

## PART VIII

### FINAL JUDGMENT, APPEALS AND REVIEW

#### CHAPTER 1

##### AVAILABILITY OF A FIRST APPEAL

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#### TABLE OF CONTENTS

1 Introduction and Scope of the Analysis .....	1
2 Converging Trends .....	3
3 Methodological Premises. A 'Comparative Law of Differences' .....	5
4 Structure of the Analysis .....	7
5 On Similarities. The Availability of a First Appeal and the Tension Between Error Correction ('Justice') and Finality.....	8
6 The Right to a First Appeal in Civil Matters and Its Limits .....	16
6.1 Domestic Perspectives .....	16
6.2 The Right to Appeal at a Supranational Level .....	20
7 On Differences. First Appeal as a Right vs First Appeal by Permission or Leave .....	22
7.1 Theoretical Postulates .....	22
7.2 The 'Appeal by Permission' Model in Practice: England and Wales, Germany, and Italy .....	27
8 Appeal as a Common Practice vs Appeal as an Exceptional Remedy.....	32
8.1 The Comparative Significance of Judicial Statistics and Courts Organization....	32
8.2 An Overlooked Distinction: Central vs Territorial Courts of Appeal .....	33
8.3 A Bird's-Eye View of Appellate Courts Structure and Data. Common Law ...	34
8.4 ... And Civil Law .....	37
9 Conclusions. A Cultural Explication .....	39
Abbreviations and Acronyms .....	44
Legislation .....	46
International/Supranational .....	46

National.....	46
Cases .....	48
International/Supranational .....	48
National.....	48
Bibliography .....	49

## 1 INTRODUCTION AND SCOPE OF THE ANALYSIS

- 1 This Chapter addresses, from a comparative law standpoint, the availability of first appeals – that is, how different legal systems and traditions permit, regulate, and conceptualize the opportunity for the unsuccessful party (or parties) to have a case reconsidered by a court of the next level in the judicial pyramid, before it achieves *res judicata* status.<sup>1</sup>

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<sup>1</sup> In the legal scholarship that investigates civil appeals explicitly from a comparative perspective, for an excellent comparative overview, A Uzelac and C H van Rhee (ed), *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse Against Judicial Decisions in Civil Matters* (Intersentia 2014), which in part collects the speeches presented at the Conference 'Appeals and Other Means of Recourse Against Judgments in the Context of Efficiency and Fairness' (Dubrovnik, May 2012). This collection covers many legal systems (England, United States, The Netherlands, China, Slovenia, Croatia, Italy) differentiating them on the basis of the frequency of appeals, that is between 'Less Appeal, More Efficiency' and 'More Appeal, Less Efficiency'. This categorization has been particularly useful in this analysis, in delineating the contraposition between 'appeals as a common practice' vs 'appeals as exceptional remedies' (see Part 8 of this publication). Cf also J A Jolowicz and C H van Rhee (ed), *Recourse Against Judgments in the European Union* (Kluwer Law International 1999); P E Herzog and D Karlen, 'Attacks on Judicial Decisions' in M Cappelletti (ed), *Civil Procedure* (vol XVI) in *International Encyclopedia of Comparative Law* (Siebeck 1982) especially 26 ff; J A Jolowicz, 'Appeal and Review in Comparative Law: Similarities, Differences and Purposes' Southey Memorial Lecture (1986) 15 Melbourne University Law Review 618 - 636; S Geeroms, 'Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated...' (2002) American Journal of Comparative Law 201 - 228. For an original perspective, M Shapiro, *Appeal* (1980) 14(3) Law & Society Review 629 - 661. In Italian, or referred to Italy, R Caponi, 'L'appello nel sistema delle impugnazioni civili (note di comparazione anglo-tedesca)' (2009) Rivista Diritto Processuale 631; R Caponi, 'La riforma dei mezzi di impugnazione' (2012) Rivista Trimestrale di Diritto e Procedura Civile 1153; S Dalla Bontà, *Contributo allo studio del filtro in appello* (Editoriale Scientifica 2015), and also the review of the book by T Arruda Alvim (2016) Revista de Processo 259; V Ansanelli, 'Qualche aggiunta sulla "via italiana" alla selezione delle impugnazioni in appello' (2014) Politica del diritto 121-144; A Tedoldi, *L'appello civile* (Giappichelli 2016) 7 ff, 461 ff; G Carmellino, 'La permission to appeal nel diritto inglese' (2014) Rivista Diritto Processuale 1462-1492; P Ortolani, 'L'appello nel diritto inglese', S Dalla Bontà, 'L'appello nel diritto tedesco', S Maffei, 'L'appello nel diritto francese e belga', and E Bernini, 'L'appello nel diritto spagnolo' all in C Cecchella (ed), *Il nuovo appello civile* (Zanichelli 2017) 269-290, 291-331, 333-359, and 361-396 respectively. In French, J Van Compernelle and A Saletti (ed), *Le double degré de juridiction. Étude de droit comparé* (Bruylant 2010). For an historical comparison between English and France, and then Québec (Canada), Y M Morissette, 'Aspects historiques et analytiques de l'appel en matière civile' (2014) 59 (3) McGill Law Journal 481 - 556. In Spanish, Á Pérez Ragone, 'La armonización del acceso a la apelación en Europa: modelos comparados y borrador del proyecto ELI/UNIDROIT' (2020) 84 Revista de Derecho PUCP 355 - 389; G Priori Posada, 'Reflexiones en torno al doble grado de jurisdicción' (2003) 9 Advocatus (Revista semestral editada por alumnos de la Facultad de Derecho de la Universidad de Lima) 405 - 422; L G Marinoni, 'El doble grado de jurisdicción' in R Cavani (ed), *Estudios sobre los medios impugnatorios en el proceso civil* (Gaceta Jurídica 2011) 39; E Vescovi, *Los recursos judiciales y demás medios impugnatorios en Iberoamérica* (Depalma 1988). For a comparison between different epochs,

- 2 In this definition, three key elements serve to delimitate the scope of the investigation.
- 3 (1) To begin with, the focus is on the availability of *first* appeals. This term is used to distinguish *first* from *second* appeals which in common law systems usually refer to appeals to the Court of Appeal against a decision that itself was rendered on appeal by a lower court (eg, in England and Wales a decision issued by the High Court on appeal from a judgment of the County Court can in theory be appealed a second time before the Court of Appeal: a limited and very exceptional possibility<sup>2</sup>).
- 4 Indeed, in general, first appeals might be conducted either by a Court of Appeal in the strict sense – this being the paradigmatic case – or by a lower court reviewing decisions from an even inferior court. For example, in England and Wales, the High Court receives appeals from circuit judges of the County Court, and circuit judges hear appeals from district judges. In Italy, the *Tribunale*, generally the court of first instance, hears appeals from the *Giudice di pace* (Justice of the peace). This applies, *mutatis mutandis*, to practically all systems. Given the varying court hierarchies, we will concentrate our attention primarily on first appeals before Courts of Appeal in the strict sense.
- 5 Also, in the common law terminology, the general term ‘appeal’ commonly indicates proceedings before both second instance and supreme courts (*final appeals*). In contrast, in the civil law tradition, two distinct words – and concepts – are employed: *appello* and *cassazione* in Italy, *appel* and *cassation* in France, *apelación* and *casación* in Spain, *apelação* and *cassação* in Portugal, *Berufung* and *Revision*, in Germany.<sup>3</sup> The

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S Liva, ‘La admisibilidad de la apelación: rasgos comunes entre el derecho romano y el sistema jurídico latinoamericano’ (2017) 78 Revista de Derecho PUCP 9 - 20. In Portuguese, R De Carvalho Aprigliano, ‘Princípio do Duplo Grau de Jurisdição nos Sistemas de Common Law e Civil Law: uma breve comparação’ in M P de Carvalho (ed), *Direito Processual civil* (Quartier Latin 2007) 319-344. Referred to Brazil, in English, C Zucatti Pritsch, ‘The Brazilian Appellate Procedure Through Common Law Lenses: How American Standards of Review May Help Improve Brazilian Civil Procedure’ (2017) 48 (3) University of Miami Inter-American Law Review 56-96; C Kern, ‘Appellate Justice and Miscellaneous Appeals: the Proposals for a Reform of Brazilian Civil Procedure as Compared to the German Solution’ (2010) 188 (35) Revista de Processo 147-162. In German, M Stürner, *Die Anfechtung von Zivilurteilen: eine funktionale Untersuchung der Rechtsmittel im deutschen und englischen Recht* (Beck 2002), for a Germany-England comparison; and L Bierschenk, *Die zweite Instanz im deutschen und französischen Zivilverfahren. Konzeptionelle Unterschiede und wechselseitige Schlussfolgerungen, Studien zum ausländischen und internationalen Privatrecht* (XXVII, Siebeck 2016), for a Germany-France comparison.

<sup>2</sup> Rule 52.7 of the UK Civil Procedure Rules (UKCPR), ‘Permission to appeal test-second appeals: The Court of Appeal will not give permission unless it considers that the appeal would—(i) have a real prospect of success; and (ii) raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it’. In common law orders, permissions are required for second appeals.

<sup>3</sup> For a common law perspective on this terminological and conceptual difference, J A Jolowicz, *On Civil Procedure* (Cambridge University Press 2000) 299 ff.

expression ‘first appeal’ clarifies that we are discussing here just second-instance proceedings (although techniques of filtering second appeals might also be used, occasionally, in the appellate phases).

- 6 (2) Secondly, in the given definition, the availability is specifically referred to the opportunity ‘to have a *case* reconsidered’. That means that the focus is on appeals against final decisions, namely judgments that terminate the whole dispute, the entire case, establishing rights and obligations. It is acknowledged, however, that appeals may also be permitted against interlocutory (ie, non-definitive) orders as well (usually, in common law orders, in a more restricted fashion, due to the so-called ‘finality rule’).<sup>4</sup>
- 7 (3) Thirdly, to qualify as a (first) appeal, the review must be brought before, and conducted by, a court at ‘the next level in the judicial pyramid’. The re-adjudication on the merits must be undertaken by the hierarchically superior judge (vertically). It is recognized, though, that in some legal systems, the law allows for a case to be reviewed the first time either by the same court or by a court of equivalent rank to the one that has pronounced the original decision (horizontally).<sup>5</sup>

## 2 CONVERGING TRENDS

- 8 The problem of the availability of a first appeal is particularly relevant today. In our times where civil justice faces a profound crisis across the globe, appeals increasingly appear as a *luxury* we can no longer afford. In this era where efficiency and rapidity are emphasized as key priorities, austerity policies and shrinking public budgets place appeals in a vulnerable position. Judging a case twice can be perceived as a waste of time and money, conflicting with the imperatives of productivity and speed. This is particularly noticeable in Italy, where appellate courts are notoriously burdened by case

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<sup>4</sup> In Italy, eg, some non-definitive decisions are immediately appealable, and the losing party on that point may choose to postpone the appeal until it can be joined with the definitive judgment; see Art 340 of the Code of Civil Procedure (ITCCP). As said, in the common law world, such appeals are usually more restricted and are mostly permitted only with leave (even where leave is not required for appealing final decisions). For a detailed analysis on this point of Canada’s provinces of Ontario and British Columbia, but analysing also English developments, G J Kennedy, ‘Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?’ (2020) 45(2) *Queen’s Law Journal* 243-286.

