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W.J. Wagner

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# APPELLATE JURISDICTION OF THE SUPREME COURTS OF FEDERAL STATES†

*W. J. Wagner\**

## I. COUNTRIES HAVING A DUAL JUDICIAL SYSTEM

### *United States*

In the United States, by virtue of a constitutional provision, in cases falling within the federal scope of jurisdiction, but not reserved to the original jurisdiction of the Supreme Court, the Court has "appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."<sup>1</sup>

Congress has from the beginning taken advantage of its constitutional power to regulate the appellate jurisdiction of the Supreme Court. If it decides to withdraw jurisdiction from the Court in cases in which it had jurisdiction previously, the Court will abstain from delivering a decision and will treat that of the court below as final even in cases which were already argued before the Court.<sup>2</sup>

The Judicial Code now in force deals with the problem in six sections. The first one permits direct appeals from interlocutory and final judgments and orders of any court of the United States which hold "an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."<sup>3</sup> The provision mentions "any court" of the United States, and thus covers the courts of appeals, the district courts, and the specialized courts.<sup>4</sup> In instances provided for by this section, therefore, the Supreme Court takes cases decided below either by courts of first instance or those of appellate jurisdiction. The section covers cases to which the United States is an original party as well as those in which it has intervened and thus become a party.<sup>5</sup>

Provisions permitting such direct appeals need not necessarily be found in the Judicial Code. The previous act of 1937 was express on this point, stating that it should not be construed as being "in derogation of any right of direct appeal to the Supreme Court . . . under existing provisions of law." In the present Judicial Code these words were deleted as unnecessary.<sup>6</sup> Thus, by

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† This article is based on a forthcoming book, *FEDERAL STATES AND THEIR JUDICIARY — A COMPARATIVE STUDY IN CONSTITUTIONAL LAW AND ORGANIZATION OF COURTS IN FEDERAL STATES*, Mouton & Co., Publishers, The Hague, Holland.

\* Associate Professor of Law, Notre Dame Law School.

<sup>1</sup> U.S. CONST. art. III, § 2.

<sup>2</sup> *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

<sup>3</sup> 28 U.S.C. § 1252 (1952). See also 28 U.S.C. § 1291 (1952).

<sup>4</sup> The definition of the term "court of the United States" is found in 28 U.S.C. § 451 (1952).

<sup>5</sup> The words making the scope of the rule clear, found in the previous Act of 1937, "were omitted as surplusage." Reviser's Note, 28 U.S.C. § 1252 (1952).

<sup>6</sup> *Ibid.*

another statutory enactment, appeals to the Supreme Court may be taken directly from a decision of a district court dismissing an information or indictment or arresting a judgment of conviction for insufficiency of the indictment or information where such a decision or judgment "is based upon the invalidity or construction of the statute upon which the indictment or information is founded"; and from a decision "sustaining a motion in bar, when the defendant has not been put in jeopardy."<sup>7</sup>

Another provision of the Judicial Code permits direct appeals to the Supreme Court from orders "granting or denying . . . an interlocutory or permanent injunction" in cases which, because of their importance, lie within the original jurisdiction of three-judge district courts.<sup>8</sup>

More frequently, the Supreme Court exercises its appellate jurisdiction in reviewing the judgments of intermediate federal courts. In addition to the right of appeal, cases may reach the Supreme Court by certification or certiorari.

On appeal, the party considering himself aggrieved by the decision of the lower court has a right to submit his case to the determination of the higher tribunal. Certification of a question, on the other hand, is entirely subject to the decision of the lower court; should it desire the higher court's instruction on any question of law, it may certify the question to the higher court, the answer to which will then be controlling. With certiorari, the determination of whether the decision should be reviewed lies within "sound judicial discretion" of the higher court.<sup>9</sup>

The right to appeal from the decisions of the federal courts of appeals is very limited, by virtue of provisions found in the Judicial Code. It may be exercised only "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." Because of the facts that on appeal, the Supreme Court will examine only "the Federal questions presented," and appealing "shall preclude review by writ of certiorari at the instance of such appellant,"<sup>10</sup> a party who would like to have a broader scope of review should well consider what his chances would be on a petition for certiorari, even though he may have the right to appeal.

There are no statutory restrictions on the courts of appeals as to their right to certify questions of law to the Supreme Court, which may then "give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."<sup>11</sup> It appears that the Supreme Court is strict in requiring that certified questions be questions of law, and dismisses all others.<sup>12</sup> One of the Court's rules states: "Questions of fact

<sup>7</sup> 18 U.S.C. § 3731 (1952). Other statutory provisions permit appeals from the district courts to the Supreme Court from judgments delivered in suits brought by the United States for violation of the Sherman Anti-Trust Act and other similar legislation. 15 U.S.C. § 29 (1952); 47 U.S.C. § 401(j) (1952).

<sup>8</sup> 28 U.S.C. § 1253 (1952).

<sup>9</sup> U.S. SUP. CT. R. 19(1).

<sup>10</sup> 28 U.S.C. § 1254(2) (1952).

<sup>11</sup> 28 U.S.C. § 1254(3) (1952).

<sup>12</sup> ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 261-70 (2d ed. Wolfson & Kurland 1951).

cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite."<sup>13</sup>

Certiorari may be granted to either party, in "any civil or criminal case," and both "before or after rendition of judgment or decree."<sup>14</sup> Again, no limitations are imposed by the statute. But the Supreme Court itself has made it clear that it will grant certiorari "only where there are special and important reasons therefor," and particularly:

Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.<sup>15</sup>

Two sections of the Judicial Code regulate the manner of reviewing the decisions of the federal specialized courts by the Supreme Court. There is no right to appeal from either the Court of Claims, or the Court of Customs and Patent Appeals; cases decided by them may reach the Supreme Court by certiorari.<sup>16</sup> The Court of Claims may also certify questions of law to the highest federal tribunal.<sup>17</sup>

That cases decided by lower federal courts should be reviewable by the Supreme Court, in a way settled by the federal legislature, is rather obvious, but difficulties have arisen in connection with the exercise, by the Supreme Court, of its appellate jurisdiction over the decisions of state courts. Although there is nothing in the Constitution expressly authorizing review of such decisions, the language of the basic law does not make any exceptions as to the appellate power of the Supreme Court in cases included in the federal scope of jurisdiction. The best evidence of how the Framers understood the constitutional provisions is section 25 of the first Judiciary Act of 1789 which expressly provided for review of state court decisions by the Supreme Court.<sup>18</sup> Hamilton wrote that in cases where state court judgments are delivered in the exercise of their jurisdiction concurrent with the federal courts, "an appeal would certainly lie" to the Federal Supreme Court,<sup>19</sup> and that, in the light of constitutional provisions, "appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made

<sup>13</sup> U.S. SUP. CT. R. 28(1). However, the certified question must include a full statement of facts necessary to determine the legal problem presented. Otherwise, the Supreme Court will decline to give an answer. ROBERTSON & KIRKHAM, *supra* note 12, at 261, 265-66.

<sup>14</sup> 28 U.S.C. § 1254(1). However, the policy of the Court is not to grant certiorari before the judgment in the court below is rendered, unless "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." U.S. SUP. CT. R. 20.

<sup>15</sup> U.S. SUP. CT. R. 19(1)(b).

<sup>16</sup> 28 U.S.C. §§ 1255(1), 1256 (1952).

<sup>17</sup> 28 U.S.C. § 1255(2) (1952).

<sup>18</sup> 1 Stat. 85-86 (1789).

<sup>19</sup> THE FEDERALIST No. 82, at 536 (Modern Library ed. 1941) (Hamilton).

to lie from the State courts to district courts of the Union."<sup>20</sup> However, considering the dignity of the supreme courts of the States, Congress never attempted to make their decisions reviewable by inferior federal courts.

In the first years of the Union, the Supreme Court did review, in a few instances, decisions of state courts without much resistance on the part of the States.<sup>21</sup> But in 1813, when the Supreme Court reversed a decision of the highest tribunal of Virginia and remanded it with directions,<sup>22</sup> the state court refused to comply, contending that Congress could not validly authorize the Supreme Court to review its judgments because such an appellate jurisdiction was not in pursuance of the Constitution, that therefore the writ of error was improvidently allowed under the authority of section 25 of the Judiciary Act of 1789, and that the mandate of the Supreme Court was not binding.<sup>23</sup>

A writ of error to that decision having been granted, the Supreme Court squarely faced a problem of great importance.<sup>24</sup> The future of the Court, as ultimate interpreter of the federal system of law, having the power to compel all other courts to comply with federal law as construed by it, was at stake.<sup>25</sup>

In the lengthy and well-reasoned opinion of *Martin v. Hunter's Lessee*,<sup>26</sup> the Court refuted the contentions of the Court of Appeals of Virginia. Story, speaking for the Court, held that "the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority."<sup>27</sup> He upheld the validity of the statute and sustained the appellate jurisdiction of the Supreme Court in the light of the theories of the Founding Fathers as expressed in the Constitution, extending the jurisdiction of federal courts to *all* cases arising under the Federal Constitution, laws, and treaties.

