959).

66. LA. CONST. art. V, §5 (D).

67. *Id.* art. V, §5 (B).

68. *Id.* art. V, §5 (C).

69. Comment, *The Scope of Judicial Review of Administrative Agencies in Louisiana*, 33 TUL. L. REV. 199 (1958).

70. La. Const. art. VII, §1 (1921). For history of this Constitutional requirement *see* Hood, *The Louisiana Judiciary*, 14 LA. L. REV. 811, 815 (1954). *See also* Hood, *History of Courts of Appeal in Louisiana*, 21 LA. L. REV. 531, 549 (1961).

Constitution, and there is no formal style for the presentation of the law and the facts. Justices tend to cite both the statute law (including the Civil Code) and previous cases as authority for their judgments. Frequently separate concurring and/or dissenting opinions are handed down in the same case and published together. Furthermore, opinions are reported and published with the names of their authors.

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 only in the case in which rendered. Even more than might be thought typical of *jurisprudence constante*, however, the Supreme Court decisions have profound persuasive effect upon other courts and practicing attorneys, and far beyond the particular case in which rendered.[71] In fact lower courts have been reprimanded for deviating from a prior decision of the Supreme Court.[72] The prospect of being overruled on appeal has a coercive effect upon the district courts and courts of appeal to follow the opinions of the Supreme Court; this plays no small part in the stabilization of the jurisprudence of the state.

*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.[73] They must have practiced law in the state for at least five years preceding their election, and they must have resided within the district from which elected for two years immediately preceding election. Under the 1921 Constitution (art. 7, §6), they were elected for terms of fourteen years; this was changed to ten years by the 1974 Constitution (art. 5, §3). They are eligible for re-election until they reach the age of retirement. The justice oldest in point of service becomes Chief Justice and serves in this capacity until retirement.

Like the judges on the courts of appeal, the Justices of the Supreme Court are likely to be more practical than their

71. *See* Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 743-55 (1962).

72. *E.g.*, Pringle - Associated Mortgage Corp. v. Eanes, 254 La. 705, 714, 226 So. 2d 502, 505 (1969). But the court of appeal opinion was adopted on rehearing, *id.* at 734, 226 So. 2d at 515. *See also* Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970).

73. These qualifications were specified in La. Const. art. VII, §6 (1921). Although not expressly stated in the 1974 Constitution, presumably they are still observed.

counterparts in continental 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 is not the case in continental civil law countries.

Supreme Court Justices are paid more than the Judges of the Courts of Appeal, at a rate which is comparable to that for Supreme Court judges throughout the United States. Their retirement plan is the same as that for all Louisiana judges.

*Additional Appellate Jurisdiction*

In addition to the appellate jurisdiction of the Courts of Appeal and Supreme Court, the District Court has appellate jurisdiction for certain minor matters which may originate in lower special tribunals (*e.g.*, city courts and justice of the peace courts). These appeals are tried *de novo* and without juries.[74]

*Judiciary Commission*

The Judiciary Commission was created by a constitutional amendment implemented by Act 152 of 1968, and began operation on April 23, 1969. The purpose of the Judiciary Commission is to receive and investigate complaints of misconduct including "willful misconduct relating to his official duty, willful and persistent failure to perform his duty, persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute, conduct while in office which would constitute a felony, or conviction of a felony."[75] The Commission enjoys all investigatory powers required for its hearings. Although the supervision of the judiciary is not as close as that provided by the French *Conseil Supérieur de la Magistrature*, there can be no doubt that the existence of the Judiciary Commission exercises a restraining influence on the conduct and activities of the judges

74. La. Const. art. VII, §36 (1921), *as amended by* Acts 1958, No. 561, *made statutory by* LA. CONST. art. V, §16(B). *See also* LA. CODE C. PRO. arts. 4899-4901.

75. LA. CONST. art. V, §25(c). For procedural details see LA. S. CT. R. XXXIII *as amended* October 24, 1974 (effective January 1, 1974).

at every level. Excessive delay in the decision and disposition of cases has been speeded up dramatically through the effects of the Commission in this regard. Public confidence in the courts has been enhanced, also, by the Commission's demonstration of the judiciary's willingness to discipline itself. Under the 1974 Constitution,[76] the Commission may recommend that the Supreme Court censure, suspend or remove a judge or involuntarily retire him, for any of the foregoing reasons.

The Commission is composed of one court of appeal and two district judges selected by the Supreme Court; two attorneys admitted to practice for at least 10 years and one admitted to practice for at least three years but not more than ten, selected by the Conference of Courts of Appeal Judges or its successor; and three private citizens selected by the Louisiana District Judges Association or its successor.[77] The Judiciary Commission's chief executive officer is the Judicial Administrator. Members of the Commission receive only necessary expenses, and no *per diem* pay. From their own number they select a chairman and such other officers as they deem necessary. The Commission may engage attorneys, staff personnel and other employees, and it fixes their duties and compensation.