<sup>5</sup> Eg, in Italy, Art 669 *terdecies* Code of Civil Procedure (ITCCP), referring to the review of provisional measures.

congestion and delays. However, this issue affects in a more systemic way judicial systems worldwide.<sup>6</sup>

- 9 It is no surprise therefore that the comparative landscape is replete with attempts to limit, weaken and disincentivize access to second-degree courts, on costs or caseload concerns, in many different ways. The more direct one is by ‘filtering out’ appeals through an *ex ante* selection, striking them out before they are heard in full, when the appellant cannot show a *prima facie real prospect, clear chance* or *reasonable probability* of future success. As we shall see, this is emblematically the case in England and Wales (Rule 52.3 UKCPR), but also in Germany (Sec 522 (2) Code of Civil Procedure; GCCP), and in Italy, at least before the last reform of the *Codice di procedura civile* (Code of Civil Procedure, ITCCP; see former Art 348 *bis* and *ter*, abrogated in 2022). While this approach is well-intentioned in its goal to conserve judicial resources by preventing full hearing for frivolous or abusive appeals, it might result, in practice, in an unduly restriction of appellants’ rights.
- 10 More subtle modes are also being employed to limit appeals, such as increasing access fees, elevating the thresholds for small claims under which appeals are not available, encouraging parties to mediate and put the controversy out of the court also at an advanced stage, setting more and more restrictive formal requirements for written introductory acts (making it for appellate courts easier to dismiss the case), or imposing

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<sup>6</sup> With respect to England, Lord Justice M Briggs (former Justice of the Court of Appeal and now Justice of the UK Supreme Court) mentioned in recent times the ‘grave overload in the work of the Court of Appeal’ and defined ‘justified the perception that the Court [of Appeal] was grossly overloaded with work [...] from the increased burden of full appeals’ (*Civil Courts Structure Review Final Report*, July 2016, para 9.1 <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> accessed 5 November 2024). In the US, similar concerns are advanced as to the federal level. M K Levy, in her review of the book *Injustice on Appeal: The United States Courts of Appeals in Crisis* (by W M Richman and W L Reynolds, Oxford UP 2012) reports that ‘[w]hen recently asked what he thought was one of the greatest problems plaguing the federal judiciary, Supreme Court Justice Samuel Alito responded by saying the “crushing” workload faced by his former colleagues on the courts of appeals’ (M K Levy, ‘Judging Justice on Appeal’ [2014] *The Yale Law Journal*, 2388 - 2421).

monetary fines not only on abusive but also on simply unsuccessful appellants – a sort of *ex post* punishment for having appealed without merits.<sup>7</sup>

- 11 So, if we look at the matter from the above, we will ascertain a clear ongoing trajectory – a 'convergence' between common and civil law<sup>8</sup> – towards stricter restrictions as to the availability of first appeals, while consolidating (or trying to consolidate) the centrality of first-degree decisions.

### 3 METHODOLOGICAL PREMISES. A 'COMPARATIVE LAW OF DIFFERENCES'

- 12 However, while important, this is not the whole story. Or at least it is not the only one comparative lawyers must tell. Indeed, at a closer examination, civil appeals still exhibit today significant theoretical differences comparative law scholars should be concerned with. These differences are to be found not only – or not that much – in the technical rules (which are in the main the object of a 'micro-comparative law' analysis), but rather in the broader institutional frameworks of the organization of courts and, perhaps more crucially, in the ways first appeals are conceived of within a given legal culture. Appeals, like any other legal practice, can be viewed as culturally-determined institutions, given that the 'cultural attitudes' about a greater or lesser inclination to appeal have been crucial in shaping current normative designs and praxis.<sup>9</sup> As we shall see, all those differences are particularly pronounced along the division – which I think to be still absolutely meaningful and relevant in Civil Procedure – between common law and civil law.
- 13 These observations are grounded in a well-defined and broader methodological framework that is concerned with the dynamics and interplays between similitudes and

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<sup>7</sup> Of course, it is a totally legitimate and necessary aim to prevent abusive or futile appeals, through sanctions (see, eg, Art 559 French Code of Civil Procedure (FCCP): '*En cas d'appel principal dilatoire ou abusif, l'appelant peut être condamné à une amende civile d'un maximum de 10 000 euros*'). However, this must be accomplished in a way that does not deter potential appellants who are in good faith to access second-degree courts, due to the fear of incurring in excessive costs. Deterring mechanisms should rigorously differentiate between *bona* and *mala fide* litigants. Unfortunately, this distinction is not always made. Eg, in Italy the party that loses an appeal-regardless of whether the appeal was abusive or not-must pay the State double the court fee required for initially accessing the corresponding level of courts (*contributo unificato*, Art 13, *comma 1 quater*, d.P.R. n 115/2002 as modified by Art 1, *comma 17*, Law 228/2012). The same applies to the access to the Supreme Court. Generally, on the abuse of civil appeals, in Italy and in comparative law, M Pacilli, *L'abuso dell'appello* (Bologna UP 2015) *passim*, but especially Ch V, 181 ff, for comparative and European perspectives.

<sup>8</sup> I recall B Markesinis's seminal book *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford UP 1994).

<sup>9</sup> See also Part 8 of this publication.

differences in comparative research. It is worth outlining it shortly as it constitutes the skeleton of the Chapter.

- 14 As I have observed elsewhere, comparative lawyers must approach legal institutions as entities that are simultaneously *similar* and *different*.<sup>10</sup> They must be *similar* in the (weak) sense that they must respond to a comparable – that is, common – social need. As we are about to see, in the case of appeals, this common need is correcting errors. But institutions must also be viewed as *different*, otherwise comparative endeavour would make no sense. Difference is the prerequisite for comparison. I make it clear from the outset that my methodological commitment is in favour of a ‘comparative law of differences’.<sup>11</sup> To make differences explicit, even when they are obscured below a veil of similarity, should be the aim of comparative law.
- 15 I acknowledge that this methodological posture may be controversial, or even old-fashioned. For many, a ‘comparative law of differences’ contrasts with the evidence that the two legal families of the Western Legal Tradition – common and civil law – are now converging in many senses. That could be argued not only for substantive law but also for our field of Civil Procedure – where this approaching process, to be frank, has been slower and somehow less pronounced. However, the circulation of practices and ideas, projects of uniformizations and harmonizations of procedural systems at global, regional and European levels, and international commercial courts’ activities, all suggest a trend towards convergence also in procedural laws. There is a good deal of truth in that.<sup>12</sup> However, it is equally true that this convergence is emerging from different points of departures, different theoretical foundations, different *cultures*. Comparativists should emphasize these diverse starting points, the reasons – of an historical, political, cultural,

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<sup>10</sup> I discussed more at length this methodological approach-drawing on the works of Mauro Cappelletti and Pierre Legrand-in C V Giabardo, ‘Mauro Cappelletti’s Methodology in Comparative Civil Justice and the Coercive Powers of Courts as a Case Study’ in L Cadiet, B Hess, and M Requejo Isidro (ed), *Approaches to Procedural Law. The Pluralism of Methods* (Nomos 2017) 67-91. Among the many works of Pierre Legrand, whose thinking has been particularly important to me, cf, in French, *Le droit comparé* (4th edn, PUF 2011). On this method, also C Valcke, ‘Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems’ (2004) 52 *The American Journal of Comparative Law* 713-740, 720 ff (especially ‘II. Comparability Requires Unity and Plurality’).

<sup>11</sup> I take the expression ‘comparative law of differences’, as contraposed to ‘comparative law of commonalities’, from M Langer, ‘In the Beginning Was Fortescue: On the Intellectual Origins of the Adversarial and Inquisitorial Systems and Common and Civil Law in Comparative Criminal Procedure’ in B Ackerman, K Ambos, and H Sikirić (ed), *Visions of Justice: Liber Amicorum for Mirjan Damaška* (Duncker & Humblot 2016) 273. Also translated into Spanish, ‘En el principio era Fortescue. Acerca de los orígenes intelectuales de los sistemas acusatorio e inquisitivo, y de la contraposición entre derecho anglosajón y derecho continental europeo en el proceso penal comparado’ (2017) 4 *Letra: Derecho Penal* 190.

<sup>12</sup> A S King, ‘Global Civil Procedure’ (2021) 62 (1) *Harvard Int’l Law Journal* 223-293; C Cavallini, ‘Global Civil Justice’ (2024) 14 *Notre Dame Journal of Int’l & Comparative Law* 1-39.



ideological, institutional kind, etc – of those distances and how they shaped legal entities as they are.

- 16 I do not view comparative law as a simple side-by-side description of the legal norms adopted in two or more countries – that would merely be a (not so interesting) study of foreign law.<sup>13</sup> Instead, I see comparative law as the intellectual labour of imagining and theorizing conceptual competing models to both categorize legal institutions and ‘make sense’ of their differences. In this Chapter, two couple of models will be explored and critically scrutinized: *appeal as a right vs appeal by leave* and *appeal as common practice vs appeal as an exceptional remedy*. But other dualities are, of course, imaginable.
- 17 One final note, to respond in advance to possible objections. Conducted at a macro level, comparative research necessarily entails a certain degree of generalization. Models mostly are paradigmatic idealizations that make it possible to measure distances and proximities between real-world phenomena. So, their theoretical necessity is unquestionable. However, we should bear in mind that in the actual word, model migrate, are transplanted, circulate, merge and influence each other, giving rise to hybrid forms that might resemble to a greater or lesser extent their theoretical reference. (In our topic, a good example of this dynamic exchange is the introduction, in 2001, in the German CCP, of a filter hearing for dismissing appeals that ‘clearly show no prospect of success’ – an institution associated with English common law – and the subsequent adoption, and then abandonment, of this model it in Italy).