The decision was a milestone in the history of the United States judicial system, but it did not settle the problem once and for all. After *Martin v. Hunter's Lessee*, the Court exercised its appellate jurisdiction over state court decisions in a few cases such as *Gelston v. Hoyt*<sup>28</sup> before its power was challenged another time, again by a court of Virginia. In *Cohens v. Virginia*<sup>29</sup> the problem was whether the Supreme Court could issue a writ of error to a state court in a criminal case, where the accused committed acts punishable by state law but permitted by federal legislation. This time, jurisdiction of the

<sup>20</sup> *Id.* at 538.

<sup>21</sup> Between 1789 and 1813, there were sixteen such cases. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 443 (rev. ed. 1947).

<sup>22</sup> *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 602 (1813).

<sup>23</sup> *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1814).

<sup>24</sup> "A graver question could scarcely have arisen in that court, or one involving considerations of higher importance and delicacy, or more deeply affecting the permanency and tranquility of the American Union." KENT, COMMENTARIES ON AMERICAN LAW 317 (1826).

<sup>25</sup> For the view that the appellate jurisdiction of the Supreme Court should not be limited to questions arising under federal law, see 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, pt. IV, ch. XXVI (1953), *The Supreme Court's Loss of Independence with Respect to State Law and Common Law: Herein of the Subordination of the National Courts to the State Judiciaries*, 365-937 (1953).

<sup>26</sup> 14 U.S. (1 Wheat.) 304, 331 (1816).

<sup>27</sup> *Id.* at 331.

<sup>28</sup> 16 U.S. (3 Wheat.) 246 (1818).

<sup>29</sup> 19 U.S. (6 Wheat.) 264 (1821).

Supreme Court was upheld in an opinion delivered by Chief Justice Marshall; and the fact that the State was one of the parties to the suit did not change the situation. A federal question was still involved in the case. On the merits, the judgment was rendered for Virginia. Such an assumption of jurisdiction by the Supreme Court in *Cohens v. Virginia* subjected the Court to attacks no less vigorous than those brought about by *Martin v. Hunter's Lessee*.<sup>30</sup>

However, little by little, the power of the Supreme Court came to be accepted by the States, though there were still some instances of resistance many years after *Cohens v. Virginia* was decided. Thus, in the 1850's, the Supreme Court of Ohio refused to obey a mandate of the Federal Supreme Court for over two years,<sup>31</sup> at the same time, the Supreme Court of California held section 25 of the Judiciary Act unconstitutional,<sup>32</sup> a position which was not approved by the state legislature<sup>33</sup> and which was overruled by the California court in 1858.<sup>34</sup> Simultaneously, the Supreme Court of Wisconsin refused to answer a writ of error issued by the Supreme Court when the Wisconsin court used the writ of habeas corpus to release a federal prisoner sentenced under the Federal Fugitive Slave Act of 1850.<sup>35</sup> But in 1880, in *Williams v. Bruffy*,<sup>36</sup> the Supreme Court could say, in spite of these instances of defiance, that "its appellate jurisdiction over the judgments of the State courts in . . . cases mentioned in the twenty-fifth section of the Judiciary Act of 1789 . . . passed beyond the region of discussion in this court more than half a century ago."<sup>37</sup> It pointed out that "the doctrine had been acquiesced in by enlightened State courts," and continued: "No doctrine of this court rests upon more solid foundations, or is more fully valued and cherished."<sup>38</sup>

Statutory provisions now in force which regulate review of state court decisions by the Supreme Court are based on section 25 of the first Judiciary Act, and read as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

- (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
- (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
- (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up

<sup>30</sup> 1 WARREN, *op. cit. supra* note 21, at 554.

<sup>31</sup> *State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1853). See 2 WARREN, *op. cit. supra* note 21, at 256.

<sup>32</sup> *Johnson v. Gordon*, 4 Cal. (1 Pac. St. Rep. Ann.) 368 (1854).

<sup>33</sup> WARREN, *op. cit. supra* note 21, at 257.

<sup>34</sup> *Ferris v. Coover*, 11 Cal. (4 Pac. St. Rep. Ann.) 175 (1858).

<sup>35</sup> *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

<sup>36</sup> 102 U.S. 248 (1880).

<sup>37</sup> *Id.* at 252-53.

<sup>38</sup> *Id.* at 253.

or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.<sup>39</sup>

Thus, only in some "constitutional questions" appeals from state courts lie to the Federal Supreme Court, as a matter of right. The great majority of cases reach the Court only with its consent, by way of certiorari.

It should be emphasized that the Supreme Court of the United States does not have general appellate power over the decisions of state courts. In cases arising under state law, judgments of state courts are final. Jurisdiction of the Supreme Court is strictly confined to cases enumerated in the statute, enacted under the Constitution. Before the Court may take jurisdiction over the case, state judicial remedies must be exhausted. If they are, the requirement is met even if the final decision was not rendered by the highest tribunal of the state involved. This rule dates back to the first Judiciary Act of 1789. In *Cohens v. Virginia*,<sup>40</sup> the Supreme Court's writ of error was issued to the Quarterly Session Court for the borough of Norfolk in Virginia, "it being the highest court of law or equity of that state having jurisdiction of the case."<sup>41</sup>

In its rules and numerous decisions, the Supreme Court has laid down rather strict requirements which must be satisfied before it will decide that all conditions for the exercise of its appellate jurisdiction have been met. Thus, from the petition for certiorari it must appear "that the federal question was timely and properly raised" in the state courts below;<sup>42</sup> in general, questions not raised or discussed in the state courts cannot be raised in the Supreme Court.<sup>43</sup> Even though a federal question be presented, the Court will decline jurisdiction if the decision of the question is not necessary for the determination of the case.<sup>44</sup> Whenever the decision of the state court is based on non-federal grounds, it is not reviewable by the Supreme Court.<sup>45</sup>

<sup>39</sup> 28 U.S.C. § 1257 (1952).

<sup>40</sup> 19 U.S. (6 Wheat.) 264 (1821).

<sup>41</sup> *Id.* at 265.

<sup>42</sup> U.S. SUP. CT. R. 23(1)(f).

<sup>43</sup> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court . . . unless it affirmatively appears . . . that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. . . . It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature." *Mellon v. O'Neil*, 275 U.S. 212, 214-15 (1927).

<sup>44</sup> "[The] jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, . . . or has in fact been decided by it, . . . and that its decision was necessary to the judgment." *Wilson v. Cook*, 327 U.S. 474, 480 (1946).

Thus, the federal question involved must be "substantial"; the general rule is "that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous." *Seaboard Air Line Ry. v. Padgett*, 236 U.S. 668, 671 (1915). In its Rules, the Court requires the appealing party to show the substantiality of the federal question. U.S. SUP. CT. R. 15(1)(e); however, the application of the standard of substantiality by the Court is not very clear. *Ulman & Spears, Dismissed for Want of a Substantial Federal Question*, 20 B. U. L. REV. 501, 522 (1940). And by denying to an appellant the right to appeal on the ground that no substantial federal question is presented, the Court may, to some extent, render its mandatory appellate jurisdiction subjected to its discretion. Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 492 (1949).

When federal and state questions are presented to the state court, and the latter are "sufficient to sustain the judgment," the Supreme Court "will not review the judgment." *Adams v. Russell*, 229 U.S. 353, 358 (1913). On the other hand, where the decision below was reached on federal law, the fact that it could have been decided on state grounds does not affect the jurisdiction of the Court. *St. Louis, Iron Mountain & So. Ry. v. McWhirter*, 229 U.S. 265 (1913).

