

# FEDERAL COURTS IN FOREIGN SYSTEMS\*

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An institutional study of the federal courts in the United States may well profit from a survey of such courts in foreign federal systems. While such an undertaking must remain cursory and general, it may nevertheless furnish useful data for a better evaluation of the advantages and shortcomings of the national arrangement and for a clearer differentiation between the intrinsic and the accidental difficulties which have arisen.<sup>1</sup>

The scope of the present investigation is limited to foreign federal governments which are of a comparable civilization and which have not been disrupted as a consequence of the war or political strife. Thus, Germany,<sup>2</sup> Austria,<sup>3</sup> India,<sup>4</sup> and the Ma-

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[For typographical reasons, accents are omitted in references in this article to foreign-language treatises. *Ed.*]

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<sup>1</sup> See Gutteridge, *The Province of Comparative Law*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND* 303 (1947).

<sup>2</sup> Under the Weimar constitution, 1919, before the advent of Hitler, the principal court of the republic was the Reichsgericht. It exercised mainly appellate jurisdiction, but possessed original jurisdiction over the crime of treason. Appeals could be based on any erroneous application of federal or, with certain restrictions, state law. As a result the court was an enormous body, heavily overburdened, and sometimes having more than ninety justices. See *Gerichtsverfassungsgesetz, 1877, §123 ff*; *Zivilprozessordnung, 1933, §549*; Simons, *Reichsgericht*, 5 *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT I* (1928). Affiliated with the Supreme Court were a Supreme Labor Court, organized under the *Arbeitsgerichtsgesetz, 1926* (*Reichsgesetzblatt I, 507*), and a Federal Court for Constitutional Litigations to settle controversies between the states or the states and federal government, and between public officials within a state. Constitution, Art. 108, and Statute of 1921 (*Reichsgesetzblatt, 905*). In addition there existed separate tax tribunals topped by the Supreme Finance Court, established under the Revenue Act of 1931 (*Reichsgesetzblatt I, 161*) and several specialized administrative tribunals. At present Germany still exists as an international entity. See *R. v. Bottrill*, [1946] 1 All Eng. 635 (K.B.D.), *Clark v. Allen*, 67 Sup. Ct. 1431 (U. S. 1947). Prussia, however, was dismembered. Law No. 46 of the Allied Control Council (Feb. 25, 1947). The ordinary courts of justice, administrative courts and labor courts, have been reestablished in the Länder by Laws Nos. 4, 21, and 36 of the Control Council; the Reichsgericht as a centralized institution, however, has apparently not been restored.

<sup>3</sup> In Austria under the federal constitutions of 1920 and 1934 the whole administration of justice in the eight Länder was national. Constitution, 1920, Arts. 10(6), 82, 83; Constitution, 1934, Arts. 34(1,6), 98-107.

<sup>4</sup> British India received a federal constitution in 1935 by virtue of the Government of India Act, 26 Geo. V, c. 42, and 1 Edw. VIII, c. 2, which, however, went only partially into operation. The Government of India (Commencement and Transitory Provisions) Order (1936, No. 672, S. R. and O. (1114), s. 3. A federal court was established by the Government of India (Federal Court) Orders (1936, No. 1323, S. R. and O., 1368, and 1937, No. 703, S. R. and O., 1304). The organization and jurisdiction of this federal court are regulated by the Government of India Act in Part IX, c. I, §200ff.

layan Union<sup>5</sup> will not be considered; the discussion will be confined to the two federal unions within the British Commonwealth of Nations (Australia and Canada),<sup>6</sup> the four foreign federal governments in the Western Hemisphere (Argentina, Brazil, Mexico, and Venezuela), and two other federations, Switzerland and the U. S. S. R.

The true position and function of the federal courts in these countries cannot be understood from a mere summary of the statutory provisions relating to their organization and jurisdiction. In addition, each case requires a brief general discussion of the constitutional framework within which the courts operate, with emphasis on the scope of the legislative powers of the federal government, and also a special consideration of the constitutional provisions concerning the judicial power under which they are established. Not only the political temperaments of the various nations but also the technical variations of the various federal systems produce such differences that separate treatment with greatest care is indicated to avoid the unwarranted generalizations and semi-truths so often found in comparative studies.

## I

### FEDERATIONS WITHIN THE BRITISH COMMONWEALTH OF NATIONS

#### A. The Commonwealth of Australia

##### 1. *General features of the constitutional system*

The Commonwealth of Australia was established as a federation by the Commonwealth of Australia Constitution Act of July 9, 1900.<sup>7</sup> The Commonwealth is composed of six states.<sup>8</sup> In addition it includes six territories, jurisdiction over which has been acquired since the adoption of the Constitution.<sup>9</sup> The distribution of gov-

<sup>5</sup> The Malayan Union was established by Order in Council (1946, S. R. and O., No. 463), made under the Foreign Jurisdiction Act, 1890. The order brings the nine Malayan States into a union under British protection and provides for their administration and for a court system. Four of these states had, until the Japanese occupation, constituted the Federated Malay States, established in 1895, and possessed a federal court system of general jurisdiction. 1 *LAWS OF THE MALAY STATES*, c. 2 (rev. ed. 1935). A new federal constitution was proposed by England in 1946, but has not yet been put in force.

<sup>6</sup> The Union of South Africa, established by the South Africa Act of 1909, 9 Edw. VII, c. 9, is a unitarian government with some federal features. See W. P. M. KENNEDY AND H. J. SCHLOSBERG, *THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION* (1935), and Kovalsky, *Federal Elements in the Union Constitution*, 49 *SO. AFR. L. J.* 479 (1932). The South Africa Act created one supreme court which was formed as a combination of the separate colonial courts for the whole union. See KENNEDY AND SCHLOSBERG, *supra*, at 358.

<sup>7</sup> 63 & 64 *VICT.*, c. 12 (1900), 1 *COMMONWEALTH ACTS 1901-1935*, 1. The leading treatises and commentaries on the Australian Constitution are JOHN QUICK AND R. R. GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (1901); WILLIAM HARRISON MOORE, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA* (2d ed. 1910); DONALD KERR, *THE LAW OF THE AUSTRALIAN CONSTITUTION* (1925). Illuminating as to the judicial attitude concerning the interpretation of the constitution is Evatt, *Constitutional Interpretation in Australia*, 3 *U. OF TORONTO L. J.* 1 (1939), and Dixon, *The Law and the Constitution*, 51 *L. Q. REV.* 590 (1935). For the history of the adoption of the federal system, see ALFRED DEAKIN, *THE FEDERAL STORY* (1944).

<sup>8</sup> Commonwealth of Australia Constitution Act, covering clause 6. The states are New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia.

<sup>9</sup> The territories are technically not "parts" of the Commonwealth. They are Federal Capital Territory (seat of the government), Ashmore and Cartier Islands, Papua (New Guinea), Norfolk Island,

ernmental powers is patterned largely after that of the United States. The legislative powers of the Commonwealth Parliament are specifically enumerated in Section 51 of the constitution.<sup>10</sup> They include, among numerous others, powers over interstate commerce, bankruptcy, insurance, and the settlement of industrial disputes. With respect to the federal territories the Commonwealth possesses full legislative powers.<sup>11</sup>

In regard to the position of Australia as member of the British Commonwealth of Nations it may be mentioned that the Statute of Westminster of 1931<sup>12</sup> was adopted pursuant to its terms by the Statute of Westminster Adoption Act of 1942<sup>13</sup> in order to remove "certain legal difficulties."

## 2. Constitutional provisions as to the judicial power

The judicial power of the Commonwealth is regulated by Chapter III of the Commonwealth of Australia Constitution Act.<sup>14</sup> While the influence of the corresponding article of the United States Constitution is obvious, the framers of the Australian instrument nevertheless adopted a scheme which in many respects is quite original and not free from difficulties. There are two essential differences from the United States system: the state courts are "invested" with some of the federal jurisdiction for the purpose of saving the expense of judicial personnel, and the High Court has appellate jurisdiction over non-federal matters decided by the state courts.

The basic provision is contained in Section 71:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

Subsequent sections specify the scope of the federal jurisdiction and the powers of

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Northern Territory, and the Australian Antarctic Territory. For the statutes regulating their administration, see 3 COMMONWEALTH ACTS 1901-1935, 2767ff. The territory of Papua and the mandated territory of New Guinea were temporarily combined as a war measure by the Papua-New Guinea Provisional Administration Act, 1945, Act No. 20. Under Arts. 4 and 5 of the Trusteeship Agreement for the Territory of New Guinea, approved Dec. 13, 1946, Australia is authorized by the United Nations to administer the territory "as if it were an integral part of Australia" and to bring it into union with her other territories. *The United States and Non-Self-Governing Territories*, 18 UNITED STATES-UNITED NATIONS INFORMATION SERIES 96 (1947).

<sup>10</sup> For the legislative powers of the Commonwealth, see, in addition to the works cited *supra*, note 7, JOHN QUICK, *THE LEGISLATIVE POWERS OF THE COMMONWEALTH* (1919); WILLIAM A. WYNES, *LEGISLATIVE AND EXECUTIVE POWERS IN AUSTRALIA* (1936).

<sup>11</sup> Commonwealth of Australia Constitution Act, §122.

<sup>12</sup> 22 GEO. V, c. 4.

<sup>13</sup> 40 COMMONWEALTH ACTS 181, No. 56 (1942). For the significance of this statute, see Comment, *The Adoption of the Statute of Westminster*, 16 AUST. L. J. 157 (1942); Harrison, *The Statute of Westminster and Dominion Sovereignty*, 17 AUST. L. J. 282, 314 (1944). See also the discussions of the Statute of Westminster by the Australian Legal Convention 1936, 10 AUST. L. J. SUPP. 96ff. (1936).

<sup>14</sup> In addition to the works mentioned *supra*, note 7, the judicial power and system of the Commonwealth are discussed in JOHN QUICK AND LITTLETON E. GROOM, *THE JUDICIAL POWER OF THE COMMONWEALTH* (1904); WYNES, *The Judicial Power of the Commonwealth*, 11 AUST. L. J. 250, 546 (1937-1938), 12 *id.* at 8 (1938); HORACE E. READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH* (2 HARVARD STUDIES IN THE CONFLICT OF LAWS) 27 ff. (1938); Bailey, *The Federal Jurisdiction of the State Courts*, 2 RES JUDICATAE 109, 184 (1940). Also illuminating in this connection are the papers by Justice Dixon, *Address to the Section of the American Bar Association for International and Comparative Law*, 17 AUST. L. J. 138 (1943), and *The Law and the Constitution*, 51 L. Q. REV. 590 (1935).

Parliament in relation thereto. The constitution distinguishes between original and appellate jurisdiction.

a. Original jurisdiction is given to the High Court directly by the constitution in five categories of cases, viz., in all matters<sup>15</sup> (1) arising under any treaty, (2) affecting consuls or other representatives of other countries, (3) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, (4) between states, or between residents of different states, or between a state and a resident of another state, and (5) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.<sup>16</sup> In addition the constitution authorizes Parliament to confer original jurisdiction upon the High Court in four other categories of cases, viz., in all matters (1) arising under the Constitution or involving its interpretation, (2) arising under any laws made by the Parliament, (3) of admiralty and maritime jurisdiction, and (4) relating to the same subject matter claimed under the laws of different states.<sup>17</sup>

Parliament is also authorized, however, to give federal jurisdiction in these nine types of cases to federal courts other than the High Court or to invest any state court with it and to declare to what extent the jurisdiction given to federal courts shall be exclusive.<sup>18</sup>

b. The appellate jurisdiction of the High Court as defined in Section 73 is broader in scope than the original federal jurisdiction.<sup>19</sup> Subject to regulation by Parliament, it extends to three classes of federal matters, viz., judgments and orders (1) of any justice or justices exercising the original jurisdictions of the High Court,<sup>20</sup> (2) of any other court exercising federal jurisdiction, be it state or federal, and (3) as to points of law only, of the Interstate Commission.<sup>21</sup> In addition, however, appeal will also lie from the Supreme Court of any state or from any other court from which an appeal lay to the Privy Council at the establishment of the Commonwealth.<sup>22</sup> Apart from Section 73, the legislature also has the power to confer jurisdiction of appeals from the territorial courts upon the High Court under Section 122.<sup>23</sup>

<sup>15</sup> The High Court has taken the position that "there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court." *In re Judiciary and Navigation Acts*, 29 C. L. R. 257, 265 (1921); but recently it seems to have broadened its concept somewhat in *R. v. The Commonwealth Court of Conciliation and Arbitration*, 19 Austr. L. J. 169 (1945), holding it a proper judicial function to direct observance of the by-laws of registered employers' or employees' organizations.

<sup>16</sup> Commonwealth of Australia Constitution Act, §75.

<sup>17</sup> *Id.*, §76.

<sup>18</sup> *Id.*, §77.

<sup>19</sup> See MOORE, *op. cit. supra*, note 7, at 220ff.

<sup>20</sup> It is thus recognized by implication that the original jurisdiction of the High Court may be exercised by a single justice.

<sup>21</sup> The Interstate Commission operates under the Interstate Commission Act of 1912, 2 COMMONWEALTH ACTS 1901-1935, 1352, passed pursuant to Commonwealth of Australia Constitution Act, §101.

<sup>22</sup> In so far as an appeal lay from a state supreme court to the Privy Council at the establishment of the Commonwealth, Parliament cannot divest the High Court of its appellate jurisdiction. §73. The scope of this limitation upon the regulatory power of Parliament is not free from doubt. See WILLIAM HARRISON MOORE, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA* 224 (2d ed. 1910).

<sup>23</sup> *Porter v. The King; Ex parte Yee*, 37 C. L. R. 432 (1926). The same power has been held to exist with respect to the mandated territory of New Guinea, but disagreement exists whether it flows from §122 or the foreign relations power, §51 (xxix). *Frost v. Stevenson*, 58 C. L. R. 528 (1937).

The High Court is thus not only the highest federal court of the Commonwealth but also the highest "national court of appeal of general and unlimited jurisdiction."<sup>24</sup> No appeal of right lies from the High Court to the Judicial Committee of the Privy Council. However, the Crown may grant leave to appeal in the exercise of its prerogative, except from a decision upon a question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or of any two or more states, in which case a special certificate from the High Court is a prerequisite.<sup>25</sup>

The concept of "federal jurisdiction" according to Australian constitutional law is thus defined by its subjects or, even more accurately, by its source,<sup>26</sup> without regard to whether it is exercised by the federal or the state judiciary. In so far as it is administered in state courts it is termed "invested" federal jurisdiction.<sup>27</sup>

### 3. Statutory provisions as to the organization of federal courts

Pursuant to the authorization contained in Sections 71 and 122 of the constitution, Parliament has regulated the organization of the federal courts in the Judiciary Act 1903-1946 and a few special statutes.

<sup>24</sup> JOHN QUICK AND R. R. GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 742 (1901); JOHN QUICK AND LITTLETON E. GROOM, *THE JUDICIAL POWER OF THE COMMONWEALTH* 33 (1904).

<sup>25</sup> Commonwealth of Australia Constitution Act, §74. The exact scope of the "*inter se* constitutional questions" (as they are called) is a troublesome and complex problem. The granting of the certificate under §74 is in the discretion of the High Court. As to the considerations which control the exercise of the discretion, see *Australian National Airways Pty, Ltd. v. Commonwealth* (No. 2), 20 *Aust. L. J.* 76 (1946). As to the sequence of obtaining leave from the Privy Council and the certificate from the High Court, see *ibid.* For a case in which the construction of the constitutional powers came before the Privy Council, see *James v. Commonwealth of Australia et al.*, [1936] *A. C.* 578, 55 *C. L. R.* 1.