#### 4 STRUCTURE OF THE ANALYSIS

- 18 Said that, this contribution will unfold ideally into two parts. In the first part (Sec 5 ff, *On Similarities*) I explore the common *rationale* for the availability of appeals – namely, to correct past errors and ensure just decisions. This section serves as a philosophical or political account of appeals. Following this, I will present a comparative panorama on the right to appeal in civil litigation. In the second part (Sec 7 ff, *On Differences*), I critically analyse two key contrasts: (1) appeal as of right vs appeal by leave, and (2) appeals as common practice vs appeals as exceptional remedies. In this latter discussion, I will particularly stress the institutional position of various models of court of appeal within their respective legal order – an aspect that is often overlooked in comparative

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<sup>13</sup> For a recent restress of the clear distinction between the study of Comparative Law and that of Foreign Law in Civil Procedure, L Passanante, ‘Il diritto processuale civile tra diritto positivo e comparazione’ (2020) *Rivista di Diritto Processuale* 1066 ff, 1074, and also in Spanish, ‘El derecho procesal civil entre positivismo y comparación’ (2021) (2) *Revista Ítalo-Española de Derecho Procesal* 41-58, 49 ff.

civil procedure. Finally, I will conclude by offering a cultural explanation of those differences.

## 5 ON SIMILARITIES. THE AVAILABILITY OF A FIRST APPEAL AND THE TENSION BETWEEN ERROR CORRECTION ('JUSTICE') AND FINALITY

- 19 As a matter of general fact, every adjudication system – dating back at least from Roman Law<sup>14</sup> – has to accommodate for at least two different and opposing demands: justice and stability. The first exigence (justice) calls for some form of review or repetition of a previous decision. The second one (stability) requires that these reviews and reconsiderations cannot be left indefinitely open.<sup>15</sup> This is true for appeals in general, both criminal and civil, although the following considerations target specifically civil appeals.
- 20 (1) On the one hand, there is the imperative to ensure that judicial decisions are subject to review. The very possibility of a review means that no man's decision should be beyond challenge, but that there will always be at least another authority that, if requested, can exercise oversight over it. The message conveyed is that no decision – and therefore *no decision-maker* – is exempt from control (by 'decision-maker' I here refer to both individual judges and judicial panels *as a whole*, although it should be recognized that collegiality itself can serve as a safeguard against the potential arbitrariness of single-judge decisions). The notion instead that certain judgments are untouchable leads to the conclusion that there is no higher authority to which to address supervision. For example, in today's Canon Law – a legal system that is unfortunately seldom considered in comparative law – Canon 1629 explicitly states that 'There is no appeal: 1 - from a sentence of the Supreme Pontiff or the Apostolic Signatura'<sup>16</sup>. And it is a historical fact that in early common law appeals in the modern sense did not exist as

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<sup>14</sup> The institution of the *appellatio* (appeal) began to develop in the Imperial Age of Roman Law, in the context of *cognition extra ordinem*. On appeals in late Roman Law, R Orestano, *L'appello civile in diritto romano* (Giappichelli 1953).

<sup>15</sup> Giovanni Priori defines this the 'dilemma' of review mechanisms: '[...] el instituto de la impugnación se encuentra siempre antes ese gran dilema, pues es consciente de que los actos humanos siempre son falibles y, por ende, revisables; y por otro lado es consciente de que las decisiones jurisdiccionales deben en algún momento alcanzar ese carácter que las haga definitiva. Se busca por ello una decisión correcta, pero, al mismo tiempo, una decisión definitiva que pueda ser ejecutada'; Priori Posada (n 1) 407.

<sup>16</sup> According to the Latin maxim *Prima Sedes a nemine iudicatur*. The Apostolic Signatura is the Church's Supreme Tribunal. See also Canons 1404, 1405 and 1406.

judges exercised judicial power in the name of the king (they were his *personification*), and the king ‘could do no wrong’.<sup>17</sup>

- 21 Errors (the possibility of) underpins the concept of appeal (and other forms of review, as well). Since mistakes in adjudication do occur, legal systems – *qua* systems of justice – must therefore provide some mechanisms of correction. The famous English legal historian John Baker called the right to appeal ‘an essential requirement of natural justice’<sup>18</sup> – a phrase which is even more significant given that common law jurisdictions, as we shall see, maintain culturally a ‘minimalist approach’ when it comes to the availability of appeals<sup>19</sup>. *Natural justice* has a precise and technical meaning in the English common law. It suggests that the revision of prior decisions is an integral part of a universal and eternal conception of procedural justice that transcends positive legal orders – of the same level as the right to an independent adjudicator or the right to be heard.<sup>20</sup> A similar point is made in the Canon Law doctrine, where this link between allowing for revisions and justice is presented in an even more explicit way, as it is stated

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<sup>17</sup> J Baker, *The History of English Law* (Butterworth 1979) 116 (Ch 9, *Judicial Review of Decisions*): ‘the machinery of appeals was not built into the common law system from the outset. It is easy to understand why the earliest legal systems had no appeal process. There was no possibility of errors in a judgment supported by divine intervention and therefore beyond questioning. Human judgment did not play a significant part in the resolution of disputes until the development of the jury as a fact-finding tribunal; but even the establishment of juries [...] did not result in the introduction of appeals. The common law courts were the courts of the king, and there was no justification for allowing appeals from the king to anyone else. [...] It follows that when judgment was entered it could fairly be treated as final and conclusive’. For a similar observation on the early-stage common law, P Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford UP 2010) 244: ‘There were only first-instance judges, no courts of appeal. The judges worked out themselves what was to be allowed. It was better not to suggest they had erred. And the jury, of course, could not’.

<sup>18</sup> Baker (n 17).

<sup>19</sup> The expression ‘minimalist approach’, in the context of appeals, is employed by A Zuckerman, *On Civil Procedure. Principles of Practice* (London, 2013) 24.6, 1113.

<sup>20</sup> For a comparative account of this crucial notion within the common law tradition, F Schauer, ‘English Natural Justice and American Due Process: An Analytical Comparison’ (1976) 18 (1) *William & Mary Law Review* 47-72.

that the core and substantial nucleus of appeals, in its most original sense, directly derives, and is rooted in, the Natural Law principles of the right to defence.<sup>21</sup>

- 22 A decision could be ‘unjust’ or ‘incorrect’ either as to the *quaestio facti* or to the *quaestio iuris*.<sup>22</sup> Of course, we need to take this distinction into account as much as possible (even if we know that, many times, it is not at all clear where to draw the line). (a) An error in the *quaestio facti* – factual error – arises when the facts upon which the initial judgment is based are inaccurately determined, ie, when the factual premise is not true – either when facts that did occur are dismissed or facts that did not occur are accepted. (b) An error in the *quaestio iuris* – legal error – happens instead when (b.1) the first court has interpreted erroneously a given legal provision, whether it pertains to substantive law (*error in iudicando*) or to procedural law (*error in procedendo*), including the errors committed in the evidential legal reasoning<sup>23</sup>, or (b.2) the legal norm, although correctly interpreted, has been applied to the wrong hypothesis. Appeals ideally serve the purpose of correcting *all* these mistakes, understood in the broadest sense possible –

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<sup>21</sup> M Lega, *Praelectiones in textum iuris canonici: De iudiciis ecclesiasticis* (vol I, Typis Vaticanis 1896), 602, para 620 ‘[...] *appellationem quoad substantiam esse iuris naturae, quoad formam iuris positivi*’ (tr ‘appeal, that as to its substance is of natural law, and as to its form is of positive law’). On a *Natural Law* basis for allowing appeals, cf also, in French, A Hoc, ‘L’appel restauré et ses fondements: droit naturel ou droits fondamentaux?’ in A Hoc, S Wattier, and G Willems (ed), *Human Rights as a Basis for Reevaluating and Reconstructing the Law* (Bruylant 2016) 245-263, who remembers (at 252) that the great French procedural law scholar Henri Motulsky wrote: ‘*il est de droit naturel, d’une part, de ne point être laissé à l’arbitraire d’un organisme juridictionnel, qui a pu usurper ses pouvoirs, et, d’autre part, de pouvoir obtenir la répression de l’atteinte portée aux droits de la défense eux-mêmes*’ (tr ‘it is a matter of natural law, on the one hand, not to be subjected to the arbitrariness of a judicial body that may have overstepped its powers, and, on the other hand, to be able to seek the remedy for any violation of the right of defence themselves’), H Motulsky, ‘Le droit naturel dans la pratique jurisprudentielle: le respect des droits de la défense’, in *Écrits. Etudes et notes de procédure civile* (2nd edn, Paris 2010, originally published in 1961) 60-84, 82.

<sup>22</sup> I use the terms ‘justice’ and ‘correctness’ of a legal decision interchangeably, although I recognize that the first term (‘justice’) carries a moral connotation which is not relevant to the observations here made. On when a legal decision is *just*, M Taruffo, *Verso la decisione giusta* (Giappichelli 2019) and also in Spanish translation, *Hacia la decisión justa* (Zela 2020).

<sup>23</sup> In favour of a review by appellate courts extended also to the correct use of evidential legal reasoning, J Ferrer Beltrán, ‘La doble instancia en la jurisdicción contencioso-administrativa y el principio de inmediación: una deferencia mal entendida al juzgador de primera instancia’ (2024) 9 *Revista de Derecho Público: Teoría y Método* 109-123.

although, on this point, significant divergencies exist, as the scope of appeals, between common and civil law attitudes in action.<sup>24</sup>

- 23 Of course, nothing guarantees that the second decision will be *per se* more just or correct than the first one. There is no assurance either that appellate judges are more competent, more prepared and skilled than their predecessors – they may be, probably, more experienced, though. This is an old and enduring objection that seeks to undermine appeal from its theoretical foundations.<sup>25</sup> The answer to this is that all what we have is, though, an *increased chance of improvement* in the final outcome, as the second court can count on, and benefit from, the reasoned and motivated decision of the first judge alongside the critiques and arguments parties have presented in order to challenge it. So, the court of appeal has, in a sense, more substantive material to work with.<sup>26</sup> To express this, Enrico Allorio famously wrote that appeals are primarily a matter of ‘logic of the thought’, and not just a question of procedural design.<sup>27</sup>
- 24 It is important to point out that justice and correctness of judicial pronouncements – and therefore appeals – serve at once both directly private interests (those of the parties at

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<sup>24</sup> Those differences are evident in the treatment of factual errors. Generally speaking, common law courts of appeal usually revise trial judges’ findings of fact with greater caution and applying a more stringent standards of review compared to revision of questions of pure law. In the English common law, cf *Assicurazioni Generali SpA v Arab Insurance Group* (Court of Appeal, UK) [2002] EWCA Civ 1642: ‘In cases in which the Court was asked to reverse a judge’s findings of fact which depended upon his view of the credibility of the witnesses, it would only do so if satisfied that the judge was plainly wrong’. In the entire common law spectrum is frequent the use of expressions such as ‘plainly wrong’, ‘palpable error’, ‘firm conviction of a mistake’ etc. (A Perry ‘Plainly Wrong’ (2022) 86 (1) *Modern Law Review* 122-143). On the contrary, civil law appellate courts are more inclined to reassess original factual findings (but without generally admitting fresh evidence), and they frequently arrive at different conclusions from the ones reached by the lower court. These are, of course, generalizations.