However, the conclusions of law of the lower courts may be worded in many different ways. Some opinions are specific as to the grounds of decision, and may state that they are based both on state and federal law, or just one of them; but others may not be clear on that point.<sup>46</sup> More than a century ago, a practice developed by virtue of which the appellant could ask and obtain from the state court a certificate stating that a federal question was raised, considered and decided in the proceedings before it. In general, such a certificate is not considered sufficient to confer jurisdiction on the Supreme Court, if the record of the case does not corroborate it.<sup>47</sup> However, it is entitled to some weight, particularly if it was given by the court below, as distinguished from a judge of the court.<sup>48</sup> Exactly what the effect is of such certification is not clear in view of "subtle distinctions and contradictory holdings" of the Supreme Court.<sup>49</sup>

The great majority of cases reaching the Supreme Court are by way of petitions for certiorari. The ratio of such petitions to direct appeals is usually seven or eight to one.<sup>50</sup> By denying petitions, the Court is able to control the number of cases it decides on the merits. Denial of writ of certiorari does not indicate that the Court approves of the opinion below,<sup>51</sup> as a Chief Justice of the Supreme Court stated, the Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions."<sup>52</sup> The policy of the Court as pointed out in its rules<sup>53</sup> was always adhered to, even before the rules were adopted, and the Court will decide the case on the merits only if the resolution of the question presented "will have immediate im-

<sup>45</sup> In many opinions, the Supreme Court emphasized this rule. Thus, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930), the Court said:

It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten law of the State; that this Court's power to review decisions of state courts is limited to their decisions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court (citations of cases omitted).

<sup>46</sup> See BUNN, *A BRIEF SURVEY OF THE JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES* 246-251 (1949), for an analysis of eight ways in which decisions may be framed.

<sup>47</sup> "A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present." *Honeyman v. Hanan*, 300 U.S. 14, 18-19 (1937) (footnote by the Court omitted).

<sup>48</sup> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record, . . . a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised." *Charleston Fed. Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 186 n.1 (1945).

<sup>49</sup> Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 HARV. L. REV. 111, 112 (1949). The authors conclude that certificates by state courts should be considered as "conclusive as to whether a federal question has been raised and decided." *Id.* at 117.

<sup>50</sup> In 1954, 626 petitions for certiorari were filed as against 87 appeals. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 149 (1955).

<sup>51</sup> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer." *United States v. Carver*, 260 U.S. 482, 490 (1923).

<sup>52</sup> Address by Chief Justice Vinson, Am. Bar Ass'n Meeting, Sept. 7, 1949, in 69 Sup. Ct. v. vi.

<sup>53</sup> U.S. SUP. CT. R. 19(1)(6).



portance far beyond the particular facts and parties involved."<sup>54</sup> A Supreme Court Justice recently stated that the Court "has accepted for argument about 15 to 25 per cent of the cases submitted" to it by way of certiorari,<sup>55</sup> but statistics show, that between 1945-54, the percentage ranged only from 13 to 22 per cent<sup>56</sup> and was considerably lower in previous years.<sup>57</sup>

Petitions for certiorari are scrutinized by all the Justices of the Supreme Court. A custom was established by virtue of which certiorari is granted whenever a substantial minority of the Court (four, or sometimes only three or two Justices) feel that the petition should be allowed.<sup>58</sup> The reason why the overwhelming majority of the petitions are denied was explained by Chief Justice Hughes who pointed out that "about 60 per cent of the applications . . . are wholly without merit and ought never to have been made," and that among the rest, about 20 per cent "have a fair degree of plausibility but . . . fail to survive critical examination."<sup>59</sup>

However, the high percentage of petitions denied did not escape unfavorable comments. In 1937, President Franklin D. Roosevelt deplored the fact that "in the last fiscal year . . . the Court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications." Recognizing that many denials "were doubtless warranted," the President asked: "But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation to hear 87 per cent of the cases presented to it by private litigants?"<sup>60</sup>

Of course, the President's observations may be easily explained by his long struggle with the Court, the invalidation of his "New-Deal" legislation, and by his desire to increase the number of Justices so as to appoint to the Court members sympathetic to his ideas. However, politicians were not the only persons to criticize the certiorari policy of the Court. Recently, for example, a scholar from the teaching profession enumerated many problems of great importance which were presented to the "Chief Justice Vinson's take-it-easy Court" in cases brought to it by petitions for certiorari and turned down. The conclusion is that probably some of them seemed to the Court "too hot to handle."<sup>61</sup>

### Argentina

In Argentina, where the system of courts is more similar to that in the United States than in any other federation, the scope of national legislation is

<sup>54</sup> Vinson, *op. cit. supra* note 52, at vi. Another Chief Justice stated that review on certiorari "is in the interest of the law, not in the interest of the particular parties." *Address by Chief Justice Hughes*, 11 ALI PROCEEDINGS 313, 315 (1934).

<sup>55</sup> Burton, *Unsung Services of the Supreme Court of the United States*, 24 FORDHAM L. REV. 169, 177 (1955).

<sup>56</sup> *Supra* note 49, at 150.

<sup>57</sup> Vinson, *op. cit. supra* note 52, at vi.

<sup>58</sup> Letter from Chief Justice Hughes to Senator Wheeler, March 21, 1937, S. REP. NO. 711, 75th Cong., 1st Sess. 34 (1937).

<sup>59</sup> *Ibid.*

<sup>60</sup> Message of the President to Congress, Feb. 5, 1937, S. REP. NO. 711, 75th Cong., 1st Sess. 25 (1937).

<sup>61</sup> RODELL, NINE MEN 15 (1955).

much broader, and in fact, the great bulk of all substantive law of the country, as enacted in federal codes, is national.<sup>62</sup> However, for a long time, the application of these laws was left entirely to the provincial courts.<sup>63</sup> The result was that the construction of national codes could be different in the several provinces, and since the Supreme Court of Justice had no appellate jurisdiction in those cases, there was no possibility to settle the problems presented.

In order to remedy the situation, it was suggested that whereas the *application* of the codes was left by the Constitution of 1853 to the provinces, the *interpretation* of the codes, as concerning only questions of federal law, could be taken care of by the Supreme Court; this result, not expressly provided for by the Constitution, was said not to be contrary to its spirit.<sup>64</sup> However, such a construction of the Constitution was not adopted by the Supreme Court.<sup>65</sup> Besides, it is interesting to note that the differences in the interpretation of the codes were not as great as might have been expected. The degree of uniformity achieved in interpretation was probably due to the work of legal scholars<sup>66</sup> whose influence is felt more strongly in civil law than in common law countries. Despite this, in legal circles, ever more voices were heard asking that the situation be remedied.

The short-lived Peronist Constitution of 1949 changed the previous rule. The last two clauses of Article 95 read as follows:

The Supreme Court of Justice shall have jurisdiction, as a court of cassation, in the interpretation and comprehension of the codes referred to in paragraph (11) of Article 68.

The interpretation which the Supreme Court gives to articles of the Constitution on special appeal and to the codes and laws in proceedings for cassation, must be followed by the national and provincial judges and tribunals.

Thus, the new duties of the Supreme Court as an appellate tribunal of last instance in cases involving construction of provisions of national codes were to be limited to questions of law. The Court was to have the last word as to their interpretation, and its opinion was to be binding on all the courts in the country. The form of the new "proceedings for cassation" was left, by the Judiciary Act of 1950, to be regulated by a special law.<sup>67</sup> However, no such law was enacted during the Peronist regime.

The downfall of Peron and the repeal of his Constitution in May, 1956, did not result in the abrogation of the above mentioned provision of the Judiciary Act. It seems that the new power of the Supreme Court will stand. Undoubtedly, in the field of private law, the exercise of this power will be the

<sup>62</sup> ARGENTINE CONST. art. 67, cl. 11.

<sup>63</sup> *Id.*, art. 100.

<sup>64</sup> Lafaille, *La Cour de Cassation en Argentine et all Nouvelle Constitution* 7-8 CAHIERS DE LEGISLATION ET DE BIBLIOGRAPHIE JURIDIQUE D' AMERIQUE LATINE 41 (1951).

<sup>65</sup> Recently, the Supreme Court affirmed its position in *Otta v. Banco Hipotecario Nacional*, 183 S.C.N. 287 (1940), where it said that it could not review on a writ of error a judgment of a provincial court construing a provision of the national code. AMADEO, ARGENTINE CONSTITUTIONAL LAW 72, n. 50 (1943).

<sup>66</sup> *Id.* at 42.