<sup>26</sup> "The phrase 'Federal Jurisdiction' as used in §§71, 73 and 77 of the constitution means jurisdiction derived from the Federal Commonwealth. It does not denote a power to adjudicate in certain matters, though it may connote such a power; . . ." *Lorenzo v. Carey*, 29 *C. L. R.* 243, 252 (1921). Similarly, *Baxter v. Commissioners of Taxation*, 4 *C. L. R.* 1087, 1142 (*N. S. W.* 1907) ("federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and Laws"). See also Bailey, *The Federal Jurisdiction of State Courts*, *supra*, note 14.

<sup>27</sup> *Cf.* Commonwealth of Australia Act, §77 (iii). The exact scope of the "invested" federal jurisdiction has been particularly troublesome in connection with the question of the validity of §39(2)(a) of the Judiciary Act 1903-1946, which abrogates all appeals to the Privy Council from state supreme courts in matters within their federal jurisdiction, except those by the Crown's prerogative. The Privy Council, in the much criticized case of *Webb v. Outrim*, [1907] *A. C.* 81, refused to be bound by this provision. It apparently followed the Supreme Court of Victoria, which granted leave to appeal and considered as within the federal jurisdiction of the state courts only such matters as they could not have passed upon except for a Commonwealth act. This view is, of course, much narrower than that of the High Court in cases cited in note 26, *supra*. The High Court developed various theories for the application of §39(2)(a) despite *Webb v. Outrim*. See Bailey, *supra*, note 14. It may be noted that the additional reason suggested for the invalidity of §39(2)(a), *i.e.*, the Colonial Laws Validity Act of 1865, no longer presents a serious difficulty. The Statute of Westminster, §2(1), repealed this act with respect to all laws passed after its adoption, and the Colonial Laws Validity Act constituted merely an additional (imperial) limitation on the powers of Parliament without limiting the scope of constitutional provisions such as §77(iii); *cf.* *A. G. for Ontario v. A. G. for Canada* [1947] *A. C.* 127. While *Lorenzo v. Carey* intimated that a state court could exercise either federal or state jurisdiction in the same subject matter, it is apparently the view now that federal jurisdiction supersedes state jurisdiction. Dixon J., in *Pfrost v. Stevenson*, *supra* note 23, and Jordan, C. J., in *Ex parte Coorey*, 45 *S. R.* 287, 301 (*N. S. W.* 1944).

The High Court, since 1933, consists of the Chief Justice and five other justices.<sup>28</sup> The court holds its hearings at its principal seat (which at present is Melbourne but ultimately will be Canberra), the other state capitals, or any other place where the Governor General has established a district registry.<sup>29</sup> The members of the court sit either as single justices or as a full court. Original jurisdiction may be exercised by a single justice, while appeals must be heard by the full court.<sup>30</sup> The latter requires normally the presence of at least two, and in specified cases of particular importance, of three justices.<sup>31</sup> Decisions involving the constitutional powers of the Commonwealth by a court consisting of less than all justices may be rendered only if at least three justices concur.<sup>32</sup> In addition to the High Court, the Commonwealth Court of Conciliation and Arbitration<sup>33</sup> and a Federal Court of Bankruptcy<sup>34</sup> form a part of the federal judiciary. For the administration of justice in the territories the Supreme Court of the Australian Capital Territory,<sup>35</sup> the Supreme Court of the Northern Territory,<sup>36</sup> the Supreme Court of Papua-New Guinea,<sup>37</sup> and the Court of Norfolk Island<sup>38</sup> have been established. These do not, however, exercise federal jurisdiction in the constitutional sense.<sup>39</sup>

#### 4. *Statutory provisions regulating federal jurisdiction*

The powers conferred upon Parliament by Sections 73, 76, and 77 of the constitution have been exercised in the Judiciary Act 1903-1946, Part VI, the Commonwealth Conciliation and Arbitration Act 1901-1946, and the Bankruptcy Act 1924-1933.

a. In addition to the original jurisdiction of the High Court directly granted by Section 75,<sup>40</sup> the Judiciary Act confers original jurisdiction pursuant to Section 76 in

<sup>28</sup> Judiciary Act 1903-1946, 2 COMMONWEALTH ACTS 1901-1935, 1379, §4.

<sup>29</sup> *Id.* §§10, 11, 12.

<sup>30</sup> *Id.* §§15 and 20.

<sup>31</sup> *Id.* §§19, 21, 22.

<sup>32</sup> *Id.* §23.

<sup>33</sup> Commonwealth Conciliation and Arbitration Act, 1904-1946, §11ff, 1 COMMONWEALTH ACTS 1901-1935, 115. Until an amendment of 1926 this court was not a federal court in the technical sense. *The Waterside Workers' Fed. v. Alexander*, 25 C. L. R. 434 (1918). Since that date it has been a constitutional court exercising federal jurisdiction (*Jacka v. Lewis*, 68 C. L. R. 455 (1944); *R. v. The Commonwealth Court of Conciliation and Arbitration*, *supra* note 15), although not all of its functions are therefore judicial. *Consolidated Press Ltd. and Prenton v. Australian Journalists' Ass'n*, 21 AUSTR. L. J. 61 (1947). *Cf.* Ross, *The Constitutional History of Industrial Arbitration in Australia*, 30 MINN. L. R. 1, 6 (1945).

<sup>34</sup> Bankruptcy Act, 1924-1933, §18A, 1 COMMONWEALTH ACTS 1901-1935, 232, 241.

<sup>35</sup> Seat of Government Supreme Court Act, 1933-1945, 3 COMMONWEALTH ACTS 1901-1935, 2307. Acts 1905, No. 57.

<sup>36</sup> Northern Territory (Administration) Act 1910-1940 §18, 3 COMMONWEALTH ACTS 1901-1935, 2799, 2803.

<sup>37</sup> Papua Act 1905-1940, §43, 3 COMMONWEALTH ACTS 1901-1935, 2804, 2815, as amended by 38 COMMONWEALTH ACTS 82 (1940) No. 47, §15. After the recapture of the area a Supreme Court was reestablished by the Papua-New Guinea Provisional Administration Act 1945, No. 20. The government now operates under the Trusteeship Agreement, cited *supra* note 9.

<sup>38</sup> Ordinance to Establish a Court for the Territory of Norfolk Island and for Other Purposes, 1936, No. 15, Commonwealth of Australia Gazette, August 13, 1936.

<sup>39</sup> *R. v. Bernasconi*, 19 C. L. R. 629 (1915); *Porter v. King*; *Ex parte Yee*, 37 C. L. R. 432 (1926); *cf.* note 23, *supra*.

<sup>40</sup> See note 16, *supra*, and text.

two classes of cases, viz., (1) all matters arising under the Constitution and involving its interpretation, and (2) offenses against federal statutes.<sup>41</sup>

With the exception of a list of specifically enumerated cases, the original jurisdiction of the High Court is concurrent with that of the state courts. Using the authority granted under Section 77(iii) of the constitution, Parliament has provided:

The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last two preceding sections.<sup>42</sup>

These exceptions in which the High Court has been given exclusive original jurisdiction pursuant to Section 77(ii) are matters arising under any treaty, suits between states or persons suing or being sued on behalf of a state, suits between the Commonwealth and a state or persons suing or being sued on behalf of either, and writs against Commonwealth officials.<sup>43</sup> In addition it is provided that in the *inter se* constitutional questions<sup>44</sup> the High Court shall have jurisdiction exclusive of the state supreme courts<sup>45</sup> and that any cause involving such a question shall be removed *ex officio* by the Supreme Court to the High Court.<sup>46</sup> Any other cause involving a constitutional question may be removed from any state court to the High Court upon the application of either party upon sufficient cause.<sup>47</sup>

The concurrent federal jurisdiction of the state courts is exercised by them without any change of their constitution and organization, over which the federal government lacks power.<sup>48</sup> While Section 39(2) of the Judiciary Act, quoted above, also leaves the territorial limits of their jurisdiction unaltered, the Bankruptcy Act has invested the specified state courts with federal jurisdiction in bankruptcy throughout the Commonwealth.<sup>49</sup>

The High Court and the state supreme courts also exercise concurrent original jurisdiction in admiralty. This jurisdiction is not based on the Judiciary Act<sup>50</sup> but on the British Colonial Courts of Admiralty Act, 1890.<sup>51</sup> As to this the jurisdiction of the High Court is not "federal" in the technical sense.<sup>52</sup>

<sup>41</sup> Judiciary Act, 1903-1946, *supra*, note 28, §30, as amended in 1939, 37 COMMONWEALTH ACTS 128, No. 43.

<sup>42</sup> *Id.* §39(2).

<sup>43</sup> *Id.* §38.

<sup>44</sup> See note 25, *supra*, and text.

<sup>45</sup> *Id.* §38A.

<sup>46</sup> *Id.* §40A.

<sup>47</sup> *Id.* §40.

<sup>48</sup> *Le Mesurier v. Connor*, 42 C. L. R. 481 (1929); *Adams v. Chas. S. Watson Pty Ltd.*, 60 C. L. R. 545, 555 (1938); *Peacock v. Newtown Marrickville and General Co-operative Bldg. Soc. No. 4 Ltd.*, 67 C. L. R. 25, 37 (1943); *Ex parte Coorey*, *supra*, note 27.

<sup>49</sup> Bankruptcy Act 1924-1933, *supra*, note 34, §18(1)(b). The validity of this section seems to be reconcilable with the rule announced in the cases cited in note 48, *supra*.

<sup>50</sup> Provisions in the Judiciary Act pertaining to admiralty were repealed in 1939 (37 COMMONWEALTH ACTS 128, No. 43) to alleviate previous doubts concerning the concurrent admiralty jurisdiction of state courts. See *Union Steamship Co. of N. Z., Ltd. v. The Cardale*, 56 C. L. R. 277 (1937).

<sup>51</sup> 53 & 54 VICT., c. 27 (1890). See *McIlwraith McEachern Ltd. v. The Shell Company of Australia Ltd.*, 19 AUSTR. L. J. 82 (1945).

<sup>52</sup> *Lathan, C. J.*, in *Musgrave v. The Commonwealth*, 57 C. L. R. 514, 532 (1937): "In Australia jurisdiction may be exercised in Admiralty and perhaps under the British Bankruptcy Act, which is neither Federal nor State jurisdiction. . . ." See also *Nagrint v. The "Regis"*, 61 C. L. R. 688 (1939).

b. The appellate jurisdiction of the High Court, apart from special statutes, extends (1) to all judgments rendered by single justices of the High Court, and (2) to all judgments of state supreme courts or other state courts which at the time of the adoption of the constitution were appealable to the Privy Council, regardless of whether they are rendered in the exercise of federal, state, or colonial jurisdiction, provided that the value involved amounts to £300.<sup>53</sup> Appeal to the Privy Council from the judgment of a state supreme court rendered in the exercise of its federal jurisdiction lies only as a matter of the Crown's prerogative.<sup>54</sup> In appeals from state courts in non-federal matters the powers of the High Court are circumscribed by state law.<sup>55</sup>

##### 5. *Statutory provisions as to the applicable law*

The Judiciary Act contains a section which was modeled after the celebrated Section 34 of the United States Judiciary Act of 1789. Section 79 of the Australian statute provides:

The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable.

While the construction of this section has not produced a rule similar to that of *Swift v. Tyson*,<sup>56</sup> and the whole of the state law has controlled the exercise of the "invested" federal jurisdiction, the applicability of the section to the High Court has produced doubts. In the latest case involving the point, which was tried in New South Wales and which concerned the liability of the Commonwealth for a libel published in Queensland,<sup>57</sup> Chief Justice Latham, sitting as single justice, thought that he was bound by the conflicts rule of New South Wales.<sup>58</sup> On appeal two justices disagreed with the Chief Justice, declaring that the law of Queensland applied directly.<sup>59</sup> One justice refused to commit himself on the question since the law of Queensland would control even under the conflicts rule of New South Wales.<sup>60</sup> The remaining justice agreed with the Chief Justice but suggested as an

<sup>53</sup> Judiciary Act, *supra*, note 28, §§34 and 35. Section 35 applies to appeals in admiralty. *Mellwraith McEachern Ltd. v. The Shell Company of Australia Ltd.*, *supra* note 51.

<sup>54</sup> Judiciary Act 1903-1946, §39(2)(a). As to the validity of this section, see note 27, *supra*.

<sup>55</sup> *McDonnell & East Ltd. v. McGregor*, 56 C. L. R. 50 (1936).

<sup>56</sup> 16 Pet. 1 (U. S. 1842).

<sup>57</sup> *Musgrave v. The Commonwealth*, *supra*, note 52.

<sup>58</sup> "A state court may exercise either its State jurisdiction under State statutes or Federal jurisdiction under §77(iii) of the Constitution. In my opinion Federal courts exercise Federal jurisdiction only, and I think all their jurisdiction must be regarded as federal jurisdiction. I therefore regard §79 of the Judiciary Act as applying. Thus I apply the law of New South Wales." *Id.* at 532. The learned justice consequently refused to follow *Lady Carrington Steamship Co. Ltd. v. The Commonwealth*, 29 C. L. R. 596 (1921), and *Cohen v. Cohen*, 42 C. L. R. 91 (1929), which had taken the opposite view.

<sup>59</sup> "Whatever may be the precise limits to be assigned to §79 of the Judiciary Act, it does not introduce, for the purpose of determining the lawfulness of the publication complained of, the general body of New South Wales law, merely because the action, being instituted in the High Court, happens to have been heard at Sydney." Per Evatt and McTierman, JJ., *id.* at 551.

<sup>60</sup> Justice Rich, *id.* at 543.



alternative ground that the liability of the Commonwealth was a matter of federal substantive law, which itself predicated the liability on the *lex loci delicti*.<sup>61</sup> In view of this disagreement the question remains open.

### 6. Diversity jurisdiction in particular

The foregoing discussion shows that in ordinary diversity of citizenship cases the state courts and the High Court have concurrent jurisdiction. Removal can be requested only if constitutional questions are involved.<sup>62</sup> In as much as there are only six states, the existence of the diversity jurisdiction has not created a heavy burden. The word "resident" used in Section 75 of the constitution has been held not to include a corporation.<sup>63</sup> A temporary abode has likewise been declared insufficient to make a person a resident.<sup>64</sup>

## B. The Dominion of Canada

### 1. General features of the constitutional system

The Dominion of Canada was established as a federal union by the British North America Act of 1867.<sup>65</sup> It is composed of nine provinces<sup>66</sup> and two territories.<sup>67</sup> The distribution of legislative powers between the Dominion and the provinces is regulated by Part VI of the British North America Act, the ultimate judicial construction of which has rested until today with the Privy Council.<sup>68</sup>

In contrast to the federal scheme of the United States, the Canadian constitution does not proceed on a theory of "delegated" and "reserved" powers. It defines the legislative powers of both the Dominion Parliament and the provincial legislatures.<sup>69</sup>

<sup>61</sup> Justice Dixon, *id.* at 546.

<sup>62</sup> See note 47, *supra*, and text.

<sup>63</sup> *The Australasian Temperance and General Mutual Life Assurance Society Ltd. v. Howe*, 31 C. L. R. 290 (1922); *Cox v. Journeaux*, 52 C. L. R. 282 (1934).

<sup>64</sup> *Coates v. Coates*, VICT. L. R. 231 (1925).