<sup>25</sup> For the very same objection in Roman Law, Ulpiano, I, *De app*, Dig 49.1.1pr: ‘*licet nonnumquam bene latas sententias in peius reformat. Neque enim utique melius pronuntiat qui novissimus sententias laturus est*’.

<sup>26</sup> This is the classical justification for first appeals advanced by E Allorio ‘Sul doppio grado del processo civile’, in *Studi in onore di Enrico Tullio Liebman* (Giuffrè 1979) 1783, and also by E T Liebman, ‘Il giudizio d’appello e la Costituzione’ (1980) *Rivista di Diritto Processuale* 401 ff, 404: ‘il giudice d’appello [...] si trova comunque avvantaggiato dal fatto stesso di dover pronunciare non più su un caso vergine [...], bensì su una controversia già precedentemente decisa ed ha perciò sotto gli occhi qualche cosa che non aveva il primo giudice, cioè proprio l’esperienza del primo giudizio, sulla quale egli è chiamato a esercitare il suo spirito critico, stimolato anche dalle contraddittorie osservazioni delle parti’.

<sup>27</sup> ‘Il criterio che presiede a un istituto come l’appello è prima un criterio di logica del pensiero che di logica del processo’, E Allorio (n 26) 1802.

dispute) and indirectly public values as well.<sup>28</sup> Society at large, too, has an interest in that the law (even if it is *private law*) is duly interpreted and applied to accurately ascertained facts, through a fair procedure. This is conceptually true in every ruled-by-law order, as erroneous decisions impede the law to perform its basic task, that of guiding human behaviour. If the correctness of judicial outcomes were irrelevant, individuals would not be incentivized to follow legal rules in their daily life. Appeals, therefore, signal that justice of results *matters*. This principle is even more crucial in the Anglo-American tradition, where courts' decisions shape the common law: precedents clearly have to be just, as much as possible. There is also an additional, more sociological aspect to consider in rendering appeals available: seeing that errors are being corrected through appellate remedies enhances citizens' trust in the court system. By enabling appeals, courts openly show their commitment and ability to remedy mistakes. Appeals are at once a declaration of the fallibility of human judgment and the best possible cure for that.

- 25 I do not mean that appeals, in the comparative landscape, perform *just* this 'private-public' role of correcting errors. In reality, they do not. In common law countries, courts of appeal also serve as an important forum to set precedents and make law, which is by definition an inherently public activity. In this sense, we can assert, with a fair amount of generalization, that most Anglo-American courts of appeal – and certainly the England and Wales Court of Appeal and the US Federal Courts of Appeals, due to their unique and central (non-territorial) position occupied within their respective jurisdiction – differ from supreme courts just in terms of degree, and not by their very nature.<sup>29</sup> It could be

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<sup>28</sup> For a recent, and broader, restress of this societal interest in adjudication by courts, even in the field of private law, A Lahav, *In Praise of Litigation* (Oxford UP 2017), and also in Spanish translation (by C L Tarifa) *En defensa de la litigación. Estudio sobre el valor democrático del proceso civil* (Palestra Europa 2024), with my Foreword (9-24).

<sup>29</sup> As to England and Wales, J A Jolowicz (n 3) 293, 294 noted that: 'It is clear, however, that the Court of Appeal must perform the dual function of correcting erroneous decisions in the interest of individual justice between the parties and of clarifying and developing the law. [...] but its principal concern seems more and more to be its role as producer of decisions that are of value to the future of the law'.

Also, as we will see later, in the English model, the appellate court will grant permission even if the case shows no real prospect of success, but there are other 'compelling reasons' for allowing it (Rule 52.6(1)(b) UKCPR). These reasons are generally referred to the public importance of the discussed points of law and to the necessity to provide an authoritative decision on them. This is an *exclusively* public activity. In the US, defining very critically US Federal Appellate Courts as 'junior supreme courts', P Carrington, 'The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution' (1999) 15 *Journal of Law and Politics* 515-529, 517; earlier, P Carrington, 'The Function of the Civil Appeal: A Late-Century View' (1987) 38 (3) *South Carolina Law Review* 411-435, 425: 'The courts of appeals have evolved into junior supreme courts, each having a territory in which it is "semi-supreme"'. This discourse is somehow generalizable also to other common law procedural orders.

argued that they both perform a guidance role, but supreme courts just do it with greater authority and more powerfully. In effect, this is a significant point of divergence with civil law courts of appeal, whose decisions do not normally enjoy a ‘quasi supreme court’ reach – although this is a generalization. However, what I maintain here is that the primary and direct *rationale* of appeals is not to make law or to provide legal guidance, but *at the very least* to correct, in theory, *all* types of errors committed by a lower court, understood in a comprehensive sense (but with the *caveat* made before).<sup>30</sup> This is, so to say, the lowest common denominator of first appeals in comparative law. It is – as Steve Shavell put it – its ‘social justification’.<sup>31</sup> In civil law systems, this scope is usually wider than in common law ones. In Italy it is said that appeals are the only avenue in which the losing party can, so to say, ‘freely critique’ the former decision. Appeals are usually labelled as mechanisms of review *a critica libera*, which literally means that the initial judgment can be challenged, in principle, on any grounds – even if there are no errors in the strict sense, but just mere discrepancies or disagreements in the assessment of the legal or factual issues of the case.<sup>32</sup>

- 26 (2) The value of justice is not absolute. On the other hand, adjudicative systems must also address the necessity to achieve finality and conclusiveness in legal disputes. Controversies must come to an end, and they must do so in a reasonable timeframe. The first and most self-evident kind of restriction is therefore related to time. Deadlines are always required, either by law or by a judicial decision, to file an appeal – usually days, weeks or even months, from the day the judgment is rendered, notified or communicated. Once the period expires, the appeal normally becomes inadmissible

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Moreover, these considerations are extensible, although to a lesser degree, to the German appellate system, which also endows its courts of appeal of a guidance role toward lower courts: see Sec 522 (2) 2.3. GCCP.

<sup>30</sup> As it has been already pointed out, in the Anglo-American tradition there is much more hesitation in revising a decision under pure questions of fact than in civil law. See above, n 23.

<sup>31</sup> S Shavell, ‘The Appeal Process as a Means of Error Correction’ (1995) 24 (2) The Journal of Legal Studies 379-426, 381.

<sup>32</sup> In the Italian procedural categories, reviews *a critica libera* - where critiques can take any forms and can be freely formulated - are contraposed to reviews *a critica vincolata*, where just a fixed number of grounds are admissible (a typical example is the recourse to the Italian Supreme Court). This is a crucial division in Italy’s procedural dogmatics; A Cerino Canova, *Le impugnazioni civili. Struttura e funzione* (Cedam 1973) 94 ff. This does not mean that any new factual allegations, exceptions, or means of proof can be freely introduced. On the contrary, such introductions are typically restricted. For instance, see Art 345 ITCCP (prohibition of *nova*) or Sec 482 Austrian Code of Civil Procedure (ATCCP) (*Novenverbot*).



(unless exceptions are granted, eg, for unforeseen circumstances<sup>33</sup>) and the initial decision practically unattackable.

- 27 The need for legal certainty and the stability of results is a public value, too. This is obtained through the institution of *res iudicata*, which endows a judgment with the quality of incontrovertibility. Once a judgment has attained *res iudicata* status, the re-opening of the case is (and should be) an absolutely exceptional occurrence, precisely because of the need to consolidate, at some point, fact situations even if they may not be free of errors.
- 28 In truth, there is also a third factor, introduced in more recent discussions, that justifies limitations to the availability of appeals: costs. Appellate procedures are costly, both for the parties involved and for the State, and cause delay, which is ultimately also a type of cost. These economic drawbacks should be carefully considered through a cost-benefit analysis while designing adjudication processes. In *Law & Economics* terms: the ability for a court to hear an appeal is (or *has become*) a scarce resource that needs to be allocated efficiently.<sup>34</sup> This is nothing but a punctual application of the principle of proportionality in civil justice – a value that is now made explicit in the English Civil Procedure Rules, but that has gained wider recognition.<sup>35</sup> For example, almost everywhere first appeals are not available for small claims, that is in hypothesis where the global costs for the system outweigh the benefits (Sec 6.1).
- 29 In sum, all these opposing necessities (justice vs finality, jointly with a proportional use of public resources) are felt by every procedural system. In this, civil and common law cultures justify appeals in a very similar way.
- 30 In England, in the opinion expressed by J Beatson in *R Capewell v Stoke on Trent County Court* (2011), reported by Neil Andrews in his well-known manual of English Civil

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<sup>33</sup> In Italy, for filing a first appeal there is a 30-day period running from the official notification of the decision (Art 335 ITCCP). In the UK, that period is normally 21 days, although extensions for asking for permission to appeal could be given discretionally by the Court of Appeal; see Rule 52.15 UKCPR; Zuckerman (n 19) 1129.

<sup>34</sup> Shavell (n 30); A Pérez Ragone, 'Hacia una apelación óptima: acceso y gerenciamiento de la segunda instancia' (2019) 15 (3) *Revista Direito GV* 1-29 ('La atención que los tribunales de apelación (al igual que los jueces de primera instancia civil) pueden prestar a los casos que conocen se ha convertido en un "recurso escaso"'), 2) In the US scholarship, M K Levy, 'Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals' (2013) 81 *The George Washington Law Review* 401-447.

<sup>35</sup> Part 1 UKCPR: 'The overriding objective. 1.1 (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost'. In the Italian scholarship, R Caponi, 'Il principio di proporzionalità nella giustizia civile: prime note sistematiche' (2011) *Rivista Trimestrale di Diritto e Procedura Civile* 389.