<sup>67</sup> Section 24, clause 3, of the Judiciary Act, Ley No. 13,998 of Sept. 29, 1950, II Legislacion Nacional Argentina 195, where the proceedings are called "for cassation and revision of the case law" ("jurisprudencia").

most important of all its tasks. Down to 1957 no statute regulating the new jurisdiction of the Court had been enacted by the legislature.

By virtue of Article 101 of the Constitution, the appellate jurisdiction of the Supreme Court is subject to "rules and exceptions prescribed by Congress."<sup>68</sup> Clearly, the North American pattern served as a model. The highest tribunal of Argentina recognizes the authority of the legislature in matters respecting its jurisdiction, and expressly relies upon the United States example.<sup>69</sup>

The two other usual ways of reaching the Supreme Court as a tribunal of last instance were traditionally by ordinary appeal (*apelacion ordinaria*) and by a writ of error (*recurso extraordinario*). The new Judiciary Act maintained this distinction, although it was enacted under the Constitution of 1949 which did not mention ordinary appeals, and a view was expressed that they had been impliedly abolished by it.<sup>70</sup>

By virtue of the Judiciary Act, ordinary appeals lie from final judgments of the national courts of appeals in five specified categories of cases:<sup>71</sup>

- (1) Cases in which the nation is a party, and the value in controversy exceeds 50,000 pesos.
- (2) Cases involving extradition of criminals requested by foreign countries.
- (3) Cases involving prizes and maritime embargoes in case of war, military salvage, and nationality and regularity of documents of ships.
- (4) Criminal cases involving crimes against the security of the country, of the nation, or against the public powers and the constitutional order, when the applicable penalty exceeds six years of confinement.
- (5) Cases arising between a province and citizens of another.

In the exercise of its jurisdiction in ordinary appeals cases, the Supreme Court may either render a judgment on the merits, or reverse the decree appealed from and remand the case. This procedure is used particularly when the lower court's decision is declared null because of violation of procedural rules.<sup>72</sup>

Writs of error to the judgments of both federal and provincial courts are issued in order to enforce the supremacy of the federal legal system. As to the categories of cases which can reach the Supreme Court on a writ of error, the new Judiciary Act has not changed the scope of the appellate

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<sup>68</sup> Translation taken from MARVAL, HUNTINGTON & MARVAL, *LAWS OF ARGENTINA* (1933). There was no similar provision in the Constitution of 1949, but it was understood that this omission did not affect the congressional powers.

<sup>69</sup> Thus, in *Gobierno Nacional v. Eiriz*, 137 S.C.N. 345 (1922), it was argued that in the light of language of the Constitution, appeals from all federal courts could reach the Supreme Court. However, the Court disagreed with this contention and held that by virtue of statutory enactments, it had no jurisdiction to hear appeals from military tribunals except when a constitutional or federal question had been raised. The Court relied on the "exception" clause of the Constitution and referred to a similar rule in the United States. AMADEO, *op. cit. supra* note 65, at 68.

<sup>70</sup> Shortly after the Constitution of 1949 was adopted, this understanding of the new basic law was expressed in a judicial opinion. It met with criticism on the part of the Attorney General. CLAGETT, *THE ADMINISTRATION OF JUSTICE IN LATIN AMERICA* 44 (1952).

<sup>71</sup> § 24, cl. 7.

<sup>72</sup> AMADEO, *op. cit. supra* note 65, at 69.

jurisdiction of the Supreme Court as provided by earlier statutory enactments.<sup>73</sup>

The similarity of section 14 of the Law No. 48, enacted in 1863, to section 25 of the United States Judiciary Act of 1789 is striking. Its provisions are as follows:<sup>74</sup>

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.

The relevant provisions of the Law No. 4055, enacted in 1902, vest in the Supreme Court the same appellate jurisdiction, whether the appeal is taken from a decision of a provincial or federal court of general jurisdiction, or a military tribunal.

The Supreme Court did not limit issuance of writs of error against decisions delivered by courts in regular judicial suits. In *In re Schuster*<sup>75</sup> the Court held that the writ of error may be granted against any final judgment of a provincial court, even if the proceedings had no ordinary judicial character and involved the denial of a license issued by a national authority.<sup>76</sup> In *Ex parte Manuel Gonzales Maceda*<sup>77</sup> the writ of error was issued against an order of a chief of police banning a public rally. The Court said that the writ may be granted against the judgment of an administrative officer "inasmuch as the constitutional guarantees may be violated in this type of proceedings as in a judicial proceeding."<sup>78</sup>

Not only the origin of section 14 of the Law No. 48 is North American, but also its interpretation and the requirement for applying the writ of error are often based on United States precedents and authorities. Thus, in *Bemberg y Cia v. Roca*<sup>79</sup> the Court, citing an American treatise, held that even where a federal question was raised on the trial, it would not review the case if the judgment could be reached without considering this question.<sup>80</sup> In

<sup>73</sup> § 24, cl. 2. This section refers to Law No. 48, § 14, and Law No. 4055, para. 6.

<sup>74</sup> Translation taken from Riesenfeld & Hazard, *Federal Courts in Foreign Systems*, 13 LAW & CONTEMP. PROB. 29, 46, n.136 (1948).

<sup>75</sup> 113 S.C.N. 294 (1910).

<sup>76</sup> AMADEO, *op. cit. supra* note 65, at 70, n.42.

<sup>77</sup> 155 S.C.N. 356 (1929).

<sup>78</sup> AMADEO, *op. cit. supra* note 65, at 70, n.42.

<sup>79</sup> 133 S.C.N. 298 (1921).

<sup>80</sup> AMADEO, *op. cit. supra* note 65, at 72, n.49.

another case, *Aredondo v. Calaza*,<sup>81</sup> the writ was denied because the petitioner made vague allegations that the Constitution had been violated, without specifying what provision of the basic law, federal statute or treaty he had in mind.<sup>82</sup>

The new Judiciary Act enumerates a few other types of cases, under separate items, where the Supreme Court can exercise its appellate jurisdiction. These refer, particularly, to its power to "review"<sup>83</sup> decisions denying the right to appeal,<sup>84</sup> to declare the meaning of its own decisions,<sup>85</sup> and to quash judgments having the authority of *res judicata*, even if delivered by the Supreme Court itself, in some criminal cases where new evidence is discovered after conviction or where the criminal law is made more lenient.<sup>86</sup>

In addition, the Supreme Court passes on complaints filed against the national courts of appeals for slowness in the administration of justice,<sup>87</sup> and on conflicts of jurisdiction between courts which have no common superior organ competent to resolve the dispute. It also intervenes in situations where it is necessary to prevent a denial of justice.<sup>88</sup>

Obviously, neither the Supreme Court nor any other tribunal of the nation has jurisdiction, either original or appellate, in any case where only the provincial constitution or laws are involved and no federal question is presented. In *Sociedad Anonima Frigorificos Anglo v. Buenos Aires*,<sup>89</sup> the Supreme Court said, citing United States authorities, that it "had no power to review the decisions of the provincial courts interpreting the provincial constitutions and statutes when their interpretation did not conflict with the national Constitution, laws, or treaties."<sup>90</sup> Even today, with its power of cassation, the Supreme Court is competent to construe only national codes federally enacted, not provincial laws. It keeps its position of the federal court of last instance and does not become a general court of appeals for the country.

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<sup>81</sup> 85 S.C.N. 395 (1900).

<sup>82</sup> AMADEO, *op. cit. supra* note 65, at 72, n.49.

<sup>83</sup> By a *recurso de revision*.

<sup>84</sup> § 24, cl. 5.

<sup>85</sup> *Id.* at § 24, cl. 4.

<sup>86</sup> *Ibid.*, in connection with § 4 of the Law No. 4055 of 1902, referred to by the Judiciary Act. Section 4 provides for the exercise of the appellate jurisdiction of the Supreme Court in cases where § 551 of the code of criminal procedure permits review of the judgments of the federal courts of appeals. Section 551 establishes four groups of situations where decisions having the authority of *res judicata* are subject to attack:

1. When it is established that a crime was committed by one person, but two or more persons were convicted for it by two or more judges.

2. When an accused is convicted for the murder of a person the existence of whom is established after the judgment.

3. When a person is convicted on the faith of a document which, after the delivery of the judgment, is established to be false; or when, after the judgment, the person who was convicted recovers a document which has a decisive bearing on the case.

4. When a subsequent law declares that an act, which previously was considered criminal, will no longer be recognized as such, or diminishes the penalty for its commission.

<sup>87</sup> Judiciary Act. § 24, cl. 6.

<sup>88</sup> *Id.* § 24, cl. 8.