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

Statutory positivism is still the primary basis 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 Spain the authority of legislation is sometimes challenged by the executive, but the principal challenge today comes from the judiciary whose members 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 considered by some as the sole source of law to Louisiana where the jurisprudence has almost as much *de facto* authority as in common law countries. It cannot be questioned that the appellate courts in all of the civil law

76. LA. CONST. art. V, §25.
77. *Id.*

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 development and law-making process. The time is long past when the traditional civil law judge, as the key figure in the judicial system, could be described in these terms: "Judicial service is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative."[78]

The 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 for a strict separation of powers in government, which is the ideal in the civilian tradition, whereas a system of checks and balances such as that established in the United States presupposes an interrelation with the executive and legislative powers which may be interpreted as a limitation on 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 France indicates the increasing importance of the judicial function. Even the establishment of administrative courts in France and Italy to maintain the separation of powers between the executive and the judiciary has 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 interpretation in a manner which is really judicial law-making. Gény[79] has been a leader in exposing the fiction of statutory interpretation particularly in France where a judge cannot refuse to decide a case on account of the obscurity of the statute.[80] *"Equité"* is commonly used as a basis for decision by civil law judges,[81] and

78. J. MERRYMAN, THE CIVIL LAW TRADITION 39, 49, 91, 117-19 (1969).

79. F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF XV-XXVIII (2d ed. J. Mayda transl. La. State Law Institute 1963).

80. FRENCH CIV. CODE art. 4. *Accord,* LEY DE ENJUICIAMUNTO CIVIL art. 361 (Spain).

81. LA. CIV. CODE art. 21; Dainow, *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico,* 22 REV. JURID.

natural law is regaining some of its former respect as a source of law.[82] In Louisiana custom[83] is admittedly a source of law; the problem begins when the courts try to define which custom may have the force of law.

"General principles of law"[84] may be resorted to for interpretation in Spain,[85] and in the legal order of the state of Italy[86] which is deliberately retreating from the natural law. In Switzerland which was not reviewed herein, the judge must decide as a legislator when the statute is silent.[87] In all of these countries, as in most civil law countries, interpretation is delegated by the legislator to the judge only where the written law 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.

In applying the law, judges interpret it in three typical kinds of situations: (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 necessary 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 evolutively; 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 body of delictual law in France and in Louisiana around Civil Code articles 1382 and 2315, respectively. The development by the appellate courts of the body of mineral law in Louisiana through analogy to servitudes is another well-known example of judicial

---

DE LA U. DE PUERTO RICO 108, 113 (1959); Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485, 505 (1935); C. SZLADITS, GUIDE TO FOREIGN LEGAL MATERIALS, 157, 401 (1959).

82. AUSTRIAN CIV. CODE art. 7; LA. CIV. CODE art. 21. *See also* C. SZLADITS, GUIDE TO FOREIGN LEGAL MATERIALS 174-75 (1959).

83. LA. CIV. CODE art. 3; Tete, *Introduction to the Civil Law of Louisiana* Book I, 11-17, 37-50 (1969) (unpublished material for student use).

84. *See* R. SCHLESINGER, COMPARATIVE LAW 158 (2d ed. 1970).

85. SPANISH CIV. CODE art. 6.

86. ITALIAN CIV. CODE art. 12.

87. SWISS CIV. CODE art. 1.

law-making in response to a need.[88] Ideally just solutions will be found by judges as the occasions demand, against the background of their legal systems viewed as a whole, and in relation to the values held by their respective societies.

Civil law judges are said to apply principles, not precedents. According to dogma, 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 *chambres réunies* of the Court of Cassation in France; yet there is strong pressure upon lower courts in civil law countries to conform to the decisions of their superiors. In European countries where judicial promotion is along bureaucratic lines, there is a great tendency by lower court judges to conform to the decisions of their higher courts. In all civil law countries, and especially in Louisiana, there is the additional pressure of probable reversal on appeal or review. In Europe, where publication of judicial decisions is often on a selective basis with the higher court making the selection, this system of reporting is organized on a doctrinal basis and serves as another factor in producing conformity. Thus, 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 Louisiana where the election of new Supreme Court judges can bring about the complete reversal of a judicial precedent.[89]

Over the civilian legal systems there broods an anxiety and a deep-felt need for certainty,[90] probably emanating from their original distrust of judges. The tendency to conform, despite an avowed rejection of precedent and *stare decisis*, is a product of the emphasis in civil law countries upon the supreme value of certainty. Furthermore civilian countries *do* develop a *jurisprudence constante*. 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 with a good measure of certainty.

88. *See* Tucker, *Au-delà du Code Civil, mais par le Code Civil*, 34 LA. L. REV. 957 (1974); LA. R. S. 31:1-214 (La. Mineral Code 1974).

89. Simon v. Ford Motor Co., 282 So. 2d 126 (La. 1973).

90. J. MERRYMAN, THE CIVIL LAW TRADITION 50, 88 (1969).