Procedure, we read as follow: ‘it is an imperfection of a legal system that an error may be left uncorrected because of the limits of the number of appeals. But, in devising a legal system, the State balances the need for finality and certainty with the need for justice’.<sup>36</sup>

- 31 In Italy, one of the most widely used handbooks of Civil Procedure, the one written by Crisanto Mandrioli, opens up its chapter devoted to the study of *impugnazioni* (the general attacks on decisions) by unfolding the very same tension. Revisions of previous legal decisions – it is written – are instruments to strike a balance between justice of results and their stability.<sup>37</sup>
- 32 The discourse on this point could certainly be expanded from a philosophical standpoint. Broadening our view beyond the confines of litigation, it becomes evident that the two contrasting values we are talking about – justice and stability – are more general and inherent in any decision-making process in law, and even outside the legal domain.<sup>38</sup> To remain within the law, eg, administrative decisions by public bodies, too, must be subjected to control mechanisms, which can be internal (an application for a revision to a superior within the administration) or external to it (such as judicial review). And these chances must be subject, too, to temporary limitations in order to prevent indefinite contestations of situations. This only reinforces the extensive generality of the philosophical underpinnings of the concept of appeals and the *rationale* for making them available.

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<sup>36</sup> *R Capewell v Stoke on Trent County Court* (Court of Appeal, UK) [2011] EWHC 3851 (Admin), quoted in N Andrews, *Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Springer 2018) 4.03, para 113, 114; A Zuckerman, *Civil Procedure* (LexisNexis UK 2003) 720, para 23.3. For a very similar formulation, in another English book on Civil Procedure, S Sime, *A Practical Approach to Civil Procedure* (Oxford UP 2020) 559 (‘striking a balance between encouraging finality and correcting mistakes is not easy, and explains some of the complications that arise in the area of appeals’). In a past version of the classical US manual by Fleming James and Geoffrey Hazard – F James and G Hazard, *Civil Procedure* (Foundation Press 1985) 653 – we read: ‘the procedures considered herein (appeals) reveal in most intense form the two fundamentally conflicting objectives of adjudicative procedure as a whole: to see that substantial justice is done on the merits, and to bring legal controversies to a final conclusion’.

<sup>37</sup> C Mandrioli and A Carratta, *Diritto processuale civile* (vol II, Giappichelli 2022) 341.

<sup>38</sup> ‘Administrative agencies commonly utilize appeals mechanisms, as do, often, employers, religious bodies, commercial trade associations, professional sport leagues, and many other organizations’, Shavell (n 30) 1.

## 6 THE RIGHT TO A FIRST APPEAL IN CIVIL MATTERS AND ITS LIMITS

### 6.1 Domestic Perspectives

- 33 Virtually all existing legal systems of the world incorporate, albeit with varying levels of restrictions, at least one opportunity for the unsuccessful party to appeal to a higher court for a review on the merits of a matter previously adjudicated. This general possibility is usually known, in the English-speaking world, as the ‘right to appeal’ – even if the word *right* might somehow be misleading, due to the presence, in some legal systems, of a degree of discretion in granting it (as I will discuss in Sec 7.1). In civil law countries it is better known instead as the *principe du double degré de juridiction*, in French; *principio de la doble instancia de jurisdicción*, in Spanish; *princípio do duplo grau de jurisdição*, in Portuguese; and *principio del doppio grado di giurisdizione*, in Italian, (‘principle of the double instance, or degree, of jurisdiction’, literally translated).<sup>39</sup>
- 34 This right or principle – its theoretical foundations and limitations and practical merits and drawbacks – has been, and continues to be, subject to academic debate.
- 35 In Italy, between the late 1960s and early 1970s, Mauro Cappelletti famously argued for the elimination of the appeal (as intended at those times in Italy, ie, in the main as a *novum iudicium*), proposing the transformation of the multiple existing Italian courts of appeal into regional sections of the Supreme Court. In turn, the central *Corte di Cassazione*, in Rome, would have retained, through a sort of *certiorari*, its competence just over high-profile, public-interest cases.<sup>40</sup> Cappelletti’s view was motivated by the

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<sup>39</sup> It is important to specify that, in all these phrases, ‘jurisdiction’ - understood etymologically as the ‘power to state the law’ (from the Latin word *iuris-dictio*, meaning ‘saying the law’) - is to be intended as a unitarian concept. In the civil law legal thinking, there are no plural jurisdictions each corresponding to different levels of courts, but just one single ‘jurisdictional power as-a-whole’ (so-called principle of the ‘unity of the jurisdiction; *principe de l’unité de juridiction*, in French; *principio de la unidad de jurisdicción*, in Spanish; *principio dell’unicità, o unitarietà, della giurisdizione*, in Italian). The division between hierarchical levels represents therefore a purely functional differentiation, not a conceptual one. Each level of courts performs distinct roles, all falling within the sphere of the jurisdictional power unitedly conceived. Common lawyers, instead, use to distinguish between an ‘original jurisdiction’ and an ‘appellate jurisdiction’ (and also between other distinct types, such as ‘general jurisdiction’, ‘statutory jurisdiction’, ‘inherent jurisdiction’, etc) as separate spheres.

<sup>40</sup> M Cappelletti, ‘Parere iconoclastico sulla riforma del processo civile italiano’ (1969) *Giurisprudenza Italiana* IV 81, and also in *Giustizia e società* (Edizioni di Comunità 1972) 111; M Cappelletti, ‘Doppio grado di giurisdizione: parere iconoclastico n. 2 e razionalizzazione dell’iconoclastia’ (1978) *Giurisprudenza Italiana* IV 1. In Spanish translation, ‘Dictamen iconoclastico sobre la reforma del proceso civil italiano’, in *Proceso, ideología, sociedad* (Ediciones Jurídicas Europa-América 1974) 273 ff. Precedently, for a similar argument, but in a different historical context, L Mortara, *Appello civile*, in *Digesto Italiano* (vol III, Part 2, Utet 1890) 380 ff. For a recent, critical discussion of Mauro Cappelletti’s

desire to restore and potentiate the ‘common law-style’ centrality of first-instance, oral processes, which in Italy had diminished over time. Although his radical proposal – an ‘iconoclastic opinion’, as he dubbed it himself – has not been adopted in the Italian normative practice, it stimulated an intense academic dispute upon the role and functions of first appeals. Following his arguments, the XXII National Congress of the Italian Association of Civil Procedural Law Scholars, held in Venice in October 1977, was dedicated to discussing the advantages and disadvantages of appeals. While some scholars highlighted their flaws<sup>41</sup>, many others defended and reaffirmed their theoretical importance in the general justice system<sup>42</sup>. Today, in Italian legal academia, it could be said that the importance of a second-degree, full judgment on the merits of a case is broadly acknowledged as a ‘guarantee of justice’.<sup>43</sup>

- 36 One of the main points of that discussion related to whether a right to appeal in civil litigation was, or was not, enshrined in the Italian Constitution. The discussion, however, is truly global, and the answer is generally negative.
- 37 In Italy, the Constitution does not mention appeals explicitly (apart from administrative, ie, not ordinary, courts, where only two levels exist: Art 103, 113 and 125 Italian Constitution). The Italian Constitutional Court has constantly ruled therefore that appeals do not enjoy constitutional protection.<sup>44</sup> The consequence is that while the legislature could limit or even entirely eliminate them, it cannot unduly restrict the right to access *Corte Suprema di Cassazione* (the Italian Supreme Court), which is fully and unequivocally guaranteed to all individuals against all types of sentences by Art 111 *comma* 7 of the Italian Constitution. In truth, this choice is far from being immune to critique. There are good reasons to argue that first appeals instead should enjoin

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ideas, D Volpino, ‘Mauro Cappelletti e le riforme della giustizia civile (spunti minimi per un’attualizzazione dell’iconoclastia)’ (2015) *Giusto Processo Civile* 791-808; D Volpino, ‘Iconoclastia e riforme processuali (rileggendo Mauro Cappelletti)’ (2016) *Annuario di diritto comparato e di studi legislativi* 217-230. Cf also D Mitidiero, ‘Por uma reforma da Justiça Civil no Brasil. Um diálogo entre Mauro Cappelletti, Vittorio Denti, Ovídio Baptista e Luiz Guilherme Marinoni’ (2011) 36 (199) *Revista de Processo* 83-99, 92.

<sup>41</sup> A Pizzorusso, ‘Doppio grado di giurisdizione e principi costituzionali’ (1978) *Rivista di Diritto Processuale* 33, 44, and E F Ricci, ‘Il doppio grado di giurisdizione nel processo civile’ (1978) *Rivista di Diritto Processuale* 59 ff.

<sup>42</sup> G Tarzia, ‘Realtà e prospettive dell’appello civile’ (1978) *Rivista di Diritto Processuale* 86; E Allorio (n 27); E T Liebman, ‘Il giudizio di appello e la Costituzione’ (n 26); I Nicotra Guerrera, ‘Doppio grado di giurisdizione, diritto di difesa e principio di certezza’ (2000) *Rivista Trimestrale di Diritto e Procedura Civile* 127 ff.

<sup>43</sup> D Dalfino, ‘L’appello, garanzia di giustizia’ (2015) *Questione Giustizia* [https://www.questionegiustizia.it/rivista/articolo/l-appello\\_garanzia-di-giustizia\\_287.php](https://www.questionegiustizia.it/rivista/articolo/l-appello_garanzia-di-giustizia_287.php) accessed on 5 November 2024.

<sup>44</sup> *Ex multis*, *Corte costituzionale*, 301/1986 (Constitutional Court, Italy), Judgment 31 December 1986 [ECLI:IT:COST:1986:301].

constitutional protection – as Enrico T Liebman famously argued<sup>45</sup> – and that access to appellate reviews should generally remain unrestricted, precisely because their primary goal is to correct errors, a purpose that inherently demands broad accessibility. In contrast, the function of a Supreme Court is different, characterized as it should be by a focus on matters of greater legal significance. It may be therefore totally justifiable to restrict its access and implement measures to select for decision only those cases reflecting a public legal dimension<sup>46</sup>. Comparative legal analysis supports this view, indicating that the exercise of public functions inherently demands restrictions and selection processes: a Supreme Court simply cannot fulfil its task if it is overwhelmed by an excessive number of recourses.