<sup>65</sup> 30 & 31 VICT., c. 3. For the Canadian constitutional law in general see the (partly antiquated) treatises by A. H. F. LEFROY, *CANADA'S FEDERAL SYSTEM* (1913), A. H. F. LEFROY AND W. P. M. KENNEDY, *A SHORT TREATISE ON CANADIAN CONSTITUTIONAL LAW* (1918), and W. H. P. CLEMENT, *THE LAW OF THE CANADIAN CONSTITUTION* (3d ed. 1916). Also important are the *Hearings of the Special Committee on the B. N. A. Act* (1935).

<sup>66</sup> Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan.

<sup>67</sup> Yukon Territory and Northwest Territory.

<sup>68</sup> The Canadian constitution contains no clause like that of the Australian instrument which withholds constitutional *inter se* questions from the Privy Council except in the exercise of the royal prerogative. Constitutional questions may reach the Privy Council on appeals not only from judgments in contested controversies, but also from advisory opinions of Canadian courts on projected legislation, a practice declared legal in *A. G. for Ontario v. A. G. for Canada* [1912] A. C. 571.

<sup>69</sup> See Kennedy, *Nature of Canadian Federalism*, in *ESSAYS IN CONSTITUTIONAL LAW* 27ff. (1934). Both the federal and the provincial powers are derived from the imperial act and are therefore "devolved" powers. HORACE E. READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH* (2 HARVARD STUDIES IN THE CONFLICT OF LAWS) 14 n. 48 (1938). The whole range of legislative powers within the new Dominion is exhausted by this distribution. Canadian constitutional theorists, on the basis of the history of the constitution, claim that the "ultimate residuum" of legislative power was intended to be assigned to the Dominion. Kennedy, *The Interpretation of the B. N. A.*, 8 *CAMB. L. J.* 146, 148 (1943); Tuck, *Canada and the Judicial Committee of the Privy Council*, 4 *U. OF TORONTO L. J.* 33, 42 (1941); and (semble) LEFROY, *op. cit. supra*, note 65, at 91ff.; but see CLEMENT, *op. cit. supra*, note 64, at 452.

Section 91 enumerates by subjects the legislative powers of the Dominion (among them the regulation of trade and commerce and bankruptcy), but contains in addition a general introductory clause which grants the power "to make laws for peace, order, and good government in Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Section 92 lists the matters which are thus exclusively assigned to provincial legislation. They likewise include two broad and vaguely defined fields, viz., "property and civil rights in the province" and "generally all matters of a merely local and private nature in the province." In construing these clauses the Privy Council has endeavored to protect the autonomy of the provinces. It has tried to accomplish this by the technique of giving a broad scope to the terms "property and civil rights," by restricting the authority granted by the "general head" of Section 91 to a mere emergency power, and by whittling away the powers under the commerce clause.<sup>70</sup> The case law so developed has been criticized as exhibiting lack of statesmanship and consistency, violating the basic principles of Canadian federalism, and hampering Dominion progress.<sup>71</sup> As a result, a bill for the total<sup>72</sup> abolition of appeals to the Privy Council from Canada has been introduced, but, though the Privy Council has affirmed<sup>73</sup> its validity, it has not been enacted into law as yet.<sup>74</sup>

## 2. *Constitutional provisions as to the judicial power*

The Canadian constitution, unlike those of Australia and the United States, does not establish a specific federal jurisdiction. Subject to the restriction that the appointment of the judges is a function of the Governor General,<sup>75</sup> the administration of justice in the provinces is a matter for their legislative regulation.<sup>76</sup> However, the constitution empowers the Dominion to establish a "General Court of Appeal for Canada" and any "additional courts for the better administration of the laws of Canada."<sup>77</sup> There is no provision for ordinary diversity jurisdiction.

## 3. *Statutory provisions as to the organization of federal courts*

Pursuant to the constitutional authorization, a number of federal courts have

<sup>70</sup> Illustrative of these tendencies are *A. G. for Toronto v. A. G. for the Dominion*, [1896] A. C. 348; *In re the Board of Commerce Act, 1919, and the Combines and Fair Price Act, 1919*, [1922] A. C. 191; *Toronto Electric Commissioners v. Snider*, [1925] A. C. 396; *A. G. for Canada v. A. G. for Ontario*, [1937] A. C. 326, 353; *A. G. for British Columbia v. A. G. for Canada*, [1937] A. C. 377; *Cooperative Committee on Japanese Canadians v. A. G. for Canada*, [1947] A. C. 87.

<sup>71</sup> Cf. Smith, *The Residue of Power in Canada*, 4 CAN. B. REV. 432 (1926); MacDonald, *Judicial Interpretation of the Canadian Constitution*, 1 U. OF TORONTO L. J. 260 (1936); Jennings, *Constitutional Interpretation—The Experience of Canada*, 51 HARV. L. R. 1 (1937); Tuck, *Canada and the Judicial Committee of the Privy Council*, 4 U. OF TORONTO L. J. 33 (1941); Kennedy, *The Interpretation of the British North America Act*, 8 CAMB. L. J. 146 (1943).

<sup>72</sup> Criminal appeals have been abolished since 1934, 23 & 24 GEO. V, c. 53, upheld by *British Coal Corp. v. The King* [1935] A. C. 500.

<sup>73</sup> *A. G. for Ontario v. A. G. for Canada*, [1947] A. C. 127.

<sup>74</sup> See the Symposium on the Abolition of Appeals to the Privy Council, 25 CAN. B. REV. 557 (1947).

<sup>75</sup> *British North America Act*, 1867, §96.

<sup>76</sup> *Id.* §92(14).

<sup>77</sup> *Id.* §101.

been established. The most important is the Supreme Court of Canada.<sup>78</sup> It consists of the Chief Justice and six puisne judges, and has its seat at Ottawa. In addition there has been created an Exchequer Court of Canada, which is composed of a President, three puisne judges,<sup>79</sup> and an undefined number of "District Judges in Admiralty of the Exchequer" for any of the six existing Admiralty districts.<sup>80</sup> There are no separate federal bankruptcy courts, but by the Bankruptcy Act certain provincial or territorial courts have been constituted courts of bankruptcy and invested with jurisdiction in bankruptcy effective in the whole Dominion.<sup>81</sup>

In the Yukon Territory a special territorial court has been established, the judge of which may be relieved by stipendiary magistrates,<sup>82</sup> while in the Northwest Territories justice is administered by stipendiary magistrates or the superior courts and probate courts of the neighboring provinces.<sup>83</sup>

#### 4. *Statutory provisions regulating federal jurisdiction*

Since the bankruptcy courts are state tribunals invested with federal jurisdiction embracing the customary bankruptcy matters, and the territorial courts exercise merely general local jurisdiction, the functions of the two major courts are the only ones of interest.

a. *The Exchequer Court.* This tribunal is the sole court in the Dominion exercising federal jurisdiction which depends either on the character of the parties or the subject matter. Thus controversies involving the Crown or its officers are within its competence. It has exclusive original jurisdiction in all suits of a civil nature *against* the Crown, based either on the common law or equity as administered in England, and other specifically enumerated causes.<sup>84</sup> It has concurrent original jurisdiction in civil actions at law or equity *by* the Crown, in proceedings to enforce Dominion revenue statutes, and in actions against officers of the Crown for acts or omissions in the performance of their official duties.<sup>85</sup>

In addition Parliament has validly<sup>86</sup> conferred upon the Court jurisdiction over certain subject matters which are within the legislative competence of the Dominion. Thus the Exchequer Court has jurisdiction over claims involving the grant, validity,

<sup>78</sup> REV. STATS. OF CANADA, 1927, c. 35, as amended by the 1928 STATS., c. 9; 1929 STATS., c. 58; 1930 STATS., c. 44; 1937 STATS., c. 42.

<sup>79</sup> REV. STATS. OF CANADA, 1927, c. 34, as amended by 1928 STATS., c. 23; 1930 STATS., c. 17; 1932-33 STATS., c. 13; 1938 STATS., c. 28; 1943-44 STATS., c. 25; 1944-45 STATS., c. 3; 1946 STATS., c. 22.

<sup>80</sup> Admiralty Act, 1934, 1934 STATS., §§3, 4.

<sup>81</sup> REV. STATS. OF CANADA, 1927, c. 11, §152ff., §170., 1932-33 STATS., c. 36, §2; *cf.* READ, *op. cit.* *supra*, note 69, at 22.

<sup>82</sup> REV. STATS. OF CANADA, 1927, c. 215, §50ff., as amended by 1929 STATS., c. 62, 1940-41 STATS., c. 30.

<sup>83</sup> REV. STATS. OF CANADA, 1927, c. 142 §34ff., as amended by 1938 STATS., c. 38, 1940 STATS., c. 36.

<sup>84</sup> REV. STATS. OF CANADA, 1927, c. 34, §§18-20, as amended by 1932-33 STATS., c. 13, 1938 STATS., c. 28.

<sup>85</sup> *Id.* §30.

<sup>86</sup> Statutes conferring jurisdiction ignoring the limitation indicated in the text have been declared invalid. See READ, *op. cit. supra*, note 69, at 17.

or infringement of patents, copyrights, trade-marks, or inventions, even between private parties,<sup>87</sup> and over the enforcement of liens and mortgages on the property of railroads engaged in interprovincial commerce.<sup>88</sup> The Exchequer Court, through its "Admiralty Side," adjudicates also all matters of maritime jurisdiction and prize law.<sup>89</sup>

b. *The Supreme Court of Canada.* The statute distinguishes between appellate and special jurisdiction. The latter covers advisory opinions upon reference either by the Governor in Council or the Senate or the House of Commons.<sup>90</sup> Civil appeals lie as a matter of right from the final judgments of the highest court in a province, provided that the value of the matter in controversy exceeds \$2,000,<sup>91</sup> or from a final judgment of the Court of Exchequer, if the amount in controversy exceeds \$500.<sup>92</sup> In other non-criminal cases which belong to certain rather narrowly defined categories, appeal may be perfected by leave obtained either from the court of last resort rendering the decision or from the Supreme Court itself.<sup>93</sup> Appeals in criminal matters are regulated by the criminal code.<sup>94</sup> Appeal may even lie from an advisory opinion rendered by a provincial court.<sup>95</sup> The Supreme Court consequently acts as a national or federal court of appeal according to whether the case comes up from a provincial court or the Exchequer Court.<sup>96</sup>

## II

### THE SOUTH AND CENTRAL AMERICAN FEDERATIONS

#### A. The Argentine Nation

##### 1. *General features of the constitutional system*

Of all the South and Central American republics, the federal system of Argentina presents the greatest similarity to that of the United States. It was established in 1853 as the culmination of a series of constitutional experiments.<sup>97</sup> The constitution

<sup>87</sup> REV. STATS. OF CANADA, 1927, c. 34, §22, as amended by 1928 STATS., c. 28, §3.

<sup>88</sup> *Id.* §27.

<sup>89</sup> Admiralty Act, 1934 STATS., c. 31, as amended by 1935 STATS., c. 35; Canada Prize Act, 1947 STATS., c. 12.

<sup>90</sup> Supreme Court Act, REV. STATS. OF CANADA, 1927, c. 35, §§55, 56.

<sup>91</sup> *Id.* §§36 and 39.

<sup>92</sup> Exchequer Court Act, REV. STATS. OF CANADA, 1927, c. 34, §82.

<sup>93</sup> Supreme Court Act, REV. STATS. OF CANADA, 1927, §37, 41, as amended by 1937 STATS., c. 42. See the criticism by How, *The Too Limited Jurisdiction of the Supreme Court of Canada*, 25 CAN. B. REV. 573 (1947).

<sup>94</sup> Criminal Code, REV. STATS. OF CANADA, 1927, c. 36, §§1023 and 1025. See the criticism by How, *supra*, note 93, at 580ff.

<sup>95</sup> Supreme Court Act, REV. STATS. OF CANADA, 1927, c. 35, §43.

<sup>96</sup> See READ, *op. cit. supra*, note 69, at 24-26. The Court may hear appeals from the court of British Columbia which have been decided on appeal from the Yukon Territory. Yukon Act, REV. STATS. OF CANADA, 1927, c. 215, §78(9).

<sup>97</sup> For the history of the Argentine Constitutions from the Estatuto Provisional of Nov. 22, 1811, to the present charter, see AMADEO, ARGENTINE CONSTITUTIONAL LAW (4 COLUMBIA LEGAL STUDIES) 3ff. (1943); ANTOKOLETZ, MANUAL TEORICO Y PRACTICO DE DERECHO PUBLICO CONSTITUCIONAL Y ADMINISTRATIVO 148ff. (1939); AMUCHASTEGUI, LA CONSTITUCION NACIONAL ARGENTINA, "SU GENESIS-SU ALMA" (1939);

of that year is technically still in force. It was, however, extensively revised in 1860 when the Province of Buenos Aires joined the Argentine Confederation. Further amendments were made in 1866 and 1898. The Argentine nation under the present charter is composed of fourteen sovereign provinces,<sup>98</sup> the federal district of the capital,<sup>99</sup> and the federal territories.<sup>100</sup>

The constitution defines in its first part the nature of the federation and the bill of rights, and in its second part the powers of the national government (Title I) and of the provinces (Title II).<sup>101</sup> The provinces possess all powers not delegated to the national government.<sup>102</sup> They must, however, under the sanction of intervention, adopt a constitution of a representative republican type which assures the administration of justice.<sup>103</sup> The powers of the central government are divided into the usual three branches. The legislative powers are specifically enumerated in Article 67. Its most important subdivision for our purpose is Number 11, which grants to the national government the power to

. . . enact the civil, commercial, penal and mining codes,<sup>104</sup> provided however, that these codes shall not modify the jurisdiction of the local courts which shall be exercised by either the federal or the provincial tribunals, according to whether the persons or subject matter fall within their respective jurisdiction; and especially general laws for the whole nation on naturalization and citizenship, subject to the principle of natural citizenship; and also on bankruptcy. . . .

Congress possesses full legislative powers with respect to the federal district and the territories.<sup>105</sup>

## 2. *Constitutional provisions as to the judicial power*

The judicial power of the national government is regulated by Part II, Title 1, Section 3, which was modeled after the corresponding provisions in the Constitution

1 GONZALES CALDERON, DERECHO CONSTITUCIONAL ARGENTINO *1ff.* (1923); SECO VILLALBRA, FUENTES DE LA CONSTITUCION ARGENTINA (1943); VARELA, HISTORIA CONSTITUCIONAL DE LA REPUBLICA ARGENTINA (4 vols. 1910).

<sup>98</sup> They are Buenos Aires, Catamarca, Córdoba, Corrientes, Entre Ríos, Jujuy, La Rioja, Mendoza, Salta, San Juan, San Luis, Santa Fe, Santiago del Estero, and Tucumán.

<sup>99</sup> CONST. 1853, Art. 3. The capital is the City of Buenos Aires, which was ceded to the nation by the province of the same name. Statute No. 1029 of 1880, 4 COLECCION COMPLETA DE LEYES NACIONALES 525 (1918).

<sup>100</sup> CONST. 1853, Art. 67(14). The territories at present are La Pampa, Neuquén, Rio Negro, Chubut, Santa Cruz, Tierra del Fuego, Misiones, Formosa, and Chaco. Their administration and government are regulated by Statute No. 1532 of 1884, 6 COLECCION COMPLETA DE LEYES NACIONALES 110, and numerous later amendments, particularly Statutes Nos. 2662 of 1889 and 2735 of 1890, 9 *id.* at 164, 254; Statute No. 3575 of 1897, 11(2), *id.* at 377. The former territory of Los Andes was divided and annexed to the three neighboring provinces by Decree No. 9375 of 1943.