<sup>89</sup> 172 S.C.N. 149 (1934).

<sup>90</sup> AMADEO, *op. cit. supra* note 65, at 73.

*Mexico*

In Mexico, as in most other federations, the Supreme Court has no constitutionally prescribed scope of appellate jurisdiction. By virtue of a constitutional amendment of 1946, a clause was added to Article 104 (I), by virtue of which, "[I]n cases in which the federation is interested the laws may establish appeal to the Supreme Court of Justice against the decisions of second instance" or those delivered by administrative tribunals of the federation. Even with this new provision, the great bulk of litigation which on appeal reaches the Supreme Court is based on Articles 103 and 107 of the Constitution, by the way of the writ of "amparo."<sup>91</sup>

By virtue of the provisions of the Judiciary Act of 1935 as amended,<sup>92</sup> the appellate jurisdiction of the Supreme Court is exercised by its four chambers.

## II. COUNTRIES HAVING ONLY ONE SET OF COURTS

In countries where there is no developed set of federal inferior courts, appellate jurisdiction of the federal supreme court is exercised, as a rule, in respect to the final judgments of the highest tribunals of the member states. In accordance with theoretical principles of federalism, this jurisdiction should be limited to cases involving federal questions and other questions in which the federation may be interested. But is that the system in all these federations?

*Brazil*

In Brazil, the appellate jurisdiction of the Federal Supreme Court is regulated, in its principal outlines, by the Constitution. As in Argentina, there are two kinds of appeals: ordinary and special. For a long time, Brazil went still further in the direction of non-reviewability of state court decisions by the Federal Supreme Court than was the rule in Argentina. This was true not only in cases where the interpretation of a national code was involved, but also where the construction of any other federal law was in question, except where the law granted an express permission to appeal. This system was changed by a constitutional amendment of 1926, and the new rule was retained by the Constitution of 1946. Review by the Supreme Court is permitted but not in all instances. The Constitution empowers the Court

To judge on special appeal cases decided in sole or final instance by other courts or judges: . . . When in the decision appealed the interpretation of the federal law invoked is different from that which has been given to it by any of the other judicial tribunals or the Federal Supreme Court itself.<sup>93</sup>

The other instances where controversies may reach the Supreme Court on special appeal are modeled on the United States pattern. They include cases:

- (a) When the decision is contrary to a provision of this Constitution or the text of a federal treaty or law;<sup>94</sup>

<sup>91</sup> The jurisdiction of the Supreme Court in cases of *amparo* is regulated in §§ 192-97 of the Ley de amparo of 1935, as amended.

<sup>92</sup> Diario Oficial of Jan. 10, 1936, and of Feb. 19, 1951.

<sup>93</sup> BRAZ. CONST. art. 101, § 3(d).

- (b) When question is raised as to the validity of federal law under the Constitution, and the decision appealed denies application of the law impugned;
- (c) When the validity of a law or act of a local government is impugned under this Constitution or under a federal law and the decision appealed holds the law or act valid.<sup>95</sup>

These cases generally are brought in the first instance directly to the highest courts of the states.<sup>96</sup>

On ordinary appeals, the Supreme Court has jurisdiction over

- (a) Writs of security and habeas corpus decided in final instance by local or federal courts when the decision is one of denial;
- (b) Cases decided by local judges based on contract or treaty between a foreign state and the Union, as well as those in which a foreign state and a person domiciled in the country may be parties;
- (c) Political crimes.<sup>97</sup>

The Court can also "review, in the interest of those condemned, its criminal decisions in closed proceedings."<sup>98</sup>

Upon "voluntary appeal to the . . . Court, its president [has] power to grant exequatur to letters rogatory from foreign tribunals."<sup>99</sup> This power can hardly be regarded, however, as an exercise of the appellate jurisdiction of the Court.

Because the scope of the appellate jurisdiction of the Supreme Court is determined by the Constitution, it cannot be changed by statute, and if a legislative enactment endeavors to vest in the Court jurisdiction over cases not provided for in the Constitution, it will be held unconstitutional. In a 1922 case,<sup>100</sup> involving an appeal in an electoral dispute, the Court declined to take jurisdiction in spite of a law permitting such appeals. The Court had this to say:

The constitution of the republic determined . . . the judicial jurisdiction of the federal supreme court. Thus its original jurisdiction, as well as its appellate jurisdiction, is perfectly defined in these provisions, in which respect our Magna Carta departed from its American prototype, in which latter only the original jurisdiction of the Supreme Court . . . was fixed . . . Our constitution, however, fixed both the original and the appellate jurisdiction, so that the ordinary law can neither enlarge nor restrict this jurisdiction.<sup>101</sup>

The Court was speaking of the Constitution of 1891, but the same observations are applicable to the Constitution of 1946. However, the latter recognizes electoral judges and tribunals as regular judicial organs of the nation, and, in some rare cases involving their decisions, permits appeals to the Supreme Court.<sup>102</sup>

<sup>94</sup> How is it possible to determine, before the judgment of the Supreme Court is rendered, whether the decision appealed from was "contrary" to federal law or not? The constitutional provision should be understood as saying: "When the decision is allegedly contrary."

<sup>95</sup> BRAZ. CONST. art. 101, §§ 3(a)-(c).

<sup>96</sup> See MACDONALD, *LATIN AMERICAN POLITICS AND GOVERNMENT* (1949).

<sup>97</sup> BRAZ. CONST. art. 101, § 2.

<sup>98</sup> *Id.* at art. 101, § 4.

<sup>99</sup> *Id.* at art. 102.

<sup>100</sup> Electoral Appeal No. 359, reported in 39 R.S.T.F. 252 (1922).

<sup>101</sup> English translation taken from JAMES, *THE CONSTITUTIONAL SYSTEM OF BRAZIL* 253-54 (1923).

### Canada

In Canada, the Federal Supreme Court is a tribunal of last resort in all cases, whether based on dominion or provincial law. The principle that in a federation the courts of the member states should have the last word in disputes involving their own law is not complied with. The Supreme Court Act states that the Court is "a general court of appeal for Canada," and "an additional court for the better administration of the laws of Canada."<sup>103</sup> The Court exercises "an appellate, civil and criminal jurisdiction within and throughout Canada."<sup>104</sup> With a few exceptions,<sup>105</sup> an appeal to the Court "lies from a final judgment . . . of the highest court of final resort in a province," in cases where the "value of the matter in controversy . . . exceeds two thousand dollars," and in all cases involving a writ of habeas corpus or mandamus.<sup>106</sup> Appeals are also permitted from advisory opinions (references).<sup>107</sup>

The expression "highest court of final resort" was given a strict interpretation by the Supreme Court. In a short opinion in *International Metal Industries Ltd. v. the City of Toronto*,<sup>108</sup> the Court approved the construction this clause received in an older case,<sup>109</sup> according to which this expression meant "the highest Court of Appeal having jurisdiction generally in the province, and not . . . the highest Court of Appeal in the particular case sought to be appealed." It follows that there was no right to appeal to the Canadian Supreme Court if by provincial legislation any court other than the highest court of the province was made the court of last resort in the particular case involved.

This result did not meet with general approval. It was pointed out that the Supreme Court Act, as understood by the Court itself, denied the right to appeal in a broad class of cases, even where important constitutional rights of citizens were involved, whenever by provincial legislation the cause was not appealable to the highest court of the province. Thus, the Canadian system permitted the provinces to control, to some extent, the jurisdiction of the highest federal tribunal, while in the United States, in cases falling under the appellate jurisdiction of the Federal Supreme Court, the states cannot obstruct federal appeal if all the remedies in the state court have been exhausted.<sup>110</sup>

In order to remedy this situation, an amendment to the Supreme Court Act, enacted in 1949, permitted the Supreme Court to grant a leave to

<sup>102</sup> "Decisions of the supreme electoral tribunal may not be appealed, except those which may declare the invalidity of a law or act contrary to the Federal Constitution, and those denying habeas corpus or writ of security, in which latter cases appeal may be had to the Federal Supreme Court." BRAZ. CONST. art. 120.

<sup>103</sup> Supreme Court Act, CAN. REV. STAT. c. 259, § 3 (1952).

<sup>104</sup> *Id.* at § 35.

<sup>105</sup> *Id.* at §§ 40, 44.

<sup>106</sup> *Id.* at § 36.

<sup>107</sup> *Id.* at § 37.

<sup>108</sup> [1939] Can. Sup. Ct. 271, [1939] 2 D.L.R. 295.