- 38 In practice, the Italian legal system does provide for certain exceptional hypotheses in which judicial decisions are not subject to appeal or where appeals are limited to specific grounds. Art 339 ITCCP generally stipulates that ‘appeals are available for all decisions rendered at first instance, unless prohibited by law or excluded by the parties’ agreement’. By law, the possibility to appeal is excluded for those decisions rendered on grounds of judicial equity, when parties have agreed upon such a determination (Art 339, *comma* 2 and Art 114 ITCCP). Additionally, appeals against decisions issued by justices of peace involving claims below the threshold of EUR 2,500, mandatorily decided on equity, are limited to grounds related to the violation of procedural laws, constitutional or EU provisions or of the ‘general principles of law governing the matter’ (Art 339, *comma* 3 and Art 113, *comma* 2 ITCCP). Parties can always opt out their right to appeal and, if they both want to, can directly petition the Italian Supreme Court (Art 360, *comma* 2 ITCCP: so-called recourse *omisso medio* or *per saltum*, also known in English as ‘leapfrog appeal’ to the Supreme Court).
- 39 Restrictions on the availability of first appeals for small claims exist in other jurisdictions as well. Limiting the data to Europe, in France, judgments concerning controversies below EUR 5,000 are issued in the first and last resort (*jugements rendu en premier et dernier ressort*).<sup>47</sup> In Spain, this threshold is EUR 3,000<sup>48</sup>, in Germany EUR 600<sup>49</sup>, in the

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<sup>45</sup> E T Liebman (n 26).

<sup>46</sup> R Caponi, ‘Contro il nuovo filtro in appello e per un filtro di cassazione nel processo civile’ (2012) *Giurisprudenza Costituzionale* 1539.

<sup>47</sup> Art R211-3-24, 25 *Code de l'organisation judiciaire* (Code of Judicial Organization, France); Art R721-6, *Code de commerce* (Commercial Code, France).

<sup>48</sup> Art 455 *Ley Enjuiciamiento Civil* (Civil Procedure Act, Spain (SCCP)).

<sup>49</sup> Sec 511 (2)1 GCCP *Statthaftigkeit der Berufung* (admissibility of appeals): ‘(2) Die Berufung ist nur zulässig, wenn 1. der Wert des Beschwerdegegenstandes 600 Euro übersteigt oder [...]’. However, according to Sec 511 (4), the court of first instance may grant permission to appeal also in those cases if the controversy is of *grundsätzliche Bedeutung* (fundamental importance) or if an appellate decision is necessary for *Fortbildung des Rechts* (the development of the law) or for *einheitlichen Rechtsprechung* (the uniformity of jurisprudence).

Netherlands is EUR 1,750, in Switzerland is CHF 10,000<sup>50</sup>, etc.<sup>51</sup> Recalling the philosophy of appeals introduced at the beginning, these restrictions are justified by the idea that, given the small amount of money, once and for all considered by the law, involved and therefore the minor interests at play, is more convenient for the legal system to tolerate a potentially unjust decision than to offer the remedy to correct it.

- 40 In France, too, *Conseil Constitutionnel* (the Constitutional Court) has affirmed that the Constitution does not protect a right to a double degree of jurisdiction in civil matters.<sup>52</sup> A comparable stance is found in Germany, where *Bundesverfassungsgericht* (the Federal Constitutional Court) has ruled that access to justice does not include the right to multiple levels of appeals (*kein Anspruch auf einen Instanzenzug*).<sup>53</sup> Likewise, in Spain, the *Tribunal Constitucional* has adopted a similar position.<sup>54</sup>
- 41 In Latin America, constitutions do not normally mention appeals. Some of them (Colombia, Venezuela) explicitly protect criminal appeals, in accordance with supranational charters. In Brazil, the Federal Constitution (Art 5 LV) protects appeal *implicitly*, given that review mechanisms are, at least, mentioned.<sup>55</sup> Perú represents an exception, perhaps in the world, as its Constitution includes expressly *pluralidad de instancias* (the ‘plurality of degrees’) for every judicial process – civil litigation included – among the constitutional rights pertaining to the administration of justice (Art 139 n 6 Peruvian Constitution).<sup>56</sup> Plurality means, of course, at least a minimum two. Art X of the

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<sup>50</sup> Art 308.2 of the Swiss Code of Civil Procedure.

<sup>51</sup> All information regarding national restrictions on the availability of appeals for small claims in the EU can be found at [https://e-justice.europa.eu/42/EN/small\\_claims?init=true](https://e-justice.europa.eu/42/EN/small_claims?init=true) accessed 5 November 2024.

<sup>52</sup> N Molfessis, ‘La protection constitutionnelle du double degré de juridiction’ (1996) *Justice. Revue générale de droit processuel* 17.

<sup>53</sup> Case 1 BvU 1/79 (BVerfG, Germany), Decision 11 June 1980: ‘Nach dem Grundgesetz liegt es in der Gestaltungsfreiheit des Gesetzgebers, ob er in bürgerlichrechtlichen Streitigkeiten Rechtsmittelzüge einrichtet, welche Zwecke er damit verfolgt wissen will und wie er sie im einzelnen regelt [...] eine Gewährleistung von Rechtsmittelzügen durch das Grundgesetz folgt indes hieraus nicht [...]. Sie ergibt sich auch nicht aus Art. 95 GG’.

<sup>54</sup> Case 160-1993 (Constitutional Court, Spain), Judgment 17 May 1993 [ECLI:ES:TC:1993:160]: ‘II.2. el derecho a la doble instancia, salvo en materia penal, no forma parte necesariamente del contenido del derecho a la tutela judicial efectiva’, officially available at <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/2289> accessed 5 November 2024.

<sup>55</sup> Art 5 LV (Federal Constitution of Brazil): ‘Aos litigantes, em processo judicial ou administrativo, e aos acusados em geral são assegurados o contraditório e a ampla defesa, com os meios e recursos a ela inerentes’.

<sup>56</sup> E Ariano Deho, ‘Sistema de impugnaciones y Constitución’, in E Ariano Deho, *Impugnaciones procesales* (Instituto Pacífico 2015) 45 - 79; Id., ‘En la búsqueda de nuestro “modelo” de apelación civil’ (2008) 2 (1) *Revista de la Maestría en Derecho Procesal PUCP* 1-20; E Ariano Deho, ‘Algunas notas sobre las impugnaciones y el debido proceso’ (2003) 9 *Advocatus* (Revista semestral editada por alumnos de

Preliminary Title of the Peruvian CCP incorporates in the legislation this constitutional guarantee.<sup>57</sup>

- 42 As to the common law world, the jurisprudence of the UK Supreme Court has made it clear many times that, in civil matters, there is no duty to legally establish appeal mechanisms under English law.<sup>58</sup>
- 43 In the United States, the Federal Supreme Court has likewise affirmed, although just in *dicta*, that there is not a Due Process right to appeal protected by the Fourteenth US Constitution Amendment (neither in civil nor criminal law) so that national legislatures could limit or restrict that right without incurring in violation of the Federal Constitutions or fundamental rights.<sup>59</sup> However, States in practice might protect first appeals in their own constitutions or, more commonly, as statutory rights, which might, or might not, be limited (so that, in those occasions, a leave to appeal is normally not required).

## 6.2 The Right to Appeal at a Supranational Level

- 44 At a supranational level, the right of an appeal in civil matters is not protected by Art 6 of the ECHR ('right to a fair trial') and nor is the right to access a Supreme Court. However, the ECtHR ruled that when states chose to implement some forms of appeals in civil adjudication, as they normally do, they must do so in accordance with the guarantees of the European Convention (eg, the court must be independent and impartial, it has to ensure equality of arms, domestic law must not impose an unreasonable burden to appellants, the duration of the procedure must be reasonable, and the like).<sup>60</sup>
- 45 In contrast, appeals are protected as human rights in criminal cases, as entitlements of the convicted person (not of the public prosecution or the victim). Regionally, for the 46

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la Facultad de Derecho de la Universidad de Lima) 395-404; E Ariano Deho, 'En defensa del derecho de impugnar (vicisitudes de una garantía «incomprendida»)', in E Ariano Deho, *Problemas del proceso civil* (Editores Jurista 2003) 229-242. On the Peruvian system of appeals, more generally, R Cavani, *Teoría impugnatoria: recursos y revisión de la cosa juzgada en el proceso civil* (Gaceta Jurídica 2018) 107.

<sup>57</sup> Art X of the Preliminary Title of the Peruvian CCP: 'Artículo X.- Principio de Doble instancia. El proceso tiene dos instancias, salvo disposición legal distinta'.

<sup>58</sup> *Re B (A Child) (Care Proceeding: Appeal)* (Court of Appeal, UK) [2013] UKSC 33.

<sup>59</sup> *Pennzoil Co. v Texaco, Inc.* (Supreme Court, US) [481 US 1 (1987)]; *Griffin v Illinois* (Supreme Court, US) [351 US 12 (1956)]; *McKane v Durston* (Supreme Court, US) [153 US 684 (1894)].

<sup>60</sup> *Ex multis, Tolstoy Miloslavsky v UK*, Case 18139/91 (ECtHR), Judgment 13 July 1995; *Platakou v Greece*, Case 38460/97 (ECtHR), Judgment 11 January 2001, para 38: 'the Court reiterates that while Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (see, among other authorities, *Delcourt v Belgium*, judgment 17 January 1970, Series A no. 11, pp. 13-15, § 25)'.



States that form part of the Council of Europe, by Art 2 of the Protocol no 7 of the ECHR ('right to appeal in criminal matters')<sup>61</sup>; in the Central-Latin American area by Art 8 (2) h) of the American Convention on Human Rights<sup>62</sup>; and in the African Region by Art 7 of the African Charter on Human and People's Rights<sup>63</sup>. Internationally, by the International Covenant on Civil and Political Rights (1966) adopted by the General Assembly of UN, whose Art 14.5 reads: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.<sup>64</sup>

- 46 These provisions are evidently driven by the distinct values at stake in criminal proceedings, that may affect personal liberty or reputational integrity. This reflects a perceived hierarchy of importance. However, this conventional narrative and its theoretical underpinnings should be reconsidered. Certain non-criminal areas (such as family law, tax law, bankruptcy law, labour law, etc) are equally sensitive as criminal law and can generate similar profound consequences on individuals' lives. For that, they should perhaps enjoy the guarantee of a full review. Conversely, there are criminal offences that, while significant, may have a comparatively lesser impact. An analytic approach to this issue would therefore be welcome, even if it may prove challenging to implement in practice.
- 47 Finally, within the area of application of the ECHR, the Council of Europe (Committee of Ministers) adopted in 1995 the Recommendation No R(95)5 'concerning the introduction and improvement of the functioning of appeal systems and procedures in

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<sup>61</sup> Art 2 of the Protocol no 7 ECHR <https://rm.coe.int/168007a082> accessed 5 November 2024:

'1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal'.

<sup>62</sup> Art 8 (2) h) American Convention on Human Rights <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed 5 November 2024: 'Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees [...] h) the right to appeal the judgment to a higher court'.

<sup>63</sup> Art 7.1 African Charter on Human and People's Rights [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) accessed 5 November 2024: 'Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.