<sup>101</sup> The leading texts on Argentine constitutional and federal law are ANTOKOLETZ, *op. cit. supra* note 97; BAS, EL DERECHO FEDERAL ARGENTINO (2 vols. 1927); GONZALES CALDERON, DERECHO CONSTITUCIONAL ARGENTINO (2 vols.) (2d ed. 1923-1936); ZAVALIA, DERECHO FEDERAL (2 vols.) (3d ed. 1941).

<sup>102</sup> CONST. 1853, Art. 104.

<sup>103</sup> *Id.*, Arts. 5 and 6.

<sup>104</sup> Argentina has enacted the four codes thus authorized.

<sup>105</sup> CONST. 1853, Art. 67(27) and (14).

of the United States.<sup>106</sup> The judicial power is vested in a Supreme Court of Justice and such inferior tribunals as Congress establishes by statute.<sup>107</sup> The jurisdiction of the federal courts is regulated by Articles 100 and 101, which contain the following provisions:

*Art. 100.* The Supreme Court and the inferior tribunals of the nation shall have cognizance and adjudication of all suits which involve issues governed by the constitution and by the laws of the nation with the reservation made in Article 67(11), and by treaties with foreign nations; of suits concerning foreign ambassadors, public ministers and consuls; of suits in admiralty and maritime jurisdiction; of suits in which the nation is a party; of suits which arise between two or more provinces, between a province and inhabitants of another; and between a province or its inhabitants against [and?] a foreign state or citizen.

*Art. 101.* In these cases the Supreme Court shall exercise jurisdiction on appeal according to the rules and exceptions which Congress prescribes; however, in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province is a party, it shall exercise original and exclusive jurisdiction.

Thus, Argentina, like the United States, has adopted a concept of federal jurisdiction defined by the subject matter or the persons over which it is exercised, and has provided for the establishment of a dual judiciary. In contrast to United States law, however, it has been believed that this dualism is also mandatory for the capital territory. Hence, we find there one set of federal judges administering "federal jurisdiction" and another set administering "ordinary jurisdiction."<sup>108</sup>

### 3. *Statutory provisions as to the organization of the federal courts*

a. The federal judiciary exercising federal jurisdiction in the technical sense consists of three groups of courts:

- (1) The Federal Supreme Court of Justice, which is composed of five justices;<sup>109</sup>
- (2) Eight Federal Chambers of Appeal, composed of three judges each except in the provinces of Buenos Aires and La Plata, where they have five judges.<sup>110</sup>

<sup>106</sup> There exist many excellent treatments of the organization and jurisdiction of the federal judiciary. The leading text is GONDRA, *JURISDICCION FEDERAL* (1944). Shorter presentations can be found in 1 ALSINA, *TRATADO TEORICO PRACTICO DE DERECHO PROCESAL CIVIL Y COMERCIAL* 366ff. (3 vols. 1941-1943); 1 BAS, *op. cit. supra* note 101, at 327ff.; 1 ZAVALIA, *op. cit. supra* note 101, at 295ff.; SAENZ VALIENTE, *CURSO DE DERECHO FEDERAL* 77ff. (1944); AQUINO Y BARILLATTI, *LECCIONES DE DERECHO USUAL Y PRACTICA FORENSE* 145ff. (1944); 2 PEREZ, *TRATADO SOBRE LA JURISPRUDENCIA DE LA CORTE SUPREMA* 1ff. (15 vols. 1941); ALSINA, *RESEÑA DE LA ORGANIZACION JUDICIAL EN LA REPUBLICA ARGENTINA*, 5 *REVISTA UNIVERSITARIA JURIDICAS Y SOCIALES* 78ff. (1939).

<sup>107</sup> CONST. 1853, Art. 94, in connection with Art. 67(11).

<sup>108</sup> See *infra*, under III.

<sup>109</sup> The organization of the Supreme Court of Justice is based on Statute No. 27 of 1862, 3 *LEYES NACIONALES* 21ff. (Peralta, ed. 1940).

<sup>110</sup> The Federal Chambers of Appeal were created by Statute No. 4055 of 1902, *id.* at 31ff. The original number of four was subsequently increased to the present eight. For details, see 1 ALSINA, *op. cit. supra* note 106, at 389.

- (3) Twenty-nine Federal Sectional Judgeships, each of which is constituted by one judge.<sup>111</sup> Originally each province formed one section with one judgeship (except Santa Fe, which possessed two), but the number has gradually been increased.<sup>112</sup>

b. The federal judiciary exercising ordinary jurisdiction in the capital consists of two Chambers of Civil Appeals, one Chamber of Commercial Appeals, one Chamber of Criminal Appeals, and one Chamber of Labor Appeals,<sup>113</sup> as well as a number of judgeships of first instance for civil, commercial, criminal, and labor cases, and justices of the peace.<sup>114</sup>

c. In the other territories both federal and ordinary jurisdiction are administered by two Chambers of Appeals for the Courts of Justice,<sup>115</sup> seventeen professional judges, and a number of justices of the peace.<sup>116</sup>

#### 4. *Statutory provisions regulating federal jurisdiction (in the technical sense)*

Pursuant to the constitutional authorization Congress has regulated the details of federal jurisdiction by statute.<sup>117</sup>

a. *The limits of legislative discretion.* The original jurisdiction of the Supreme Court is narrowly defined by the constitution, but the same cannot be said of the appellate jurisdiction of that tribunal or the jurisdiction of the inferior federal courts. While Congress cannot add to the constitutional scope of federal jurisdiction, it has been held that it may leave certain matters to the provincial courts, although it might attribute them to the federal courts. The exact limits in this respect have not yet been clearly established.<sup>118</sup>

<sup>111</sup> Statute No. 27 of 1862, *supra* note 109.

<sup>112</sup> The distribution of the sectional judges at present is thus: six are sitting in the province of Buenos Aires, three each in the Federal Capital and the provinces of Santa Fe and Córdoba, two each in the provinces of Entre Ríos and Mendoza, and one each in the remaining nine provinces. For details see REPUBLICA ARGENTINA, PRESUPUESTO GENERAL DE LA NACION 386ff. (1943); I ALSINA, *op. cit. supra* note 106, at 391, and AQUINO Y BARILLATTI, *op. cit. supra* note 106, at 151ff.

<sup>113</sup> The organization of the courts of ordinary jurisdiction in the capital is based upon Statute No. 1893 of 1886, 3 LEYES NACIONALES 213 (1940). It has undergone a number of amendments, particularly by Statute No. 7055 of 1910, *id.* at 253. For details see I ALSINA, *op. cit. supra* note 106, at 403. The labor tribunals were created by Executive Decree No. 32347 of 1944, Buletin Oficial, Jan. 13, 1945, and made permanent by Statute No. 12948 of 1947.

<sup>114</sup> For details see I ALSINA, *op. cit. supra* note 106, at 410; AQUINO Y BARILLATTI, *op. cit. supra* note 106, at 155.

<sup>115</sup> Established by Presidential Decrees Nos. 4256 and 4257 of 1945, 5 ANALES DE LEGISLACION ARGENTINA 79, 80.

<sup>116</sup> See the list in I ALSINA, *op. cit. supra* note 106, at 394, which must be supplemented by Statute No. 12680 of 1941 and Decree No. 4257 of 1945 creating one additional judgeship for the territories of Chaco and Chubut respectively.

<sup>117</sup> The basic statutes regulating federal jurisdiction are Statutes Nos. 48 and 50 of 1863, 3 LEYES NACIONALES 23ff. and 45ff. (1940) and Statute No. 4055 of 1902, *id.* at 31ff.

<sup>118</sup> Thus the Supreme Court of Justice has upheld Statute No. 927 of 1878, 3 LEYES NACIONALES 29ff. (1940), which excludes from the field of concurrent federal jurisdiction all suits involving less than 500 pesos, *Vignale c. Albarracin*, 36 Fallos de la S. C. 394 (1889), *Pinto c. Moureaux*, 53 Fallos de la S. C. 111 (1893); *Ferrocarril Buenos Aires c. Sociedad E. Bertolina*, 119 Fallos de la S. C. 161 (1914); *Millan c. Caviglia*, 152 Fallos de la S. C. 344 (1928). The Supreme Court has also declared recently that the adjudication of matters regulated by federal statute of general application may be left to the

b. *Jurisdiction conferred upon the inferior federal courts.* The original jurisdiction of the sectional judges is predicated either upon the character of the subject matter or of the parties.<sup>119</sup>

(1) The federal jurisdiction defined by the subject matter is exclusive.<sup>120</sup> According to Article 2 of Statute No. 48 of 1863, it includes all matters

. . . which are governed specifically by the national constitution and the laws which Congress has enacted or may enact and by public treaties with foreign nations.<sup>121</sup>

Numerous difficulties are encountered in the interpretation of this article. Since a broad construction of the first clause would mean that whenever a constitutional issue is raised the provincial court loses jurisdiction, the Supreme Court of Justice has taken pains—not always consistently—to restrict its meaning to causes of action directly based on the constitution.<sup>122</sup> Otherwise the original federal jurisdiction would be unduly extended. The second clause has likewise required restrictive interpretation. Since the constitution itself excludes the four codes from the exercise of federal jurisdiction (absent other reasons for it),<sup>123</sup> the term “laws” in Article 2 of the statute of 1862 has been interpreted to apply only to “special” laws. Exactly what comes under this concept is a much debated question.<sup>124</sup> The statute governing bankruptcy has been considered a general law and not within the reach of federal jurisdiction.<sup>125</sup>

Original federal jurisdiction by reason of the character of the parties includes among others “civil suits in which the parties are an inhabitant of the province in which suit is brought and an inhabitant of another or in which the parties are an Argentine citizen and a foreigner.”<sup>126</sup> The interpretation of this section has been much influenced by United States precedents. The statute itself requires for the acquisition of inhabitancy within the meaning of this section a continuous residence of two years, or the holding of real property or such establishment that the intent to remain is manifested.<sup>127</sup> The Supreme Court of Justice has declared that this

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provincial courts. *Caja Nacional de Jubilaciones y Pensiones c. Enrique P. Oses y otros*, 190 Fallos de la S. C. 469 (1941). The position of the court is defended by GONDRA, *op. cit. supra* note 106, at 25ff. and criticized by I ZAVALIA, *op. cit. supra* note 106, at 419, 431.

<sup>119</sup> For discussions of the statutory provisions, see GONDRA, *op. cit. supra* note 106, at 1ff.; I ALSINA, *op. cit. supra* note 106, at 665ff.; I ZAVALIA, *op. cit. supra* note 106, at 371ff.

<sup>120</sup> Statute No. 48 of 1863, Art. 12, 3 LEYES NACIONALES 23ff. (1940). Conversely, the parties cannot bring non-federal matters before the federal courts by mutual agreement. Statute No. 50 of 1863, 3 *id.* at 45.

<sup>121</sup> See note 120 *supra*.

<sup>122</sup> Details are given in I ZAVALIA, *op. cit. supra* note 106, at 372ff.; GONDRA, *op. cit. supra* note 106, at 53 ff.; 2 PEREZ, *op. cit. supra* note 106, at 55ff.; I ALSINA, *op. cit. supra* note 106, at 665.

<sup>123</sup> CONST. 1853, Arts. 67(11) and 100, see parts 1 and 2, *supra*.

<sup>124</sup> See GONDRA, *op. cit. supra* note 106, at 63ff.; ALSINA, *op. cit. supra* note 106, at 667; I ZAVALIA, *op. cit. supra* note 106, at 381ff.

<sup>125</sup> GONDRA, *op. cit. supra* note 106, at 91ff.; I ZAVALIA, *op. cit. supra* note 106, at 389ff.; Statute of 1878 for an additional regulation of the jurisdiction and competence of the national tribunals, §2; Bankruptcy Act of 1933, Law No. 11719 Art. 52.

<sup>126</sup> Statute No. 48 of 1863, Art. 2(2), 3 LEYES NACIONALES 23 (1940).

<sup>127</sup> Statute No. 48 of 1863, Art. 11.



means the acquisition of domicile is necessary in all cases.<sup>128</sup> In addition it has limited the application of this article to Argentine citizens.<sup>129</sup> Inhabitants of the capital territory are by special statute assimilated to the inhabitants of a province.<sup>130</sup> Jurisdiction over this category is concurrent. Provincial jurisdiction attaches if the defendant denies the allegations of the complaint in a provincial court without contesting the jurisdiction.<sup>131</sup>

The federal Chambers of Appeal exercise appellate jurisdiction chiefly over the judgments of the sectional judges of first instance.<sup>132</sup>

*c. Appellate jurisdiction of the federal Supreme Court of Justice.* While the original jurisdiction of the federal Supreme Court is defined by the constitution, its appellate jurisdiction is statutory. Argentine procedural theory distinguishes between ordinary and extraordinary appeals. The former is a true appeal while the latter corresponds to a writ of error.<sup>133</sup> Ordinary appeals lie from the judgments of the Federal Chambers of Appeal in specifically enumerated cases of particular importance.<sup>134</sup> The extraordinary appeal lies from judgments of the Federal Chambers of Appeal, the Chambers of Appeal of the Federal District, and the Supreme Courts of the provinces to preserve the supremacy of the federal constitution, the federal statutes, and treaties in accordance with Article 31 of that instrument, which is a copy of the corresponding Article VI of the United States Constitution.<sup>135</sup> The prerequisites of these extraordinary appeals are regulated by Statute No. 48 of 1863, Article 14, which is in turn a close adaptation of the United States

<sup>128</sup> GONDRA, *op. cit. supra* note 106, at 223; I ZAVALIA, *op. cit. supra* note 106, at 422.

<sup>129</sup> Aspiazu y Bilbao c. Castagno, 1 Fallos de la S. C. 451 (1865); GONDRA, *op. cit. supra* note 106, at 222; I ZAVALIA, *op. cit. supra* note 106, at 421.

<sup>130</sup> Statute No. 1467 of 1884. See Demarchi c. Olmos, 29 Fallos de la S. C. 363 (1885). The constitutionality of this statute was not questioned in this case, in contrast to the attitude of our courts toward our similar statute of 1940. See Willis v. Dennis, 72 F. Supp. 853 (W. D. Va. 1947).

<sup>131</sup> Statute No. 48 of 1863, Art. 12(4).

<sup>132</sup> Statute No. 4055 of 1902, Arts. 15 and 16, 3 LEYES NACIONALES 31ff. (1940). The value of the litigation must exceed 500 pesos. For details see I ALSINA, *op. cit. supra* note 106, at 689ff.

<sup>133</sup> As to the jurisdiction of the Supreme Court of Justice in general, see I ALSINA, *op. cit. supra* note 106, at 691ff. The difference between the ordinary and extraordinary appeals consists chiefly in the scope of review. The writ of extraordinary appeal, which was unknown to the Italo-Spanish concepts of procedure that govern Argentine law, was introduced in imitation of the old United States writ of error. 2 ALSINA, *supra*, at 642ff.

<sup>134</sup> Statute No. 4055 of 1902, Art. 1, 3 LEYES NACIONALES 31ff. (1940). It lies in such civil actions against the nation as are authorized by statute, actions against private persons in tax matters and cases involving certain crimes, extradition, and certain war measures. Suits against the nation in certain matters were first authorized by Statute No. 3952 of 1900, 3 LEYES NACIONALES 93 (1940), after the Supreme Court of Justice, following North American rather than Spanish precedent, had declared the nation to be immune from suit by private parties. Balmaceda c. Fisco Nacional, 6 Fallos de la S. C. 159 (1868); Nunez c. el Gob. Nacional, 12 Fallos de la S. C. 227 (1872). The subsequent Statute No. 11634 of 1932, 3 LEYES NACIONALES 94 (1940), extended the suabidity of the nation to civil suits generally, see I ALSINA, *op. cit. supra* note 106, at 680.