<sup>109</sup> *Farquharson v. Imperial Oil Co.*, [1899] 30 Can. Sup. Ct.

<sup>110</sup> How, *The Too Limited Jurisdiction of the Supreme Court of Canada*, 25 CAN. B. REV. 573 (1947).



appeal, according to its discretion, "from any final or other judgment of the highest court of final resort in a province . . . in which judgment can be had *in the particular case sought to be appealed to the Supreme Court*, whether or not leave to appeal to the Supreme Court has been refused by any other court."<sup>111</sup> This provision is subject to a few exceptions.

In addition, with some exceptions, appeals to the Supreme Court lie, "with leave of the highest court of final resort in a province . . . where, in the opinion of that court, the question involved . . . is one that ought to be submitted to the Supreme Court. . . ."<sup>112</sup> In the above instance, the requirement of the jurisdictional amount may be dispensed with.<sup>113</sup>

The provincial legislatures cannot abolish the right to appeal from the decisions of the provincial courts to the Supreme Court of Canada. In matters involving federal law, there could hardly be any doubt as to this principle, but there was some uncertainty as to causes of action arising under provincial law.<sup>114</sup> In a few decisions at the end of the nineteenth century, the Supreme Court held that provincial legislatures had no power to limit its appellate jurisdiction.<sup>115</sup> In 1907, the Privy Council agreed with the Supreme Court and affirmed its judgment holding that the legislature of Manitoba could not enact a provision by virtue of which there would be no appeal from the decisions of its Court of King's Bench in cases involving mechanics' and wage-earners' liens, in spite of the fact that the right to the lien was created by a provincial statute. The decision was based on the principle of supremacy, and the provincial statute being repugnant to a valid Dominion statute, had to give way.<sup>116</sup>

In the matter of appeals directly from inferior provincial courts to the Supreme Court, if the case involves \$2,000 or more and the highest provincial court grants leave, ordinarily the appeal will lie.<sup>117</sup> The Supreme Court may also issue writs of certiorari, which in the Canadian system are designed "to bring up any papers or other proceedings had or taken before any court, judge or justice of the peace, and that are considered necessary with a view

<sup>111</sup> Supreme Court Act, CAN. REV. STAT. c. 259, § 41(1) (1952) (emphasis added).

<sup>112</sup> *Id.* at § 38.

<sup>113</sup> In *Gill v. Ferrari*, [1951] 1 D.L.R. 647, the British Columbia Court of Appeal, applying § 38, refused to grant leave to appeal to the Supreme Court of Canada on the ground that the question presented was not one that "ought to be submitted" to that Court, because it involved only provincial law matters. However, if the provincial court thinks that the question should be decided by the Supreme Court of Canada, it will not be deterred from granting leave to appeal even if the value of the matter in controversy is quite insignificant. Thus, in *R. M. of Assiniboia v. Montgomery*, 38 Man. 527, 1 W.W.R. 500 (1930), leave to appeal was granted although the judgment against the respondent was only for \$11.00. Bergman, *A Brief Outline of Some of the Principal Differences Between the Canadian and American Systems of the Administration of Justice*, 3 DAK. L. REV. 187, 198 (1930).

<sup>114</sup> Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 CAN. B. REV. 1038, 1049 (1952).

<sup>115</sup> LASKIN, CANADIAN CONSTITUTIONAL LAW 481 (1951).

<sup>116</sup> *Crown Grain Co., Ltd. v. Day*, [1908] A. C. 504, 507 (Man.). However, in *Gill v. Ferrari*, [1951] 1 D.L.R. 647, O'Halloran, Judge of the British Columbia Court of Appeal, by way of dictum, expressed the opinion that the question was not yet definitely settled, asking, "if the Federal Parliament has no jurisdiction to legislate upon a given subject-matter solely within provincial competence, then how can another Federal branch (*viz.*, the Supreme Court), review, supervise or alter decisions thereon by provincially-constituted Courts?" *Id.* at 649.

<sup>117</sup> Supreme Court Act, CAN. REV. STAT. c. 259, § 39 (1952).

to any inquiry, appeal or other proceeding had or to be had before the Court."<sup>118</sup>

The Supreme Court Act provides that, notwithstanding the act, the Court "has jurisdiction as provided in any other Act conferring jurisdiction."<sup>119</sup> The most important instance of such jurisdiction is the one vested in the Supreme Court by the Exchequer Court Act. By virtue of this act, appeals to the Supreme Court from the decisions of the Exchequer Court lie "from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings," and "with leave of a judge of the Supreme Court, . . . from an interlocutory judgment, pronounced by the Exchequer Court, in an action, suit, cause, matter, or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars."<sup>120</sup> Also, if an inter-provincial controversy or a dispute between the federation and a province is submitted to the Exchequer Court, the Supreme Court has appellate jurisdiction in such cases.<sup>121</sup>

In bankruptcy cases, appeals from the provincial courts reach the Supreme Court only where a judge of the latter grants a special leave to appeal.<sup>122</sup> The "ordinary procedure" of the Court is applicable.<sup>123</sup>

Another statute conferring appellate jurisdiction on the Supreme Court is the Dominion Controverted Elections Act. Election cases receive a special treatment in the Supreme Court, being regarded as a special class of appeals, and are entered by the registrar of the Court on the first part of the list of cases reaching the Court on appeal. All other cases are entered on the list according to the province from which they originated: part two includes Western Provinces cases; part three—Maritime (Eastern) Provinces cases; part four—Quebec cases; and part five—Ontario cases.<sup>124</sup>

By virtue of section 40 of the Supreme Court Act, most provisions as to the appellate jurisdiction of the Court, as set by the act, are inapplicable in criminal cases.<sup>125</sup> The regulation of criminal appeals was left to the criminal code. The code, however, does not cover all types of conduct classified as criminal. Many crimes arise from violation of other statutes such as the Income War Tax Act or traffic regulations.<sup>126</sup> In all these cases there can be no appeal to the Supreme Court, as a matter of right, unless such a right is expressly granted by these statutes, which is not the usual situation. The number of crimes not mentioned in the criminal code is ever increasing. Further, there is a limited body of provincial criminal legislation, in spite of the fact that the power to legislate in criminal matters belongs to the Dominion. The lack of the right to appeal to the Supreme Court in cases involving

118 *Id.* at § 61.

119 *Id.* at § 42.

120 Exchequer Court Act, CAN. REV. STAT. c. 98, § 82 (1952).

121 *Id.* at § 30(2).

122 Bankruptcy Act, CAN. REV. STAT. c. 14, § 151 (1952).

123 *Id.* at § 140(3).

124 Supreme Court Act, CAN. REV. STAT. c. 259, § 84 (1952).

125 *Id.* at § 40. "No appeal to the Supreme Court lies under §§ 36, 38 or 39 from a judgment in a criminal cause, in proceedings for or upon a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge. . . ."

126 How, *supra* note 110, at 576.

such crimes has been criticized.<sup>127</sup> Only where a writ of habeas corpus is asked by a person committed under a federal statute, does the Supreme Court have jurisdiction. Every judge of the Court has power to issue the writ, concurrently with provincial courts. Refusal to issue the writ by a Supreme Court judge is appealable to the Court.<sup>128</sup>

In criminal code crimes, appeals to the Supreme Court of Canada were limited, for a long time, to cases where in the court below there was a dissent and where there was a conflict between provincial courts on the point involved.<sup>129</sup> This artificial classification did not seem to be proper. Its unworkability was clearly demonstrated when, in a recent case, the Attorney General suggested to the Ontario Court of Appeal that one of the judges should dissent from its opinion in order to give appellate jurisdiction over the case to the Supreme Court of Canada.<sup>130</sup> The situation was partially remedied by the enactment of section 41(1) of the Supreme Court Act in 1949,<sup>131</sup> which includes criminal appeals. By virtue of this section, the Supreme Court may grant leave to appeal. In one of the first cases where this power was exercised,<sup>132</sup> the Court insisted on the complete exhaustion of provincial remedies before leave would be granted. In the case before the Court, the petitioner had no right to appeal to any provincial court from a summary conviction by a Quebec magistrate; however, he could ask for a writ of prohibition or for certiorari to the provincial court, which he neglected to do. The leave to appeal to the Supreme Court was therefore denied.<sup>133</sup>