<sup>64</sup> International Covenant on Civil and Political Rights (1966) available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 5 November 2024.

civil and commercial cases'.<sup>65</sup> This document is an act of soft law that covers both civil and common law jurisdictions. In it, parties have agreed that 'appeal procedures should also be available for civil and commercial cases and not only for criminal cases' and that 'effective appeal procedures are in the interests of all parties to litigation and of the administration of justice'. In Art 1 ('Right to judicial control') it is stated that

'[i]n principle, it should be possible for any decision of a lower court ("first court") to be subject to the control of a higher court ("second court")' and that '[s]hould it be considered appropriate to make exceptions to this principle, any such exceptions should be founded in the law and should be consistent with general principles of justice'.

- 48 States could either exclude certain categories of cases from the right to appeal (eg, for small claims; much more problematic, and perhaps unreasonable, would be ruling out specific matters) or require forms of permission. Measures could, and should, be taken in order to prevent abuse of appeal (considered specifically by Art 4, such as the dismissal of 'manifestly ill-founded, unreasonable or vexatious' appeals through a simplified track or the establishment of fines.

## 7 ON DIFFERENCES. FIRST APPEAL AS A RIGHT VS FIRST APPEAL BY PERMISSION OR LEAVE

### 7.1 Theoretical Postulates

- 49 Let us now see more closely the difference part. Legal disciplines of first appeals vary significantly across the world both in their availability and scope. Technical variations are infinite and involve every aspect of appellate procedures – if, how and who can initiate them, before which court, how they must be conducted, what are the effects of the appellate decision, and so on. To navigate this complex landscape, it is necessary to articulate some taxonomical distinctions. Those distinctions, as we have pointed out at the beginning of the chapter, are *models*.
- 50 For example, civil procedural scholars, particularly within the civil law tradition, typically and primarily distinguish between two historic models of appeal: appeal as a *revisio*

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<sup>65</sup> Recommendation Concerning the Introduction And Improvement of the Functioning of Appeal Systems and Procedures in Civil And Commercial Cases, No R (95) 5 of 7 February 1995 (Council of Europe, Committee of Ministers) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505f3c> accessed 5 November 2024.



*prioris instantiae* (revision of the previous judgment) and appeal as a *novum iudicium* ('new judgment', or *de novo* appeal).<sup>66</sup>

- 51 However, while helpful on many levels – particularly as to the scope of the second judgment – this one is not the opposition I am concerned with in dealing with the topic of availability. For our purposes, a first and more appropriate distinction would be that between appeal (I) as an institution that is given as of a right of the losing party, and (II) as an institution that is subjected to a discretionary decision of a court – either by the same court that has pronounced the first judgment (court *ad quem*) or by the appellate court (court *ad quo*). This decision in England and Wales is called 'permission to appeal' and 'leave to appeal' in the other common law jurisdictions where it applies. In civil law countries, instead, where a permission of this sort is also present (in Germany since 2001, and in Italy between 2012 and 2022) it is more common to use the word *filter*.<sup>67</sup>
- 52 This opposition takes the normative structure of the availability of appeal as its object. In this, it is the most immediate and – let me say – the most *obvious* one. However, as we shall see, from an epistemological viewpoint, it does not provide an entirely accurate representation of the comparative landscape today.

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<sup>66</sup> In the first model, the appeal functions as a strict review of the first decision. Its aim is not to re-try the case but just to assess whether the first judgment was, or was not, legally correct. The scope of the appeal, therefore, is tightly constrained by the original lawsuit and it is prohibited to expand the *thema decidendum*. New elements are never admitted. In the second model, which has been associated with the Romano-Canonical procedure, appeals are conceived as new trials. The object of the second decision can also be wider than the first one and the possibility to reconsider each aspect of the case is automatically transferred to the superior court. New allegations, claims and counterclaims, new arguments and fresh evidence-including live testimony are permitted. In English, on these two theoretical models, shortly, F Fernhout and R van Rhee, *Elements of Procedural Law*, in J Hage, A Waltermann and B Akkermans, *Introduction to Law* (Springer 2017) 331-358, 357 ff. Remember that these models are intended to be abstract theorizations. In the real-world, what we find is rather a mixture of the two. A given procedural system often, if not always, leans *more or less* toward one end of the spectrum or the other. For example, it is often held that in Italy, over the last century, the structure of civil appeals has constantly evolved transitioning one step after another from being conceived as more like 'new judgments' - as it was in the first unitarian Code of 1865 and initially in the Code of 1942 – to being modelled more as 'revision of previous decisions', particularly following reforms initiated in the 1990s and continuing to present days. A Carratta, 'Oggetto dell'appello ed evoluzione giurisprudenziale' (2019) [https://www.treccani.it/enciclopedia/oggetto-dell-appello-ed-evoluzione-giurisprudenziale\\_\(altro\)/](https://www.treccani.it/enciclopedia/oggetto-dell-appello-ed-evoluzione-giurisprudenziale_(altro)/) accessed 5 November 2024; A Henke, 'Tramonto del novum iudicium (a proposito dell'appello civile di Alberto Tedoldi)' (2018) *Rivista di Diritto Processuale* 752-768.

<sup>67</sup> B Hess, *Deutsches Zivilprozessrecht: Prozessuale Filter- und Rechtsbehelfe*, speech presented at the Conference 'Comparative Civil Procedure', Corte d'Appello di Milano (Milan, 22 April 2013) available at [https://www.corteappello.milano.it/allegato\\_corsi.aspx?File\\_id\\_allegato=926](https://www.corteappello.milano.it/allegato_corsi.aspx?File_id_allegato=926) accessed 5 November 2024.

- 53 These two models are considered as opposed in the sense that the very concept of ‘right’, in its strictest sense, seems to be incompatible with the presence of a permission to exercise it. It could be considered theoretically problematic to assert that a right ‘exists’ when it is conferred through a substantially discretionary choice: rights correspond to duties, not to concessions. It should be acknowledged, though, that a use of language that seeks to reconcile these two sides is familiar to English common lawyers.<sup>68</sup> Somehow, the permission to appeal is not perceived *per se* as a negation of the right to appeal, but as a specification of its legitimate boundaries. As Adrian Zuckerman wrote ‘the imposition of a requirement of permission to appeal is not a restriction on the availability of an opportunity for a reassessment of first decision because the permission hearing itself offers an opportunity for reassessment’. And he went on quoting the opinion of Sir Robert Andrew Morritt in the case *Colley v Council for Licensed Conveyancers* (2001) for which:

There is no substantial restriction [...] on the right of appeal, since there is [...] no reason in justice why a person should be entitled to occupy the time of the court, and put opposing parties to expense and trouble, in conducting appeals which have no real prospect of success and where there is no other compelling reason why the appeal should be heard.<sup>69</sup>

- 54 In effect, this argument raises a valid point. Its validity, however, depends on the amount and extension of discretion involved in giving the permission. The greater the discretion allowed by the law (let us imagine: ‘the court may grant the permission if it likes so’ or ‘if it deems just to do so’), the less one can argue that there exists a right to appeal. Conversely, the more the criteria for granting leave are objectively defined and predictable, the more these can be viewed as legitimate specifications of the conditions

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<sup>68</sup> For example, in a widely used English introductory manual, the one by G Slapper and D Kelly, *The English Legal System* (Routledge 2015) 129, para 4.8.2. (titled ‘Right to appeal’), we read: ‘The Access to Justice Act 1999 provides for rights of appeal to be exercised only with the permission of the court, as prescribed by rules of court’. The expression ‘right to appeal’ is also found in the official webpage of the UK judiciary: See <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/right-2-appeal/>. Neil Andrew reports that J A Jolowicz once quoted - in M Cappelletti and D Tallon (ed), *Fundamental Guarantees of the Parties in Civil Litigation* (Giuffrè - Oceana Publications Inc 1973) 170 - a phrase of the Committee on Supreme Court Practice and Procedure (Final Report) that said that ‘the legal system of every civilized country recognize that judges are fallible and provide machinery for appeal in some form or another. The *right of appeal* in this country is too ingrained in our legal system to be capable of being uprooted *in toto*’ (emphasis added). But, as N Andrews wryly commented, ‘the main fetter upon access to appeal in English civil matters is that the prospective appellant must gain permission to appeal. *The courts-like St. Peter-guard the gate*’ (emphasis added); N Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford UP 2003) 900-901, para 38.09 - 10.

<sup>69</sup> Zuckerman (n 19) 1118, para 24.19, quoting *Colley v Council for Licensed Conveyancers* (Court of Appeal, UK) [2001] EWCA Civ 1137, [2001] 4 All ER 998, CA.

under which that right is exercised. Now, as we shall see in a while, the English Court of Appeal grants the permission to appeal (scenario no 1) if it considers that the appeal is not hopeless. This raises the question: is this an objective criterion? It seems to me that while this assessment may involve a certain degree of subjectivity – so that, theoretically, two different judges might reasonably disagree on whether a case has or has not some prospect of success – neither it is entirely subjective. Indeed, determining whether a claim is legally meritorious is an activity guided by law, which provides the framework that limits the court’s discretion. So, it would be more accurate to say that where permissions or leaves to appeal apply, there is *not* an absolute right to have the appeal fully heard – being that right subject to the conditions that the claim has some prospect of success on its merits – but there is always a right to have an appeal at least considered *prima facie*. There is always a judgment on the merits (after all, it could not be otherwise), just not the *full* one, which is reserved for appeals that do present some chances of victory.

- 55 On another note, it should be made clear that this distinction does not reflect the civil law vs common law divide. In fact, on the one hand, the vast majority of other common law countries – United States, every common law province in Canada, New Zealand, Australia, Hong Kong, etc – apart from England and Wales, now recognize statutory rights to a first appeal of final decisions. That means that at least one appellate revision, in those cases, can be generally initiated without permission. Exceptions do exist from specifically determinate cases, such as first appeals against non-definitive orders (which almost universally, in the common law world, require permission) or for particular kind of provisions.<sup>70</sup> But these are, indeed, exceptions. There has been, of course, a debate over the pros and cons of this choice. In the United States, for instance, criticisms have been made to appeals as a right, and some scholars have advocated for a shift to more discretionary practices.<sup>71</sup> In the same line, in their important empirical study of the functioning of the Federal Courts of Appeals, William Richman and William Reynolds have shown that *de facto*, appellate judges, who are facing a growing workload, allocate varying levels of attention and care to different types of cases, discretionally, creating

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<sup>70</sup> Eg, Canada’s Bankruptcy and Insolvency Act requires that certain decisions can only be appealed with leave. I thank Gerard Kennedy for this information.