<sup>135</sup> The present basis of this review by the Supreme Court is Art. 6 of Statute No. 4055 of 1902, *supra* note 117. For details see 2 ALSINA, *op. cit. supra*, note 106, at 642; I ZAVALIA, *op. cit. supra*, note 106, at 257ff; Pecach, *Los modos de iniciación del controlar judicial de la constitucionalidad de las leyes en la Rep. Argentina*, 5 REVISTA UNIVERSITARIA JURIDICAS Y SOCIALES 150 (1939). As to the political efficacy of the institution of judicial review in recent political developments, see Zavilia, *Amparo judicial, su alcance y eficacia*, 1 REVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES (3d Ser.) 53 (1946).

Judiciary Act of 1789, Sec. 25,<sup>136</sup> which provided for writs of error to the Supreme Court under identical conditions.

### 5. *Reform movements*

The present system has recently been criticized as unsatisfactory and changes have been proposed. On the one hand, it has been suggested that the diversity jurisdiction is of no advantage and should be abolished. But Argentine theory has taken the position that Congress could not go so far without constitutional amendment.<sup>137</sup> On the other hand, it has been advocated that the Supreme Court be transformed into a national court of review for the purpose of eliminating the discordant interpretations given to the great national codes by the the provincial supreme courts.<sup>138</sup>

## B. The United States of Brazil

### 1. *General features of the constitutional system*

Brazil declared her independence of the Crown of Portugal in 1822. Two years later the Empire of Brazil obtained a constitution.<sup>139</sup> In 1889 the republic was proclaimed, and in 1891 adopted its first constitution. It established a federal form of government, transforming the former imperial provinces into autonomous states.<sup>140</sup> Following the Vargas revolution of 1930 a new constitution was put in force in 1934,<sup>141</sup> and it in turn was superseded by another in 1937.<sup>142</sup> The present organic

<sup>136</sup> It provides: "Once a suit has been commenced in the provincial courts it must be decided and determined in the provincial jurisdiction, but the final judgments pronounced by the provincial courts can be appealed to the Federal Supreme Court in the following cases:

"1. if in the complaint the validity of a treaty, a Congressional statute or of an authority exercised in the name of the Nation was questioned and the decision was against the validity;

"2. if the validity of a statute, decree or authority had been questioned under the claim that it was repugnant to the national constitution, a treaty or the laws of Congress and the decision was in favor of the validity of the statute or authority;

"3. if the significance of any clause of the constitution or a treaty or a congressional statute or a commission exercised in the name of the national authority had been questioned and the decision went against the validity of the title, right, privilege and exemption which was founded upon these clauses and was a matter of the litigation."

Article 15 of the same act excludes specifically the codes mentioned in Article 67(11) of the constitution from the term "laws" as used in Article 14(3).

<sup>137</sup> See GONDRA, *op. cit. supra*, note 106, at 217ff., 219.

<sup>138</sup> See RIVAROLA, *La unidad de derecho en la Republica Argentina*, 15 REVISTA DEL COLEGIO DE ABOGADOS DE ROSARIO 53 (1944); COLOMBO, LA CORTE NACIONAL DE CASACION (2 vols. 1943).

<sup>139</sup> For the text of the constitution of 1824 see CONSTITUICOES DO BRASIL 5ff. (ed. by Marchese, 1944); for the history of its adoption see LEAL, HISTORIA CONSTITUCIONAL DO BRASIL (1915).

<sup>140</sup> For the text of the constitution of 1891 see CONSTITUICOES DO BRASIL, *supra*, note 139, at 37ff. The leading Brazilian commentaries are BARBALHO, CONSTITUICAO FEDERAL BRASILEIRA (2d ed. 1924); MAXIMILIANO, COMMENTARIOS A CONSTITUICAO BRASILEIRA (3 ed. 1929); BARBOSA, COMMENTARIOS A CONSTITUICAO FEDERAL BRASILEIRA (6 vols. 1934). A good English discussion is HERMAN G. JAMES, THE CONSTITUTIONAL SYSTEM OF BRAZIL (1923).

<sup>141</sup> For the text of the constitution of 1934 see CONSTITUICOES DO BRASIL, *supra* note 139, at 67. Its features are discussed in LEGON, REORGANIZACION DEL SISTEMA CONSTITUCIONAL DEL BRASIL (1935).

<sup>142</sup> For the text of the constitution of 1937 see CONSTITUICOES DO BRASIL, *supra* note 139, at 129. Its features are discussed in ARAUJO CASTRO, A CONSTITUICAO DE 1937 (1938) and PONTES DE MIRANDA, COMMENTARIOS A CONSTITUICAO DE 10 DE NOVEMBRO DE 1937 (3 vols. 1938). See also PEREIRA DE VASCONCELLOS, CONSTITUICAO DOS E. U. DO BRASIL, INTERPRETADA PELO DO SUPREMO TRIBUNAL FEDERAL (1944).

charter was promulgated on September 18, 1946.<sup>143</sup> The United States of Brazil form a federal union comprising twenty states,<sup>144</sup> the federal district constituting the capital,<sup>145</sup> and the territories.<sup>146</sup>

The powers of the union are enumerated by the constitution.<sup>147</sup> Its legislative competence extends to civil, commercial, penal, procedural, aviation, and labor law.<sup>148</sup> The states retain all powers which are not implicitly or expressly prohibited by the constitution.<sup>149</sup> The union possesses full powers in respect to the administration of the federal district and the territories.<sup>150</sup>

## 2. *The eclipse of the system of a dual jurisdiction and a dual judiciary*<sup>151</sup>

The constitution of 1891 was greatly influenced by those of the United States and Argentina. It provided, accordingly, for a federal jurisdiction and a dual judiciary. The judicial power was vested in a Supreme Federal Tribunal and as many federal judges and tribunals as Congress chose to create.<sup>152</sup> Federal jurisdiction was regulated much along the same lines as in the United States and Argentina.<sup>153</sup> The original jurisdiction of the lower federal courts was predicated upon either the subject matter or the character of the parties to the suit, including litigation between citizens of different states.<sup>154</sup> The original jurisdiction of the Federal Supreme Tribunal consisted of the familiar categories, and its appellate jurisdiction extended not only over the lower federal courts, but also over the state supreme courts.<sup>155</sup> In the latter case appeals lay only to safeguard the supremacy of the federal constitution and statutes, under conditions similar to those specified by the United States Judiciary Act.<sup>156</sup>

<sup>143</sup> 12 ANNUARIO DE LEGISLACAO FEDERAL 1004 (1946).

<sup>144</sup> The names of the States are Alagoas, Amazonas, Bahia, Ceará, Espírito Santo, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Paraíba, Paraná, Pernambuco, Piauí, Rio de Janeiro, Rio Grande do Norte, Rio Grande do Sul, Santa Catarina, São Paulo and Sergipe.

<sup>145</sup> CONST. 1946, Art. 1, §2.

<sup>146</sup> The territories are Acre, Fernando de Noronha, Amapá, Rio Branco, Guaporé, Ponta Parã and Iguaçú. With the exception of Acre, which was acquired in 1903, they were established in 1942 and 1943.

<sup>147</sup> CONST. 1946, Art. 5.

<sup>148</sup> *Id.* Art. 5, xv, a.

<sup>149</sup> *Id.* Art. 18, sec. 1.

<sup>150</sup> *Id.* Art. 25.

<sup>151</sup> Excellent surveys of the development of federal justice in Brazil are given by Justice Castro Nunes in his great treatise, *TEORIA E PRATICA DO PODER JUDICIARIO*, 58ff. (1943), and by Nunez Leal, *Organização judiciária dos territórios*, 1 *REVISTA DE DIREITO ADMINISTRATIVO* 789ff (1945).

<sup>152</sup> CONST. 1891, Art. 55. Even before the adoption of the constitution the republican government had established a Supreme Tribunal and twenty-one federal courts (one for each state and one for the capital). Decree No. 848 of 1890, amplified by Decree No. 1420A of 1891. This organization was retained, and all rules and regulations concerning organization and administration of federal justice were consolidated by Decree No. 3084 of 1898, *COLECCAO DAS LEIS DA REPUBLICA DOS E. U. DO BRASIL*, 779ff. (1898).

<sup>153</sup> For details see LESSA, *DIREITO CONSTITUCIONAL BRASILEIRO: DO PODER JUDICIARIO* (2d ed., 1915), and BARBALHO, *op. cit. supra*, note 140, at 313ff.

<sup>154</sup> CONST. 1891, Art. 60. Federal jurisdiction because of the subject matter was not predicated, however, simply on the fact that the litigation was based on a federal statute. To come within federal jurisdiction the suit had to involve a claim or defense founded on the constitution. This concept created great difficulties.

<sup>155</sup> CONST. 1891, Art. 59.

<sup>156</sup> *Id.*, Art. 59, §§1 and 2.

The constitutional provisions gave rise to numerous doubts and proved unsatisfactory. Consequently, this portion of the constitution was amended in 1926 for the purpose of eliminating the difficulties. The most significant change was the abolition of federal jurisdiction in diversity of citizenship cases.<sup>157</sup>

The 1934 constitution, in spite of its centralizing and authoritarian tendencies, retained the dual jurisdiction on the insistence of some states.<sup>158</sup> Its major innovation in the administration of justice was the grant to the federal government of power to enact rules of procedure applicable in the state courts. Otherwise no material changes were made except that the appellate jurisdiction of the Supreme Court was extended to review by writ of error (called *recurso extraordinario*) of decisions rendered by the state courts in violation of the literal terms of a federal statute.<sup>159</sup> The constitution of 1937, however, made a radical break with tradition. It eliminated all lower federal courts except in the federal district and the territories.<sup>160</sup> The state courts were listed as organs of the judicial power of the nation, thus manifesting the trend toward the national state.<sup>161</sup>

### 3. *The present scope and organization of federal justice*

a. *The organization of the federal courts.* The framers of the new constitution of 1946, while reemphasizing democratic principles, did not feel it necessary to restore lower federal courts of the old type. Apart from the electoral and the military tribunals, the constitution vests the judicial power of the national government in three types of courts: (1) the Federal Supreme Tribunal, (2) the Federal Tribunal of Appeals, and (3) labor tribunals.<sup>162</sup> The Federal Supreme Tribunal has its seat in the capital and is staffed by eleven justices; their number can be increased by statute upon request of the tribunal.<sup>163</sup> The Supreme Tribunal of Appeals likewise sits in the capital and is composed of nine members.<sup>164</sup> The labor tribunals form three sets of courts, viz., the Superior Labor Tribunal, regional labor tribunals as determined

<sup>157</sup> One of the other important changes made was the extension of the appellate jurisdiction of the Supreme Tribunal to situations in which two or more state courts had interpreted the same federal statute in different ways, Arts. 59-60, III, §1, c, in the form of the amendment of Sept. 3, 1926. Considering the fact that civil, commercial, and criminal law were controlled by federal codes, this extension was of great significance. For details see MAXIMILIANO, *op. cit. supra*, note, 140, at 623ff; CASTRO NUNES, *op. cit. supra*, note 151, at 377.

<sup>158</sup> See ARAUJO CASTRO, *op. cit. supra*, note 142, at 200.

<sup>159</sup> CONST. 1934, Art. 76, III, a.

<sup>160</sup> CONST. 1937, Art. 90. The extinction of the lower federal courts was perfected by the Decree-Law No. 6 of 1937, 3 COLECCAO DAS LEIS DO BRASIL, 311 (1937): cf. CASTRO NUNES, *op. cit. supra*, note 151, at 73ff, 78.

<sup>161</sup> See CAMPOS, O ESTADO NACIONAL (3d ed. 1941).

<sup>162</sup> CONST. 1946, Art. 94. The "Tribunal of Accounts" which is established by the Constitution of 1946, Art. 76, for the control of governmental expenditures (Arts. 22 and 77) does not constitute part of the judicial branch. While it exercises supervision in a judicialized form, its activities are comparable to those of the Comptroller-General in the United States, being executive in character. CASTRO NUNES, *op. cit. supra*, note 151, at 22ff; see also in general CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 407ff. (1941).

<sup>163</sup> CONST. 1946, Art. 98.

<sup>164</sup> *Id.*, Art. 103.

by statute, and conciliation and arbitration commissions.<sup>165</sup> In addition, the federal district<sup>166</sup> and the territories<sup>167</sup> have a separate federal judiciary. The constitution contains rigid standards for the appointment and tenure of the state judges, and guarantees impartial judicial process to all residents.<sup>168</sup>

b. *The jurisdiction of the federal courts.* Only the jurisdiction of the Federal Supreme Tribunal and of the Tribunal of Appeals will be outlined, in as much as the jurisdiction of the federal courts of general jurisdiction in the federal district and the territories and that of the labor courts are separately controlled by special statutes.<sup>169</sup>

(1) The Federal Supreme Tribunal exercises either original or appellate jurisdiction. The former extends to eleven specifically enumerated classes of cases, which include criminal prosecutions of certain high foreign or domestic officials and the revision of convictions in these cases; suits between foreign states on the one side and the union, the states, the federal district, or municipalities on the other; suits between the states or between the nation and the states; jurisdictional conflicts between state courts, between federal courts, or between state and federal courts; extraditions requested by foreign states; and, finally, writs of habeas corpus or mandamus, and injunctions against certain high officials.<sup>170</sup>

The appellate jurisdiction of the Federal Supreme Tribunal is exercised either in "ordinary" appeals or by writs of error.<sup>171</sup> Appeals are permitted (1) from denials by courts of last resort of writs of habeas corpus and mandamus,<sup>172</sup> (2) from judgments of local courts concerning either claims based on a treaty with a foreign nation or suits between foreign states and inhabitants of Brazil, and (3) from judgments in prosecutions for political crimes.<sup>173</sup>

<sup>165</sup> *Id.*, Art. 122. The labor tribunals are now regulated in detail by Decree-Law No. 9797 of 1946 (ANNUARIO DE LEGISLACAO FEDERAL, 894 (1946)), amending the Consolidação das leis do trabalho; Decree-Law No. 5425, 5 COLECCAO DAS LEIS DO BRASIL, 240 (1943).

<sup>166</sup> The administration of justice in the Federal District is regulated by the Código de Organização Judiciária do Distrito Federal, Decree-Law No. 8527 of 1945, 1 COLECCAO DAS LEIS DO BRASIL 578ff (1946), providing for a Tribunal of Appeal, now called Tribunal of Justice, composed of twenty-seven judges sitting in eight divisions, a tribunal for the press, a number of single judges of first instance, and a jury.

<sup>167</sup> The administration of justice in the territories is regulated by Decree-Law No. 6887 of 1944 (7 COLECCAO DAS LEIS DO BRASIL, 296, (1944)), which establishes various judicial districts and provides for a single judge, a press tribunal, a jury, and justices of the peace in each of them. See NUNES LEAL, *op. cit. supra*, note 151.

<sup>168</sup> See CONST. 1946, Art. 124, Art. 7, VII, g (federal intervention in case of non-compliance), and Art. 141.

<sup>169</sup> See notes 165-167 *supra*.

<sup>170</sup> CONST. 1946, Art. 101, I, a to k. For the development of the original jurisdiction of the Supreme Federal Tribunal, see CASTRO NUNES, *op. cit. supra*, note 151, at 213ff.

<sup>171</sup> As to the development of and difference between ordinary and extraordinary recourses (appeals and writs of error) see CASTRO NUNES, *op. cit. supra*, note 151, at 287ff, 309ff, and FRAGA, INSTITUICAO DO PROCESSO CIVIL DO BRASIL 256ff (1941).