The decision as to the granting of a leave to appeal depends upon one judge of the Supreme Court;<sup>134</sup> the Court held it had no jurisdiction to change it, even if the challenged judgment involves a capital punishment case. This rule is strikingly different from civil appeal cases, where any decision involving at least \$2,000 may reach the Supreme Court as a matter of right, and some other decisions, if leave of the court below is granted. The insufficiency of the criminal appeal rules came into focus in a recent case where one Coffin, whose death sentence was unanimously affirmed by the highest court of Quebec, was seeking leave to appeal to the Supreme Court. Leave was refused, and the full Court refused to take jurisdiction to review

127 How, *supra* note 110, at 577-85.

128 Supreme Court Act, CAN. REV. STAT. c. 259, § 57 (1952).

129 Sections 1023 and 1025 of the old criminal code of 1893, CAN. REV. STAT. c. 36 (1927).

130 How, *supra* note 110, at 581.

131 See pp. 35-36, *supra*.

132 Major v. Beauport, [1951] 1 D.L.R. 586.

133 Section 597(1) of the new criminal code, Statutes of Canada 1953-54, 2 & 3 Eliz. 2, c. 51, reads as follows: "A person who is convicted of an indictable offense whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada (a) on any question of law on which a judge of the court of appeal dissents, or (b) on any question of law, if leave to appeal is granted by a judge of the Supreme Court. . . ." By § 598(1), the same provisions are applicable to appeals by the Attorney General.

Section 597(2) provides: "A person (a) who is acquitted of an indictable offense and whose acquittal is set aside by the court of appeal, or (b) who is tried jointly with a person referred to in paragraph (a) and is convicted and whose conviction is sustained by the court of appeal, may appeal to the Supreme Court of Canada on a question of law." For an evaluation of the new code see a series of four articles in 33 CAN. B. REV. 1, 20, 41, 63 (1955).

134 Section 41 of the Supreme Court Act, CAN. REV. STAT. c. 259 (1952), laying down rules as to when a leave to appeal may be granted, speaks about the Supreme Court of a judge.

this decision. Coffin then resorted to the executive branch of the government asking for clemency or an order for a new trial, as is made possible under section 596 of the new criminal code. In a move without precedent, the Governor General in Council, taking advantage of his power to ask the Supreme Court for advisory opinions, referred to the Court the question of "what disposition of the appeal would . . . be made by the Court" if Coffin's application for leave to appeal had been granted. Of course, the decision of the executive will depend on the answer given by the Court.<sup>135</sup>

Thus, in fact, the Supreme Court will review the case anyhow, but only due to the intervention of the executive. It seems that the discrepancy between the rules of civil and criminal appeals to the Supreme Court is difficult to justify, and that they should be more closely aligned. However, at least some outstanding defense lawyers feel that there should be no appeal as a matter of right to the Supreme Court in all criminal cases, even if capital punishment is at stake. Otherwise, even in a hopeless case, appeal would be taken, and the business of the Court would increase unnecessarily. At a recent panel discussion of some outstanding Canadian jurists, the prevailing opinion was that the only possible improvement would be to require three judges of the Supreme Court to pass on the petitions to grant leaves. On the other hand, perhaps no appeal of right should lie in civil cases.<sup>136</sup>

Where the Supreme Court does accept an appeal and disaffirms the judgment appealed from, it may either deliver a final judgment, or order a new trial.<sup>137</sup> It may also "quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith."<sup>138</sup>

### *Australia*

The appellate jurisdiction of the High Court of Australia is delimited by Section 73 of the Constitution.<sup>139</sup> It must be pointed out that the jurisdiction

<sup>135</sup> The data on the *Coffin* case is taken from Laskin, *Supreme Court of Canada: The Coffin Case*, 33 CAN. B. REV. 1059 (1955). On a preliminary motion to dismiss, the Supreme Court held that the case was properly referable to the Court under the language of the Supreme Court Act. Reference re *Regina v. Coffin*, [1957] 7 D.L.R. 2d 568.

<sup>136</sup> *Inequalities of the Criminal Law, A Symposium*, 34 CAN. B. REV. 245, 282-87 (1956).

<sup>137</sup> Supreme Court Act, CAN. REV. STAT. c. 259, §§ 46, 47 (1952).

<sup>138</sup> *Id.* at § 45.

<sup>139</sup> 73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (1) Of any Justice or Justices exercising the original jurisdiction of the High Court;
- (2) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- (3) Of the Inter-State Commission, but as to questions of law only; and the judgment of the High Court shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a state in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

It should be observed that clause (III) is inoperative because the Inter-State Commission does not exist.

is not limited to cases arising under federal law, and thus the High Court acquires the features of a general court of appeals for the country (subject to the appellate jurisdiction of the Privy Council).<sup>140</sup> Taking advantage of its powers granted by the Constitution, the Australian Parliament set some limits to the appellate jurisdiction of the Court. By virtue of section 35 of the Judiciary Act<sup>141</sup> as amended in 1955,<sup>142</sup> appeals to the High Court lie, as a matter of right, in cases involving at least £1500 or affecting "status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency," and from judgments "pronounced in the exercise of the federal jurisdiction in a matter pending in the High Court." Also, the High Court may grant leave to appeal in other cases, civil or criminal, when it sees fit. In the exercise of its appellate jurisdiction, the High Court may either grant a new trial, if there has been a trial in the court below,<sup>143</sup> or render a judgment on the merits.<sup>144</sup>

### *Switzerland*

In Switzerland, with some minor exceptions, the substantive law of the country is federal, but applied by the cantonal courts. It is quite natural that the Federal Tribunal should have the last word in cases which involve federal law, but the Constitution has not defined the appellate jurisdiction of the Tribunal. Instead, by virtue of Article 114 of the Constitution, the federal legislature may place within the jurisdiction of the Federal Tribunal matters not enumerated in the basic law, and, "in particular, powers may be conferred on the tribunal for the purpose of ensuring the uniform application of the laws contemplated in Article 64" (national codes).<sup>145</sup> This power was freely exercised by the legislature, starting with the Judiciary Act of 1874.

The wording of the Constitution seems to permit conferring general appellate jurisdiction on the Federal Tribunal; however, in the light of the Judiciary Act, it has the character of a court of cassation.<sup>146</sup> Usually, the cases are remanded by the Tribunal to the cantonal courts on which "the conclusions of law of the Tribunal are binding." However, it sometimes decides them on the merits.<sup>147</sup>

In civil matters, the jurisdictional amount is 4,000 Swiss francs,<sup>148</sup> but the appellate jurisdiction of the Tribunal may also be resorted to in cases

<sup>140</sup> In Australia,

The Commonwealth government and the state governments are in their relations independent and not hierarchical. . . . The exception to this independence is the department of judicature, for the High Court of the Commonwealth is the head of the judicial system both of the Commonwealth and of the states, and the states as corporate communities are made amenable to the jurisdiction of the Commonwealth courts.

W. H. MOORE, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA* 70-71 (1910).

<sup>141</sup> Judiciary Act 1903-1950, 3 COMMONWEALTH ACTS 1905-1950, at 2387.

<sup>142</sup> Note, *Appeals to the High Court*, 29 AUST. L.J. 276 (1955).

<sup>143</sup> Judiciary Act 1903-1950 § 36, 3 COMMONWEALTH ACTS 1905-1950, at 2387.

<sup>144</sup> *Id.* at § 37.

<sup>145</sup> The duty of insuring uniform application of the national codes is the most important task of the Tribunal. RAPPARD, *THE GOVERNMENT OF SWITZERLAND* 89 (1936).

<sup>146</sup> FLEINER & GIACOMETTI, *SCHWEIZERISCHES BUNDESSTAATRECHT* 833 (1949).

<sup>147</sup> *Id.* at 839.