<sup>172</sup> The *mandado de segurança*, which combines the functions of the writ of mandamus and an injunction against public officers, was introduced into Brazilian law in 1934. See ARAUJO CASTRO, *op. cit. supra*, note 142, at 383ff, and CASTRO NUNES, DO MANDADO DE SEGURANCA E OUTROS MEIOS DE DEFESA DO DIREITO CONTRA ACTOS DO PODER PUBLICO (1937).

<sup>173</sup> CONST. 1946, Art. 101, II.

Judgments rendered by courts of last resort are reviewable upon writ of error in four classes of cases, viz.:

(a) when the decision is contrary to a provision of the constitution or the terms of a treaty or federal statute,

(b) when the validity of a federal law has been questioned in view of the constitution and the decision below denied the applicability of the attacked statute,

(c) when the validity of the statute or act of a local government has been contested in view of the constitution or federal law and the decision below upholds the statute or act, and

(d) when in the decision below the interpretation of a federal statute is different from that which was given to it by another court or the Federal Supreme Tribunal itself.<sup>174</sup>

(2) The Federal Tribunal of Appeals has jurisdiction to issue writs of mandamus or injunctions against the ministers of state, and to hear appeals from cases in which the federal government is a party, or in which writs of habeas corpus or writs of injunction or mandamus against federal authorities have been denied.<sup>175</sup>

### C. The United States of Mexico

#### 1. General features of the constitutional system

The constitutional organization of Mexico has undergone a stormy development.<sup>176</sup> The first constitution based on democratic and federal principles was adopted in 1824.<sup>177</sup> It remained in force for only eleven years but, after various experiments with unitarian schemes, was restored in 1846. Its reign was again of short duration, however, due to the dictatorship of Santa Anna. The revolt of Ayutla resulted finally in the adoption of the liberal constitution of 1857, which was replaced by the present constitution of 1917.<sup>178</sup>

The federation is composed of twenty-eight states,<sup>179</sup> the federal district, and three territories.<sup>180</sup> The federation also possesses jurisdiction over all islands not under the actual control of a state.<sup>181</sup> The federal government is divided into the

<sup>174</sup> *Id.*, Art. 101, III, a to d. As to the construction of the analogous clauses in the constitution of 1937 see CASTRO NUNES, *op. cit. supra*, note 151, at 353ff.

<sup>175</sup> CONST. 1946, Art. 104.

<sup>176</sup> On the constitutional history of Mexico, see CAMPILLO CAMARILLO, *TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL MEXICANO* (1928), xvff, and JOHN T. VANCE AND HELEN L. CLAGETT, *A GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO* 161ff (1945).

<sup>177</sup> On the early history of federalism in Mexico, see MARTINEZ PALAFOX, *LA ADOPTION DEL FEDERALISMO EN MEXICO* (1945).

<sup>178</sup> The constitution of 1917 has been amended several times pursuant to the procedure specified in Art. 135. For a recent text see TRUEBA URBINA, *CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS* (3d ed. 1946), which, however, does not incorporate the amendment of Dec. 16, 1946, regarding Art. 104, *Diario Oficial* Dec. 30, 1946.

<sup>179</sup> Their names are listed in Art. 43 of the Constitution, 1917: Aguascalientes, Campeche, Coahuila, Colima, Chiapas, Chihuahua, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nueva León, Oaxaca, Puebla, Querétaro, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxacala, Veracruz, Yucatán and Zacatecas.

<sup>180</sup> CONST. 1917, Arts. 43 and 45: Territorio Norte de la Baja California, Territorio Sur de la Baja California, and Quintana Roo.

<sup>181</sup> *Id.*, Art. 48.

three traditional branches. Its legislative powers are specifically enumerated.<sup>182</sup> The constitution provides expressly for the adoption of a commercial code but makes no such reference to a civil code.<sup>183</sup> The federal government has full legislative powers in the federal district and the territories.<sup>184</sup>

## 2. *Constitutional provisions as to the judicial power*

The judicial power of the federation is regulated in Title III, Chapter IV of the constitution. It is lodged in a Supreme Court of Justice, Circuit Tribunals, and District Judgeships, the number and functions of which are fixed by statute.<sup>185</sup> The Supreme Court of Justice is composed of twenty-one justices who sit *in banco* or in four divisions as determined by statute. Since 1940 the Supreme Court of Justice has exercised supervision over the lower federal courts.<sup>186</sup>

The constitutional scope of federal jurisdiction is governed by Articles 103 and 104.<sup>187</sup> The former vindicates the supremacy of the constitution in regard to both the federal structure and the guarantees of civil rights.<sup>188</sup> The latter defines the other controversies which the framers wished to confide to the federal courts because of the subject matter or the parties involved.<sup>189</sup> Suits between a state and the inhabitants of another state are within the ambit of federal jurisdiction, but suits between citizens of different states are not. Controversies involving compliance with, or the application of, a federal statute or treaty which affects only private interests may be

<sup>182</sup> *Id.*, Art. 73 (I-XXIX).

<sup>183</sup> *Id.*, Art. 73(X). The Federal Civil Code of 1932 which applies in all of Mexico is therefore specifically restricted to federal matters.

<sup>184</sup> *Id.*, Art. 73 (VI).

<sup>185</sup> *Id.*, Art. 94.

<sup>186</sup> CONST. 1917, Art. 97, as amended in 1940. Diario Oficial No. 9, 1 (1940).

<sup>187</sup> For a discussion of details, see LANZ DURET, DERECHO CONSTITUCIONAL MEXICANO 291ff (1936).

<sup>188</sup> Art. 103 of the Constitution, 1917, provides: "The tribunals of the Federation shall determine every controversy which arises:

"I. because of laws or acts of federal authorities which violate civil liberties guaranteed by the constitution;

"II. because of laws or acts of federal authorities which violate or encroach upon the sovereignty of the states; and

"III. because of laws or acts of authorities of the latter which invade the sphere of federal authority."

<sup>189</sup> Art. 104 provides: "The tribunals of the Federation shall take cognizance

"I. of all civil or criminal controversies which arise about the compliance with or application of federal statutes or out of treaties concluded with foreign powers. If such controversies affect only private interests the local judges and tribunals of general jurisdiction in the states, the Federal District and the territories may take cognizance thereof at the election of plaintiff. The judgments of first instance are appealable to the immediate superior of the judge who has decided the suit in first instance.

"In the suits in which the Federation has an interest the law may prescribe appeals to the Supreme Court of Justice against the judgments of second instance or against judgments of administrative tribunals created by federal statute, provided that these tribunals are endowed with full independence to render their decisions;

"II. of all controversies involving maritime law;

"III. of those in which the Federation was a party;

"IV. of those which arise between two or more states, or between a state and the Federation, as well as of those which arise between the tribunals of the Federal District and those of the Federation or a state;

"V. of those which arise between a state and one or more inhabitants of another;

"VI. of the suits concerning a member of the diplomatic or consular corps."

adjudicated, at the election of the plaintiff, by the judges of federal jurisdiction or by the ordinary courts of justice.

The original jurisdiction of the Supreme Court of Justice extends to controversies between states, between the states and the federation, and all other suits to which the federation is a party.<sup>190</sup> The Supreme Court also determines disputes between the authorities of one state about the constitutionality of their acts,<sup>191</sup> and jurisdictional disputes between various federal courts, or federal and state courts, or courts of different states.<sup>192</sup>

Article 107 gives rules for the vindication by judicial action of constitutional supremacy as provided in Article 103. This method is a proceeding, peculiar to the Mexican system, called the writ of *amparo*,<sup>193</sup> the details of which are governed by statute.

### 3. Statutory provisions as to the organization of the federal courts

The statute regulating the organization of courts is the Organic Law for the Judicial Power of the Federation of 1935.<sup>194</sup> The national territory is divided into six circuits, each of which is the seat of a Circuit Tribunal (with one judge) and of a varying number of district judgeships.<sup>195</sup> The Supreme Court of Justice exercises its original jurisdiction under Article 105 *in banco*; in all other cases it acts through one of the four divisions.<sup>196</sup> A Fiscal Tribunal of the Federation was added to the federal judiciary in 1936.<sup>197</sup> Following the example of Argentina, federal jurisdiction and ordinary jurisdiction are separate even in the federal district and the territories. The latter is regulated by a statute of 1932<sup>198</sup> which establishes a Superior

<sup>190</sup> The nation must be a party not in its capacity as "authority" but as "person." Vázquez Vallejo *c. Gov. Fed.*, 81 SEMANARIO JUDICIAL, 6015 (1941).

<sup>191</sup> CONST. 1917, Art. 105.

<sup>192</sup> *Id.*, Art. 106.

<sup>193</sup> The Mexican literature on the writ of *amparo* is extensive. See VANCE AND CLAGETT, *op. cit. supra*, note 176, at 172ff. The classical treatises are CASTILLO, *TEORIA DEL RECURSO DE AMPARO* (1901); MORENA CORA, *TRATADO DEL JUICIO DE AMPARO CONFORME A LAS SENTENCIAS DE LOS TRIBUNALES FEDERALES* (1902); CORTES, *EL JUICIO DE AMPARO AL ALCANCE DE TODOS* (1908). Also illuminating is Vega, *El juicio de amparo y el recurso de casacion Frances* (1889), reprinted in 8 *REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA*, 213 (1946). More modern treatments are DE LEON, *MANUAL DE PROCEDIMIENTO CIVIL* 64ff (1934); COUTO, *LA SUSPENSION DEL ACTO RECLAMADO EN EL AMPARO* (1929); Moreno, *La sentencia del amparo*, 1 *JUS, REVISTA DE DERECHO Y CIENCIAS SOCIALES*, No. 2, 35 (1938); DE LEON, *MANUAL Y LEY DE AMPARO* (1940). The most significant discussions of the writ are contained in the report of the third division of the federal Supreme Court of Justice in *INFORME RENDIDO A LA SUPREMA CORTE DE JUSTICIA* (1941), and the report of the committee of justices, entitled *El problema del rezago de juicios de amparo en materia civil*, in *INFORME RENDIDO A LA SUPREMA CORTE DE JUSTICIA* (1946).

<sup>194</sup> *Diario Oficial* No. 8 (Jan. 10), 1ff (1936).

<sup>195</sup> *Ley orgánica del Poder Judicial de la Federación*, Art. 71ff. The six circuit tribunals sit at Mexico City, Aguascalientes, Monterey, Guadalajara, Puebla City, and Merida City. The total number of district judgeships at present is forty-six, the Federal District having six federal judges and each state at least one.

<sup>196</sup> *Ley orgánica del Poder Judicial*, Art. 11. Cf. WHELESS, *COMPENDIUM OF THE LAWS OF MEXICO* 530 (2d ed. 1938).

<sup>197</sup> *Ley de Justicia Fiscal* of Aug. 27, 1936. The position and jurisdiction of this court are now defined by the *Código fiscal de la federación* of 1938, Arts. 146 and 160.

<sup>198</sup> *Ley orgánica de los tribunales de justicia del fuero común del Distrito y territorios federales*, 75 *DIARIO OFICIAL*, No. 53, 2 (1932). The statute has been amended several times.



Court of Justice for the federal district and one Superior Tribunal each for Northern and Southern Lower California, and provides for a variety of judicial officers of inferior jurisdiction. The federal courts and the courts of ordinary jurisdiction in the federal district and the territories observe different rules of procedure.<sup>199</sup>

#### 4. *Statutory provisions regulating federal jurisdiction*

In addition to and in pursuance of the constitutional provisions, the federal jurisdiction (in the technical sense) is regulated by two statutes, viz., by the above mentioned *Ley orgánica del poder judicial* of December 30, 1935, and by the *Ley orgánica de los Artículos 103 y 107 de la Constitución Federal*, called *Ley de amparo*, of the same date.<sup>200</sup> The first statute sets forth in detail the jurisdiction of the district judges over criminal, civil, and administrative litigations,<sup>201</sup> that of the Circuit Tribunals, which is chiefly appellate,<sup>202</sup> and that of the Supreme Court of Justice,<sup>203</sup> the appellate jurisdiction of which was recently augmented by giving to it the appeals listed in Article 104(T), Par. 2. of the Constitution.<sup>204</sup>

The jurisdiction in *amparo* is controlled by the separate statute mentioned. The bulk of the business of the federal courts and of the Supreme Court in particular is formed by proceedings under the *Ley de amparo*.<sup>205</sup> The office of the writ, as we have said, is the prevention of infringements upon the federal structure and of the civil liberties guaranteed by the constitution.<sup>206</sup> One of these liberties is embodied in a provision similar to our due process clause with the specific addition that "civil judgments must be in conformity with the letter or the juridical interpretation of the statutes or in the absence thereof be based upon the general principles of law."<sup>207</sup> Logically, therefore, any incorrect judgment constitutes a violation of this constitutional guaranty which can be vindicated by the writ of *amparo*. The Supreme Court of Justice, indeed, has reached this conclusion. As a result the federal judiciary, particularly the Supreme Court itself,<sup>208</sup> has gradually become "an organ of control

<sup>199</sup> They are contained in the Código de procedimientos civiles para el Distrito federal y territorios of Aug. 30, 1932, and the Código federal de procedimientos civiles of Dec. 31, 1942, 131 DIARIO OFICIAL, No. 45 (1943).

<sup>200</sup> DIARIO OFICIAL (Jan. 10, 1936). Cf. WHELESS, *op. cit. supra*, note 196, at 536.

<sup>201</sup> *Ley orgánica del Poder Judicial* Arts. 41, 42, 43, 44, 45. Cf. WHELESS, *op. cit. supra*, note 196, at 532.

<sup>202</sup> *Id.*, Art. 36; cf. WHELESS, *op. cit. supra*, note 196, at 531.

<sup>203</sup> *Id.*, Arts. 11, 24, 25, 26, 27.

<sup>204</sup> See note 189 *supra*. The significance of this amendment is discussed by Carrillo Flores, *La significación de una reciente reforma constitucional*, 9 REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA, No. 33, 9 (1947).

<sup>205</sup> The business of the federal courts is classified in the judicial statistics contained in the annual *Informe* issued by the Supreme Court of Justice.

<sup>206</sup> See note 192 *supra*, and text. Civil liberties were suspended during the war by decree of June 1, 1942, but restored by law of Sept. 28, 1945. DIARIO OFICIAL (Dec. 28, 1945).

<sup>207</sup> CONST. 1917, Art. 14, par. 4.

<sup>208</sup> According to the statute the writ of *amparo* lies either in the Supreme Court in the first instance (*amparo directo*) or goes there on review (*amparo en revision*); cf. the headings of the Supreme Court cases in the official reports called *Semanario Judicial*. Five decisions by the Supreme Court of Justice to the same effect, not interrupted by a contrary holding, are binding on all lower courts. *Ley de amparo*, *supra* note 200, Arts. 193, 194; see also VANCE AND CLAGETT, *op. cit. supra*, note 193, at 177; WHELESS, *op. cit. supra*, note 196, at 542.

of the legality of all acts of the authorities of the whole country," and a "veritable centralization of justice"<sup>209</sup> has taken place. To remedy this condition a radical reform of the pertinent provisions of the constitution and the statute regulating the writ has been projected.<sup>210</sup>

#### D. The United States of Venezuela

##### 1. *General features of the constitutional system*

The constitutional history of Venezuela vascillates between periods of unitarian and federal organization.<sup>211</sup> The birth of the present federation is officially set at 1858. The style of "United States of Venezuela" was first adopted in the constitution of 1864.<sup>212</sup> A number of constitutions succeeded one another. The present organic charter was adopted on July 5, 1947.<sup>213</sup> According to this constitution<sup>214</sup> the United States of Venezuela is composed of twenty states,<sup>215</sup> the federal district containing the capital,<sup>216</sup> the federal territories,<sup>217</sup> and federal dependencies.<sup>218</sup>

The constitution regulates the powers of the states<sup>219</sup> and of the nation.<sup>220</sup> The states retain all non-delegated powers,<sup>221</sup> but their legislatures and executives<sup>222</sup> must comply with certain prescribed standards of organization. The powers of the nation are divided into the traditional three branches. The subjects of national legislation are specifically enumerated<sup>223</sup> and include the administration of justice, civil, commercial, penal, and procedural law, and all other matters which the constitution attributes to the national government.<sup>224</sup>

##### 2. *Constitutional provisions as to the judicial power*

Until the adoption of the constitution of 1945, which has been superseded by the present constitution, the states were responsible for the administration of justice on the lower level. The federal government merely participated through the high-

<sup>209</sup> These are the observations of the court itself in the committee report of 1946, *supra*, note 193, at 65.

<sup>210</sup> See the memoranda by the Supreme Court in 1941 and 1946, *supra* note 193.

<sup>211</sup> Cf. PERERA, *HISTORIA ORGANICA DE VENEZUELA* (1943); GIL FORTOUL, *HISTORIA CONSTITUCIONAL DE VENEZUELA* (3 vols., 3d ed. 1942); OROPEZA, *EVOLUCION CONSTITUCIONAL DE NUESTRA REPUBLICA* (1944).

<sup>212</sup> The texts of the various Venezuelan constitutions from 1811 to 1936 are reprinted in PICON RIVAS, *INDICE CONSTITUCIONAL DE VENEZUELA* (1944). For a summary see CLAGETT, *A GUIDE TO THE LAW AND LEGAL LITERATURE OF VENEZUELA* 59ff. (1947).

<sup>213</sup> *Gazeta Oficial*, July 30, 1947, No. 194 Extra.

<sup>214</sup> CONST. 1947, Art. 2.

<sup>215</sup> They are Anzoátegui, Apure, Aragua, Barinas, Bolívar, Carabobo, Cojedes, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Nueva Esparta, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy, Zulia.

<sup>216</sup> Pursuant to the Constitution of 1947, Art. 5, its administration is regulated by the *Ley orgánica del Distrito Federal* of Oct. 14, 1936, as amended in 1937. *COMPILACION LEGISLATIVA DE VENEZUELA* 830 (ed. by Pulido Villafañe and others, 1940).

<sup>217</sup> Amazonas and Delta Amacuro, CONST., 1947, Art. 7. Their administration is regulated by statutes of 1940. See note 235, *infra*.

<sup>218</sup> All islands except Coche, Margarita, and Cubagua, which form Nueva Esparta. CONST. 1947, Art. 9. Their administration is governed by statute of 1938, note 236 *infra*.

<sup>219</sup> *Id.*, Tit. VI.

<sup>220</sup> *Id.*, Tit. VII.

<sup>221</sup> *Id.*, Art. 120.

<sup>222</sup> *Id.*, Tit. VI, c. 2, §§1 and 2.

<sup>223</sup> *Id.*, Art. 138.

<sup>224</sup> *Id.*, Arts. 138, 4, 25 and 26.

est tribunal, called the Federal and Review Court,<sup>225</sup> some special tribunals, and the courts of general jurisdiction for the federal district and the territories.

The constitution of 1945 provided for the *nationalization of the whole administration of justice*.<sup>226</sup> The present constitution operates on the same principle. The states have no constitutional power to establish a judiciary, and the administration of justice is listed among the subjects of national legislation.<sup>227</sup>

The new constitution provides specifically that "the judicial power of the Republic is independent of the other Public Powers and constituted by the Supreme Court of Justice and the other Tribunals which the law establishes."<sup>228</sup>

The Supreme Court of Justice is composed of ten justices who may sit in divisions according to statutory regulation.<sup>229</sup> Its jurisdiction, original and appellate, is specifically enumerated under thirteen heads, which include appeals and all other writs which are conferred upon it by statute and "all other attributions which are assigned to it by the constitution and states on subjects of national power."<sup>230</sup>

### 3. *Statutory provisions regulating the organization and jurisdiction of courts*

The abolition of the state courts has not yet been effected.<sup>231</sup> The organization and jurisdiction of the Supreme Court, except in so far as they are altered by the new constitution, are still regulated by the Organic Law of the Federal and Review Court of 1945.<sup>232</sup> In addition, special labor tribunals<sup>233</sup> and tax courts<sup>234</sup> have been established. Separate statutes have been passed for the regulation of the administration of justice in the federal district,<sup>235</sup> the federal territories,<sup>236</sup> and the federal dependencies.<sup>237</sup>

<sup>225</sup> Corte Federal y de Casacion. The name and the functions of this court have varied with the different constitutions.

<sup>226</sup> As to the movement towards nationalization of the administration of justice, see RUGGERI PARA, LA JUSTICIA CENTRALIZADA (1944), HERNANDEZ RON, LA NACIONALIZACION DE LA JUSTICIA EN VENEZUELA (1944), 2 WOLF, TRATADO DE DERECHO CONSTITUCIONAL VENEZOLANO 340 (2 vols. 1945).

<sup>227</sup> See the provisions concerning the organization of the states and the legislative powers of the nation, *supra*, notes 221, 223, and text.

<sup>228</sup> CONST., 1947, Art. 211. <sup>229</sup> *Id.*, Arts. 218, 220. <sup>230</sup> *Id.*, Art. 220(3) and (13).

<sup>231</sup> *Cf.* the temporary regulation by Decree No. 87 of December, 1945, DECRETOS Y RESOLUCIONES DE LA JUNTA REVOLUCIONARIA DE GOBIERNO 124 (1946).

<sup>232</sup> Ley orgánica de la Corte Federal y de Casacion, *Gazeta Oficial* Aug. 27, 1945, No. 21796. The planned companion statute, Ley orgánica del Poder Judicial, was never promulgated because of the revolution of 1945. The court sits either *in banco* or in two divisions called Federal Chamber and Appeal Chamber. The court reviews all applications of federal statutes, Ley orgánica, Art. 15(6). Its decisions are reported in the annual *Memoria de la Corte Federal y de Casacion* and in the *Gazeta Oficial*.

<sup>233</sup> Ley orgánica de tribunales y de procedimiento de trabajo of 1940 (1940), 63(2) RECOPIACION DE LEYES Y DECRETOS 215, which establishes a Superior Labor Tribunal and various Labor Tribunals.

<sup>234</sup> Ley orgánica de la Hacienda Nacional of 1934, in the form of the amendment of 1947, *Gazeta Oficial*, July 30, 1947, No. 195 Extra, which provides for a special Superior Tribunal and National Tax Judges (Art. 273).

<sup>235</sup> Ley orgánica de los tribunales del Distrito Federal of 1936 as amended in 1939 and 1943, 66 RECOPIACION DE LEYES Y DECRETOS 563. The administration of justice in the district is confided to a Supreme Court, a Superior Civil and Commercial Court, a Superior Criminal Court, five judges of first instance, three divisional judges of limited jurisdiction, and other specialized judicial personnel.

<sup>236</sup> Ley orgánica del Territorio Federal Delta Amacuro, 1940, 63(2) RECOPIACION DE LEYES Y DECRETOS 55; Ley orgánica del Territorio Federal Amazonas, 1940, *id.* at 170.

<sup>237</sup> Ley orgánica de las Dependencias Federales, 1938, 63(3) RECOPIACION DE LEYES Y DECRETOS 45 (1940).

## III

## FEDERATIONS IN EUROPE AND ASIA

## A. The Swiss Confederation

1. *General features of the constitutional system*

The Swiss Confederation boasts the oldest federal tradition of any existing government. Its origin goes back to the celebrated compact of 1291 between Uri, Schwyz, and Unterwalden.<sup>238</sup> The present constitution dates from May 29, 1874, but has undergone a number of amendments.<sup>239</sup> The confederation is composed of twenty-two sovereign cantons.<sup>240</sup> No federal district or federal territories exist. The legislative powers of the confederation are specifically enumerated and extend to the whole field of private, commercial, bankruptcy, and criminal law.<sup>241</sup>

2. *Constitutional provisions as to the judicial power*

The constitution specifically provides for the establishment of a Federal Court and a Federal Administrative Court,<sup>242</sup> the organization of which is left to statute.<sup>243</sup> The Federal Court is given jurisdiction in a number of specifically listed civil,<sup>244</sup> criminal,<sup>245</sup> and constitutional<sup>246</sup> matters. The last include the violation of the civil rights guaranteed by the constitution, but it is expressly declared that the statutes and resolutions passed by the Federal Diet and all treaties ratified by it are binding upon the courts.<sup>247</sup> These rules are supplemented by two important catch-all clauses. On the one hand, the Federal Court must take jurisdiction over cases which both

<sup>238</sup> For the evolution of Swiss constitutional law see HILTY, *DIE BUNDESVERFASSUNGEN DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT* (1891); HIS, *GESCHICHTE DES NEUERN SCHWEIZERISCHEN STAATSRECHTS* (3 vols., 1920); HEUSLER, *SCHWEIZERISCHE VERFASSUNGSGESCHICHTE* (1920).

<sup>239</sup> The present form is printed in *1 NEUES RECHTSBUCH DER SCHWEIZ 1ff.* (ed. by the Chancellery of the Confederation, 2 vols., 1946). The leading commentary on the constitution is BURCKHARDT, *KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG* (3d ed. 1931).

<sup>240</sup> CONST. 1874, Art. 1. They are Zurich, Bern, Luzern, Uri, Schwyz, Unterwalden, Glarus, Zug, Freiburg, Solothurn, Basel, Schaffhausen, Appenzell, St. Gallen, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, and Geneva.

<sup>241</sup> *Id.*, Arts. 64 and 64 bis.      <sup>242</sup> *Id.*, Arts. 106 and 114 bis.      <sup>243</sup> *Id.*, Art. 107.

<sup>244</sup> *Id.*, Art. 110. "The Federal Court adjudicates civil controversies

"1. between the confederation and the cantons;

"2. between the confederation on the one side and corporations or individuals on the other, if the object of the litigation is of significance as determined by law and the corporations or individuals are plaintiffs;

"3. between the cantons;

"4. between the cantons on the one side and corporations or individuals on the other, if the object of the litigation is of sufficient significance as determined by law and if one of the parties requests it. . ."

<sup>245</sup> *Id.*, Art. 112.

<sup>246</sup> *Id.*, Art. 113.

<sup>247</sup> *Id.*, Art. 113, last paragraph. The Federal Court is not only denied the power to declare federal statutes or resolutions unconstitutional, but is also severely restricted in its jurisdiction over complaints based upon a violation of the constitutional rights of citizens. The federal statute on the organization of the federal administration of justice of 1943, note 252 *infra*, Art. 84a, confers jurisdiction only in respect to ordinances or decrees by officials of the *cantons*. Complaints against decisions or orders of *federal* agencies or departments are decided by the Federal Council, *id.*, Art. 124, except in cases in which the jurisdiction of the Federal Court is expressly prescribed by the Act, Arts. 97-99. On the whole question, see the references in Schoch, *Conflict of Laws in a Federal State, The Swiss Experience*, 55 HARV. L. R. 738, 749, notes 60-61 (1942); RUCK, *SCHWEIZERISCHES STAATSRECHT* 133ff (2d ed. 1939).

parties submit to it, if the object is of sufficient significance as defined by statute.<sup>248</sup> On the other hand, the Federal Diet is given power to add further cases to the jurisdiction of the court, especially such functions as are necessary for the uniform application of the laws on the subjects mentioned above.<sup>249</sup> It is, however, expressly provided that the cantons retain control over the organization and procedure of their courts.<sup>250</sup>

The organization and jurisdiction of the Administrative Court are left to statutory regulation.<sup>251</sup>

### 3. *Statutory provisions as to the organization of the federal courts*

The organization of the Federal Court, envisaged by the constitution, is regulated by the recent revision and codification of the law on the organization of federal justice of 1943.<sup>252</sup> No separate administrative court has been established; its functions have been conferred upon the Federal Court. There exists, however, a separate Federal Insurance Court for the adjudication of controversies arising under certain social insurance statutes.<sup>253</sup> While its establishment is not in terms provided for by the constitution, its legality followed from the power of the Diet to legislate on social insurance.

The Federal Court is composed of not less than twenty-six and not more than twenty-eight regular justices, and eleven to thirteen substitutes.<sup>254</sup> Its judicial functions are exercised by nine different divisions.<sup>255</sup> The whole bench acts judicially only in exceptional circumstances—when one division wants to deviate from the decision of another.<sup>256</sup>

### 4. *Statutory provisions regulating federal jurisdiction*

The federal law on the organization of federal justice also defines in detail the original and appellate jurisdiction of the divisions of the Federal Court in civil, bankruptcy, constitutional, and administrative matters.<sup>257</sup> The criminal jurisdiction

<sup>248</sup> CONST. 1874, Art. 111.

<sup>249</sup> *Id.*, Art. 114.

<sup>250</sup> *Id.*, Art. 64 bis, par. 2. The regulation of the burden of proof and the effects of *res judicata* are considered as substantive law within the control of the federal legislature; BURCKHARDT, *op. cit. supra*, note 239, at 589ff.

<sup>251</sup> *Id.*, Art. 114 bis, par. 1.

<sup>252</sup> Bundesgesetz über die Bundesrechtspflege of 1943, 95 BUNDESLATT DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT I, 167ff (1943). An official message by the Federal Council which accompanied and explained the bill is published in *id.* at 97.

<sup>253</sup> Federal Ordinance Relating to the Organization and Procedure of the Federal Insurance Court of March 28, 1917, 1 NEUES RECHTSBUCH DER SCHWEIZ, *cited supra*, note 239, at 950.

<sup>254</sup> Law on the Organization of Federal Justice, *supra* note 252, Art. 1.

<sup>255</sup> *Id.*, Art. 12. There are eight ordinary divisions, of which one sits in constitutional and administrative controversies, two in private suits, one in bankruptcy, and four in various criminal matters. An extraordinary division acts on certain criminal appeals from the other divisions. The details are regulated by a General Order of the Court of 1944, 1 NEUES RECHTSBUCH DER SCHWEIZ, *cited supra*, note 239, at 971.

<sup>256</sup> Law on the Organization of Federal Justice, *supra* note 252, Art. 16.

<sup>257</sup> *Id.*, Art. 41ff. (civil matters), Art. 75ff. (bankruptcy), Art. 83ff. (constitutional matters), Art. 97ff. (administrative matters).

is governed by separate statutes.<sup>258</sup> It may suffice to point out that an appeal from the final judgments of the cantonal courts in civil suits may be based only upon a violation of federal law or of a treaty.<sup>259</sup> Infringement upon one of the constitutional guaranties cannot be vindicated in that way, but must be asserted in separate proceedings within specially and narrowly defined limits.<sup>260</sup> The decisions of the Federal Court are officially reported and classified according to the four main heads of jurisdiction.<sup>261</sup>

## B. The Union of Soviet Socialist Republics

### 1. *General features of the Constitutional system*

With the disintegration of the Russian Empire in war and revolution in 1917 and 1918, the major ethnic groups established their independence and declared themselves republics. Russians, Ukrainians, Byelorussians, Georgians, Armenians, and Azerbaidjanians created soviet socialist republics. Finns, Poles, Estonians, Latvians, and Lithuanians adopted patterns of governmental organization and economic structure familiar to Central and Western Europe. The nomadic feudal peoples of Central Asia emerged in a middle position by establishing soviet republics without public ownership of the means of production.