<sup>148</sup> Judiciary Act § 46, 95 B.S.E. I, 167 (1943), 60 RECUEIL DES LOIS FEDERALES 269 (1944).

where the value in controversy is less than that amount,<sup>149</sup> and where no pecuniary interests are involved.<sup>150</sup>

The Tribunal can summarily annul the judgment below and remand it to the cantonal court where the decision was based on federal law, but cantonal or foreign law was applicable.<sup>151</sup> On the other hand, in cases where appeal<sup>152</sup> to the Tribunal does not lie, it can still annul the judgment below where instead of the federal law applicable, cantonal or foreign law was applied,<sup>153</sup> and where provisions as to the competence of some authorities, as set by federal statutes or international treaties concluded by the Confederation, are violated.<sup>154</sup> In those instances, cases reach the Federal Tribunal by the extraordinary remedy called "nullity plea."<sup>155</sup>

In the judicial administration of civil law, the Tribunal has regular appellate jurisdiction if federal law or international treaties are allegedly violated.<sup>156</sup> By virtue of the Judiciary Act, "federal law is violated when a rule of law expressly established by a federal enactment or implicitly deriving from its provisions has not been applied or has been misapplied."<sup>157</sup> An erroneous legal characterization of a fact is treated as a violation of the law.<sup>158</sup> As to findings of fact, they cannot be considered as violating federal law except if the federal rules of evidence have been disregarded,<sup>159</sup> otherwise, they are binding on the Tribunal. However, the Tribunal may rectify findings clearly resting on an oversight of the court below.<sup>160</sup> Before an appeal to the Tribunal may be taken, all cantonal remedies must be exhausted.<sup>161</sup> In civil cases, these regular appeals constitute 90 per cent of the business of the Tribunal.<sup>162</sup>

Evidently, before the enactment of the national codes and the adoption of the constitutional provision vesting in the Federal Tribunal the power to ensure the codes "uniform application," the business of the Tribunal was much restricted, disputes of "public law" being largely within the jurisdiction of the other branches of government. However, the Tribunal developed a theory which brought within its jurisdiction cases not expressly provided for by legislative enactments, and extended its control over the cantonal courts in some instances. The starting point was Article 113(3) of the Constitution, by virtue of which the Tribunal was vested with jurisdiction over "complaints

<sup>149</sup> *Id.* at § 45, dealing particularly with literary and artistic property, patents, and annulment of some commercial papers.

<sup>150</sup> *Id.* at § 44.

<sup>151</sup> *Id.* at § 60(1)(c).

<sup>152</sup> An ordinary appeal is called, in the judiciary acts, "recours en reforme" in French; "Berufung" in German.

<sup>153</sup> Judiciary Act § 68(1)(a), 95 B.S.E. I, 167 (1943), 60 RECUEIL DES LOIS FEDERALES 269 (1944).

<sup>154</sup> *Id.* at § 68(1)(b).

<sup>155</sup> In French, "recours en nullite"; in German, "Nichtigkeitsbeschwerde."

<sup>156</sup> Judiciary Act § 43(1), 95 B.S.E. I, 167 (1943), 60 RECUEIL DES LOIS FEDERALES 269 (1944).

<sup>157</sup> *Id.* at § 43(2).

<sup>158</sup> *Id.* at § 43(4).

<sup>159</sup> *Id.* at § 43(3).

<sup>160</sup> *Id.* at § 63(2).

<sup>161</sup> *Id.* at § 48.

<sup>162</sup> There were 460 appeals in 1950. HUGHES, THE FEDERAL CONSTITUTION OF SWITZERLAND 125 (1954).

in respect of violation of constitutional rights of citizens, and complaints by individuals in respect of violation of concordats or treaties."

In connection with some other constitutional provisions, Article 113(3) served the Tribunal with a basis for the theory that the Tribunal has jurisdiction in cases where Swiss citizens are denied justice by the cantonal authorities. At first, Article 5 of the Constitution guaranteeing "the liberty and rights" of the people and the "constitutional rights of the citizens" was relied upon by the Tribunal. Then, at the end of the nineteenth century, Article 4 came to be considered as a constitutional guaranty against denial of justice, and was used by the Tribunal as the basis of its extended jurisdiction. It provides that "all Swiss are equal before the law," and that "there is neither subjection nor privilege of locality, birth, family, or person."<sup>163</sup> The Tribunal held that it was its duty to assure that the way of judicial redress be open to each Swiss. Naturally, cases of a "formal" denial of justice, where judicial remedies are simply refused to a litigant by denying him the right to be heard, are rare.<sup>164</sup> But little by little the whole concept of denial of justice was broadened by the Tribunal to include instances where a suit was dismissed "under a pretext," where a cantonal court delivered an arbitrary decision, where it did not apply some clear mandate of the law, or where, due to different cantonal rules of conflicts of law, plaintiff could not find any court which considered itself competent to pass upon the case. In cases of denial of justice, the Tribunal assumes the role of a court of cassation; the cases are not adjudicated on the merits, but remanded with instructions to proceed in accordance with conclusions at law reached by the Tribunal. The denial of justice jurisdiction of the Tribunal was well settled and developed by the end of the nineteenth century, and in 1901, out of 100 "appeals in public law," 55 were based on the alleged denial of justice.<sup>165</sup>

Besides the denial of justice, some other "appeals in public law"<sup>166</sup> are based on Article 4 of the Constitution; they are expressly recognized by the new Judiciary Act which permits resort to the Tribunal only after all cantonal remedies have been exhausted.<sup>167</sup> The rest originate from other provisions in connection with Article 113(3) of the Constitution, and include various instances of alleged violations of the rights of citizens, granted by the federal Constitution or the cantonal ones under the guarantee of the former. They may be brought in the same cases as when the Federal Tribunal is called to review acts of cantonal non-judicial authorities, together with other cases of "public" law which reach the Tribunal by virtue of Article 113 of the Constitution (constitutional law), and Article 114A of the basic law (administrative

<sup>163</sup> Translation in HUGHES, *op. cit. supra* note 162, at 6.

<sup>164</sup> In the years 1925-35, there were only two instances of this kind; HUGHES, *op. cit. supra* note 162, at 7.

<sup>165</sup> Data on the historical development of the denial of justice jurisdiction of the Federal Tribunal are taken from SOURIAU, *L'EVOLUTION DE LA JURIDICTION FEDERALE EN SUISSE* 377 (1909). The author considers this development as particularly noteworthy in the light of two facts: first, that it was due to the opinions of the Tribunal itself—a source of law much less important in civil law than in common law countries; second, that it took place in a federal country where, as a rule, the jurisdiction of the federal supreme court is rigidly delimited.

<sup>166</sup> In French, "recours de droit public"; in German, "Staatsrechtliche Beschwerde."

<sup>167</sup> Judiciary Act § 87, 95 B.S.E. I, 167 (1943), 60 RECUEIL DES LOIS FEDERALES 269 (1944).

law). Some cases falling under these constitutional provisions are taken care of by the Tribunal in the exercise of its original jurisdiction.

Among the five departments of the Federal Tribunal dealing with criminal matters, two exercise the appellate jurisdiction of the Tribunal as courts of cassation.<sup>168</sup> One of them, called the "extraordinary court of cassation," hears appeals from the other criminal law departments where the Tribunal's original jurisdiction is exercised and passes on the conflicts of competence between them. It consists of seven judges, including the President and the Vice-President of the Tribunal.<sup>169</sup> The other one, called the "court of cassation,"<sup>170</sup> is the court of last resort in criminal cases for the country, and it acquired a particular importance with the enactment of the federal criminal code which has been in force since 1942 (as amended in 1950). It consists of five judges and hears appeals brought by "prayers to quash" the decisions below in matters of federal criminal law, be they rendered by judicial or non-judicial authorities.<sup>171</sup> The Tribunal can either affirm the judgment below, or reverse it and remand it to cantonal authorities for a reconsideration of the case, the legal conclusions of the Tribunal being binding on them.<sup>172</sup>

Administrative law crimes are not codified; they are found in different statutes dealing with customs, telephones and telegraphs, fiscal regulations, etc.<sup>173</sup> Where the offense is not punishable by confinement, it may be tried by the administrative organs of the government, in instances provided for by the law, if the accused does not require a judicial proceeding.<sup>174</sup> In other cases, cantonal courts have jurisdiction in the first instance, and the litigation may reach the Federal Tribunal as the court of last resort.

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<sup>168</sup> In 1951, the business of the Tribunal in criminal cases included 550 cases. HUGHES, *op. cit.* *supra* note 162, at 126.

<sup>169</sup> Judicial Act §§ 12(2), 168, 95 B.S.E. I, 167 (1943), 60 RECUEIL DES LOIS FEDERALES 269 (1944), modifying §§ 1 & 2 of the code of criminal procedure of 1934.

<sup>170</sup> *Id.* at § 12(1)(g).

<sup>171</sup> *Id.* at § 168, modifying §§ 12 & 268 of the code of criminal procedure

<sup>172</sup> Section 277 *ter*, of the code of criminal procedure, as modified by § 168 of the Judiciary Act.

<sup>173</sup> FLEINER & GIACOMETTI, *op. cit.* *supra* note 146, at 843.

<sup>174</sup> *Id.* at 853-54.