Survival as individual republics in the face of economic stagnation and the danger of annihilation was found difficult, if not impossible, and a movement toward union emerged as early as 1919.<sup>262</sup> By degrees the peoples of the soviet socialist republics brought their economic, military, and diplomatic activities together until formal union was agreed upon in December, 1922.<sup>263</sup> Union took the form of federation.<sup>264</sup> Since that time internal boundary changes and the admission of

<sup>258</sup> Bundesgesetz über die Bundesstrafrechtspflege of 1934, as amended by the Bundesgesetz über die Organisation der Bundesrechtspflege, Art. 168. 1 NEUES RECHTSBUCH DER SCHWEIZ, cited *supra* note 239, at 906; Schweizerisches Strafgesetzbuch, 1937, Art. 340ff., 1 *id.* at 782, 837.

<sup>259</sup> Law on the Organization of Federal Justice, 1943, *supra* note 252, Art. 43. "Federal law" also includes the principles deduced from a federal statute.

<sup>260</sup> *Id.*, Art. 43, par. 1, cl. 2. See note 247 *supra*.

<sup>261</sup> Entscheidungen des Schweizerischen Bundesgerichts, issued in four parts, viz., public and administrative law, private law, bankruptcy and criminal law.

<sup>262</sup> Documents relating to Soviet constitutional history have been published in ISTORIYA KONSTITUTSII V DEKRETAKH I POSTANOVLENIYAKH SOVETSKOGO PRAVITELSTVA, 1917-1936 (Moscow, 1936).

<sup>263</sup> The original members of the Union were the Russian Socialist Federated Soviet Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic and the Transcaucasian Socialist Federated Soviet Republic. The R. S. F. S. R. was a federation of the Great Russians with the politically and sometimes culturally immature ethnic minorities, living in relatively homogeneous groups, in the area between Leningrad and Vladivostok. No special position was given these minorities in the central governmental structure of the R. S. F. S. R., and their agencies of local government bore the same structural relationship to the central government of the R. S. F. S. R. as the agencies of local government in the provinces which were basically Great Russian in ethnic structure. The Transcaucasian S. F. S. R. differed in that it was a federation of three politically and culturally equal peoples—the Georgians, Armenians and Azerbaidjanians. Each retained its own Republic and delegated to the federal government of the Transcaucasian S. F. S. R. only military and economic powers.

<sup>264</sup> The first federal constitution of the Union of Soviet Socialist Republics was patterned on the Agreement of Union of December, 1922. It was formally and finally adopted on January 31, 1924, although it had been put into effect on July 6, 1923, subject to final approval. For English translation of text, see RAPPARD *et al.*, SOURCE BOOK ON EUROPEAN GOVERNMENTS (1937).

additional peoples have swelled the total of federated republics to sixteen.<sup>265</sup> In addition to these "union republics" there are sixteen "autonomous soviet socialist republics," nine "autonomous regions," and ten "national districts."<sup>266</sup>

## 2. *Constitutional provisions as to the judicial power*

The federating republics brought into the union in 1922 their own systems of courts. These republic courts have remained to the present day the major judicial agencies within the U. S. S. R. The first federal constitution granted to the federal government power to establish the basic principles to be followed by the republics in the structure of their courts and also in the enactment of legislation relating to procedure and to civil, criminal, and labor law; but the enactment of statutes putting these basic principles into effect remained the province of each republic.<sup>267</sup>

A Supreme Court of the U. S. S. R. was also created "for the purpose of enforcing revolutionary law and order within the territory of the U. S. S. R."<sup>268</sup> No inferior federal courts were created by the constitution, but by the first federal judiciary act of 1924<sup>269</sup> military tribunals were created in districts, corps, fronts, and fleets, and the Military Transport College of the Supreme Court was given original jurisdiction over crimes committed by transport officials without regard to the republics in which the crimes were committed.

The judicial system of the U. S. S. R. has continued to be a dual one of federal and republic courts since the establishment of the union. It is currently established in accordance with the pattern authorized by the second federal constitution as follows:<sup>270</sup>

In the U. S. S. R. justice is administered by the Supreme Court of the U. S. S. R., the Supreme Courts of the Union Republics, the Territorial and Provincial courts, the courts

<sup>265</sup> The second constitution of the U. S. S. R. became effective on December 5, 1936, with eleven participating Republics, namely R. S. F. S. R., Ukrainian S. S. R., Byelorussian S. S. R., Azerbaidjan S. S. R., Georgian S. S. R., Armenian S. S. R., Turkmen S. S. R., Uzbek S. S. R., Tadjik S. S. R., Kazakh S. S. R., and Kirgiz S. S. R. Republics becoming a part of the Union since 1936, with their dates of admission, are the following: Karelo-Finnish S. S. R. (Mar. 31, 1940), Moldavian S. S. R. (Aug. 2, 1940), Lithuanian S. S. R. (Aug. 3, 1940), Latvian S. S. R. (Aug. 5, 1940), and Estonian S. S. R. (Aug. 6, 1940). For text of Constitution of 1936, with amendments, see KONSTITUTSIYA (OSNOVNOI ZAKON) SOYUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (Moscow, 1947), and English translation published by American Russian Institute (New York, 1947).

<sup>266</sup> The governmental agencies of these lesser republics, regions or districts correspond structurally but not in name to provincial or district agencies in the union republics. The principal claim to special constitutional status for these ethnic minorities lies in the fact that within each the language of the ethnic minority is the official language of state agencies and they are represented directly in the Soviet of Nationalities of the U. S. S. R., which is one of the two equally empowered chambers of the Supreme Soviet of the U. S. S. R. in which all federal power resides.

By Art. 35 of the Constitution, the rate of representation is twenty-five deputies from each union republic, eleven deputies from each autonomous republic, five deputies from each autonomous region and one deputy from each national district.

<sup>267</sup> C. I, Art. 1(o) and (p). The 1936 Constitution in Art. 14(u) changed the power of the federal government to authorize it to enact "legislation on the judicial system and judicial procedure: criminal and civil codes." The intervention of the war prevented the development of federal codes, but they are currently in process of preparation.

<sup>268</sup> C. VII, Art. 43.

<sup>269</sup> *Sobr. Zak.* S. S. S. R., 1924, No. 23, Art. 203.

<sup>270</sup> Art. 102.

of the Autonomous Republics and the Autonomous Regions, the Area Courts, the special courts of the U. S. S. R., established by decision of the Supreme Soviet of the U. S. S. R., and the People's Courts.

Supremacy of the Supreme Court of the U. S. S. R. is established by the Constitution as follows:<sup>271</sup>

The Supreme Court of the U. S. S. R. is the highest judicial organ. The Supreme Court of the U. S. S. R. is charged with the supervision of the judicial activities of all the judicial organs of the U. S. S. R. and of the Union Republics.

### 3. *Statutory provisions as to the organization of the federal courts*

Details of organization of the Soviet court system are provided in the Judiciary Act of 1938.<sup>272</sup> At the top of the federal court system is the Supreme Court of the U. S. S. R. It is composed of a president and sixty-eight judges named by the Supreme Soviet of the U. S. S. R. for five-year terms.<sup>273</sup> The judges are assigned to five "colleges," dealing with military, railroad transport, and water transport cases, and also criminal and civil cases. To provide a board of review over the work of the "colleges," the sixty-eight judges meet with the president not less often than once every two months as a plenum.

Inferior federal courts exist to hear cases of military, railroad transport, and water transport crimes. The military tribunals are composed of three officers in the military jurists' department of the Red Army. They sit in districts defined by armies, fronts, or fleets and have four grades: (1) division, (2) corps, (3) army or flotilla, and (4) military district, front or fleet. Railroad and water transport courts sit in districts defined by individual railroad systems or river basins, and have two levels.

Non-judicial agencies of the federal government performing functions as law-enforcing agencies are the state arbitration tribunals.<sup>274</sup> These tribunals are organized at three levels, two of which are in the republics. The top level is in the federal government. All have jurisdiction only over cases in which government corporations are the two parties.

### 4. *Statutory provisions regulating federal jurisdiction*

Original jurisdiction of the federal courts is determined largely by the subject matter of the case. The citizenship or status of the parties is not a determining factor, except in the state arbitration tribunals. In these specialized commercial tribunals one of the bases for federal jurisdiction is that each of the parties, which are always government corporations, has its place of business in a different one of the sixteen union republics. Even in such instances the dispute must involve 50,000 rubles or more, or the tribunal in one of the republics concerned will have jurisdiction.<sup>275</sup>

<sup>271</sup> Art. 104.

<sup>272</sup> *Vedomosti Verkhovnogo Soveta S. S. S. R.*, No. 11, Sept. 5, 1938, reprinted in Code of Criminal Procedure 220 (1947 ed.).

<sup>273</sup> For the present membership see Law of Mar. 19, 1946, *Vedomosti Verkhovnogo Soveta S. S. S. R.*, No. 10 (419), Mar. 28, 1946.

<sup>274</sup> See law of May 3, 1931, *Sobr. Zak. S. S. S. R.*, 1931, No. 26, Art. 203.

<sup>275</sup> *Sobr. Post. S. S. S. R.*, 1938, No. 8, Art. 52.



Federal matters are those of a specialized character having no relation to boundaries of republics. Military tribunals of all grades have jurisdiction depending on the military rank of the person to be tried, the highest grade having the right to review petitions from sentences of the lower tribunals. Jurisdiction in military tribunals is not limited to military personnel, but extends even in peacetime to all civilians who commit acts of treason, espionage, terror, arson, explosion, or other types of diversion.<sup>276</sup> During the past war, jurisdiction was broadened in theaters of war to all crime, and civilians were tried by specially constituted military tribunals of the Ministry of the Interior rather than of the Red Army.<sup>277</sup> Military tribunals have no civil jurisdiction.

The railroad and water transport courts have jurisdiction over criminal acts directed to the disorganization of labor discipline and other crimes upsetting the normal work of transportation, whether the accused be an employee of the transport system or an ordinary citizen.

Jurisdiction of the Supreme Court of the U. S. S. R. is original and appellate.<sup>278</sup> The court may assume original jurisdiction over any case selected by the president of the court because of its national importance. It also hears cassational appeals from the inferior federal courts. While there is no right of appeal from a court of a republic unless the supreme court of a republic has heard a case as a court of original jurisdiction, the Supreme Court of the U. S. S. R. is also active in reviewing cases coming from the courts of the republics. Its attention is drawn by protests of the Prosecutor General of the U. S. S. R. or the president of the Supreme Court itself to the effect that the inferior court has violated substantive or procedural law, whether it be law of the federal government or of the republic concerned.

In making determinations in accordance with its duty to assure observance of the law, the Supreme Court may find that the law which has been violated is that of the Constitution of the U. S. S. R. In such an event the Supreme Court is not empowered to declare the law of a republic unconstitutional, but it notifies the Supreme Soviet of the U. S. S. R., as the repository of all federal power.<sup>279</sup> The Supreme Soviet may then advise the republic to bring its law into conformity with the law of the U. S. S. R. The republic must do so if it desires to remain in the union.<sup>280</sup> No law promulgated by the Supreme Soviet of the U. S. S. R. may be found unconstitutional by the Supreme Court. The Supreme Soviet is its own judge.

<sup>276</sup> Law of July 10, 1934, §2. *Sobr. Zak. S. S. R.*, 1934, No. 36, Art. 284.

<sup>277</sup> See Order of People's Commissariat of Justice of the U. S. S. R. and of the Prosecutor of the U. S. S. R., June 24, 1941, No. 102/58, §1(b), reprinted in Code of Criminal Procedure, R. S. F. S. R. 123-4. (1943 ed.).

<sup>278</sup> See Judiciary Act of 1938, *supra* note 272, c. VII.

<sup>279</sup> By Art. 43 of the first federal constitution of the U. S. S. R. the Supreme Court of the U. S. S. R. was authorized "to render an opinion on the constitutionality of any decree of a Union Republic if requested to do so by the Central Executive Committee of the U. S. S. R." This provision was not repeated in the second Constitution of the U. S. S. R., but Soviet law professors have said, in conversation, that nothing prevents the Supreme Soviet from asking advice of the Court, although nothing binds the Supreme Soviet to accept the advice when given.

<sup>280</sup> By Art. 17 of the constitution a union republic may secede from the U. S. S. R.

as to when a projected law amounts to an amendment to the constitution, requiring promulgation in conformity with the procedure for amending the constitution.<sup>281</sup>

#### CONCLUSION

The foregoing survey of the courts in foreign federal systems seems to lead to the following conclusions:

1. Federal systems, with their inherently complicated legalism, seem to spawn difficult jurisdictional questions as a matter of course and therefore to call for the establishment of a separate judiciary or at least specialized courts. While specialized judicial branches have been established even in unitarian governments,<sup>282</sup> the existence of separate judges for the administration of all or portions of the federal law is a general phenomenon in federations.<sup>283</sup> The scope of the business of the federal courts will depend at least in part upon the ambit of federal powers granted by the constitution and upon the limits within which the enforcement of federal statutes can constitutionally be conferred or imposed upon the state courts.<sup>284</sup> The absence of lower federal courts in Switzerland is somewhat deceptive. The different approach to the "rule of law" permits on the lower level the attribution of a non-judicial character to administrative litigation, which becomes judicialized only by complaint to the federal court.

2. The experience of the other federal systems seems to indicate that ordinary diversity jurisdiction tends to become outmoded and superfluous. There is no reason why the dangers against which this type of jurisdiction is intended to guard cannot be effectively suppressed by a proper handling of the Fourteenth Amendment, which of course did not exist when the diversity clause was devised. Interpleader jurisdiction, which does perform a valid function, could now be much more effectively based on the interstate commerce clause.<sup>285</sup> The hope that diversity jurisdiction might tend toward a uniform application of the law has been dispelled by the Supreme Court. It should be realized, however, that such uniformity is really inconsistent with the basic idea of federalism and that its absence in certain fields is the price and effect of local autonomy.

<sup>281</sup> Art. 146.

<sup>282</sup> See, for instance, the French administrative and labor tribunals discussed by Riesenfeld, *The French System of Administrative Justice*, 18 B. U. L. REV. 48ff., 400ff., 715ff. (1938), and Riesenfeld, *Recent Developments of French Labor Law*, 23 MINN. L. REV. 407 (1939).

<sup>283</sup> In the United States the "federal specialties," in spite of their ever-expanding scope, have been generally entrusted to the jurisdiction of a common system of federal tribunals. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 515 (1928). The creation of specialized federal tribunals such as the Emergency Court of Appeals under the Emergency Price Control Act of 1942 has been the exception.

<sup>284</sup> In the United States Congress apparently can impose the administration of federal statutes upon the state courts to an extent which is very far-reaching and as yet not clearly circumscribed. See *Testa v. Katt*, 67 Sup. Ct. 810 (U. S. 1947), and Hatton, *State Court Jurisdiction of Federal Rights of Action*, 40 ILL. L. REV. 355 (1945).

<sup>285</sup> See the suggestion to this effect in 30 MINN. L. REV. 643, 645 (1946).

3. Experience of other nations, particularly Mexico, shows that the federal due process clause is an important regulator of the centralization and character of justice on the higher level. Constitutionalization of rules of private law, conflicts, or practice may make for uniform application, but it also produces the danger of overburdening the Supreme Court. Constitutionalization of administrative activities is even more dangerous, for it enmeshes the court in problems of political or technical expediency and threatens to impair the standards of judicial performance.