<sup>71</sup> On this debate, eg, H Dalton, ‘Taking the Right to Appeal (More or Less) Seriously’ (1985) 95 The Yale Law Journal 62-107; against appeals as right in federal courts, D P Lay, ‘A Proposal for Discretionary Review in Federal Courts of Appeal’ (1980) 34 Southwestern Law Journal 1151-1158.

*contra legem* a sort of ‘quasi-certiorari’ mechanism.<sup>72</sup> However, these findings derive from an empirical investigation, not from the standpoint of normative analysis.

- 56 On the other hand, in Europe, some procedural reforms have introduced filters that were expected to prevent unmeritorious claims to further proceed in the second stage. As already said multiple times, this is the case of Germany (since 2001, in a manner similar to the admission of second appeals, *Revisionszulassung*) and Italy (2012-2022). However, forms of permissions for first appeals, in the strict sense here defined, are unknown to other civil law systems and might well also be labelled as *culturally unfamiliar* to the civil law approach – and in particular to the French model.
- 57 A final specification. It is important not to confuse the *leave to appeal* with the presence – typical of the Hispano and Latin-American tradition – of a sort of double authorization for the appeal to proceed: the first one to be obtained from the judge of first instance and then from the appellate judge. In Perù, for example, the Peruvian CCP establishes that firstly the losing party must file an appeal before the judge of the first instance (Art 357 and 367), who grants it if all procedural requirements are satisfied (compliance with deadlines, payment of court fees, inclusion of all necessary elements in the introductory documents, existence of a losing party’s interest, etc). The trial judge then orders the case file to be transmitted to the appellate court. The latter reassesses the admissibility of the appeal independently, namely without being bound by the lower court’s decision. However, both assessments do not consider the merits of the appeal, its likelihood of success or the importance of the legal and factual issues involved.<sup>73</sup> A similar ‘double-review system’ was in force in Spain, too, until recently (former Art 458, *Ley de Enjuiciamiento Civil*, Civil Procedure Act). However, this regime has changed (*Real Decreto-ley* 6/2023, 19 December 2023) and as of today, appeals must be filed directly before the competent appellate court. In general, this double system is highly objectionable as it duplicates judicial efforts, consumes additional resources and creates new problems (such as implementing a further mechanism of review for the decision of dismissal issued by the first court: so-called *recurso de queja*). For our purposes, these assessments do not technically qualify as forms of leave, since they are based purely on compliance with legal-procedural requirements and do not normally involve subjective determinations.

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<sup>72</sup> W M Richman and W L Reynolds, *Injustice on Appeal: The United States Courts of Appeals in Crisis* (n 6) 118 ff; M K Levy (n 6) 2401, 2402; W M Richman and W L Reynolds, ‘Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition’ (1996) 81 Cornell Law Rev 273-342. More recently, M E McAlister, ‘Bottom-Rung Appeals’ (2023) 91 Fordham Law Review 1355-1423.

<sup>73</sup> Similarly in Brazil (Art 1.010, *Código de Processo Civil*), Uruguay (Art 255, *Código General del Proceso*), El Salvador (Art 511, *Código Procesal Civil y Mercantil*), and others.

## 7.2 The 'Appeal by Permission' Model in Practice: England and Wales, Germany, and Italy

- 58 In England and Wales, first appeals are governed by Part 52 UKCPR and corresponding Practice Directions. According to the Access to Justice Act, 1999, Sec 54, a permission to appeal is required for appeals before whichever appellate courts, be it the County Court, the High Court or the Court of Appeal in the strict sense.<sup>74</sup> The permission applies for all cases, including cross-appeals, unless the appeal is brought against contempt of court orders (but only when the sanction for contempt is prison), refusals to grant habeas corpus and secure accommodation orders (Rule 52.3 (1) (a) (i) (ii) (iii) UKCPR) – all decisions that may affect personal liberty, where therefore the exigence of control is higher.
- 59 The permission can be first asked to the original judge orally and immediately after the conclusive hearing, or to the upper court, for the first time or, more frequently, as a renewal following a previous refusal to grant from the lower court. It might seem odd that a court is called to allow an appeal of its own decision, based on the high chance of obtaining a reversal. Common lawyers justify this choice by pointing out that the first judge is more 'familiar with the issues and will be in a good position to assess the chances of an appeal's success or importance without much further argument'.<sup>75</sup> This evaluation requires a highly impartial attitude, measured judgment and adherence to legal ethics.
- 60 By law, the upper court's decision on the permission – whether positive or negative – is not further appealable.
- 61 Considering the design as a whole, the most prominent factor that impacts a civilian's eye is the pervasiveness of the court's discretion, both procedurally and substantially. This, however, should not be surprising, as it is coherently in line with the general way of thinking of common lawyers. The use of broad and flexible expressions, in both statutes and judicial opinions, gives a very wide range of margins for deciding according to circumstances. Nevertheless, decisions are not arbitrary but build on precedents that have developed over time and reasoned arguments within a relatively small judicial

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<sup>74</sup> On English appeals, in English, Zuckerman (n 19), the entire Ch 24, 1112 ff. N Andrews, 'A New System of Civil Appeals and a New Set of Problems' (2000) 59 (3) *The Cambridge Law Journal* 464-466; S Sime, 'Appeals after the Civil Courts Structure Review' (2017) 36 (1) *Civil Justice Quarterly* 51-69; D J De Saullès, 'Process Costs and Error Costs: The Reform of Civil Appeals in Anglo-American Perspective' (2017) 3 *Athens Journal of Law* 179-200, 190. For a comprehensive book on the English Court of Appeal, encompassing institutional, historical, political and normative aspects, G Drewry, L Blom-Cooper and C Blake (ed), *The Court of Appeal* (Bloomsbury Publishing 2007).

<sup>75</sup> Zuckerman (n 19) 1138, para 24.82.

community. By and large, this remains one of the major differences between common and civil law judicial work.

- 62 From a technical viewpoint, the Court of Appeal will normally determine whether to grant the permission without a hearing, relying solely on written submission ('on paper'), although it has discretion to dispose an oral hearing in cases of a particular nature. See Rule 52.5 (2) UKCPR, which contains a pretty circular directive: 'The judge considering the application on paper may direct that the application be determined at an oral hearing [...] if the judge is of the opinion that the application cannot be fairly determined on paper without an oral hearing'. If the permission to appeal is denied based on written materials, the losing party might ask for a reconsideration in an oral hearing, though the Court retains a great degree of discretion in allowing this second chance. In deciding whether to concede or not the permission, the matter is usually handled by a single Lord or Lady Justice, while the subsequent hearing, if conceded, may be presided over either by one judge or by a panel of two. The opposing party might participate at this stage, but his involvement is not automatically required.<sup>76</sup>
- 63 Concentrating on substantive criteria, according to Rule 52.6 (1) UKCPR permission to appeal may be given where (a) the court considers that the appeal would have a real prospect of success, or (b) there is some other compelling reason why the appeal should be heard.<sup>77</sup> The two grounds are independent of one another.
- 64 Note that permissions in those cases *may* be given. Permissions are not given *mandatorily*, even if one of the two conditions is complied with. The Court will always maintain its discretion, as to align the practice of appeal with the larger principle of proportionality, established in general terms by the overriding objective written down in Part 1 of the Rules.
- 65 In scenario number one, in considering whether the chance of success of the appeal is 'real', the Court usually applies the same test as articulated in the leading case *Swain vs Hillman* (1999) used to dispose summarily (ie, without trial) the whole claims, or specific issues or defences, which likewise have 'no real prospect of succeeding' (Rule 24.3 UKCPR).<sup>78</sup> As the Court of Appeal recently clarified, 'real' here means 'realistic', as

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<sup>76</sup> Zuckerman (n 19) 1150, para 24.116.

<sup>77</sup> These typical conditions are found also in other common law jurisdictions for applying for leave to appeals where it is the case (eg, in South Africa, before the Supreme Court of Appeal; Superior Courts Act 2013 (South Africa) Ch 5, 17).

<sup>78</sup> *Swain v Hillman & Anor* (Court of Appeal, UK) [1999] EWCA Civ 3053, [2001] 1 All ER 91. The Rule 24.3 UKCPR reads as follows: 'The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if— (a) it considers that the party has no real prospect of succeeding



opposed to ‘fanciful’.<sup>79</sup> The prospect of success therefore does not necessarily need to be above 50% – that would be a higher standard, namely ‘probable’ or ‘more likely than not’. Instead, it is generally sufficient that the appeal is not deemed *hopeless*. This decision is of course nothing but a *prima facie* and *ex ante* assessment, and it is not infrequent that the Court later confirms the appealed decision, even if permission had been initially granted.<sup>80</sup>

- 66 In the second scenario, the Court might grant permission to appeal even if the notice is hopeless, but ‘there is some other compelling reason for the appeal to be heard’. This somehow mysterious phrase – drafted in a genuinely *common law style* that opens the door for great judicial discretion – refers to the opportunity for the appellate court to issue a judgment that addresses a particularly significant legal issue, setting an authoritative precedent in the interest of the general public. Note that if the appeal does not have a real prospect of success, that does not automatically mean that the losing party is *wrong*. The lower court might have been obliged to follow an upper court’s precedent, which is however widely considered to be a bad one by scholars and judicial community. In such cases, lower courts might consider that the case merits to proceed further, up to the Court of Appeal, which could choose to overrule publicly the precedent and remedy the injustice.<sup>81</sup> Under this second scenario, the Court of Appeal might also opt to hear a hopeless appeal, perhaps confirming the lower decision, because the ‘public [...] expect[s] a pronouncement on the matter’, even if its outcome may be the same.<sup>82</sup>
- 67 Let us now turn to the German and Italian appellate systems. While this could be considered somehow less surprising for the German procedural system (which, in this

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on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial’. J Ching, ‘Civil Procedure: Part 24 - How Real is a Real Prospect of Success? Governing the Grant of Summary (at a Pre-Trial Stage) Judgment’ (1999) 8 Nottingham Law Journal 28-47.

<sup>79</sup> *R (A Child)* (Court of Appeal, UK) [2019] EWCA Civ 895. As we read in *Swain v Hillman* (Lord Woolf MR): ‘[...] The words “no real prospect of being successful or succeeding” do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success’.

<sup>80</sup> Carmellino (n 1) 1485-1486.

<sup>81</sup> For this hypothesis, A Gillespie, *The English Legal System* (Oxford UP 2013) 542, para 16.2.2.1.

<sup>82</sup> Zuckerman (n 19) 1157-8, para 24.137. This is an activity of pure public guidance. As such, it could be somehow compared to the pronouncement rendered ‘in the interest of the law’ by the Italian *Corte di Cassazione* (Art 363 ITCCP, *principio di diritto nell’interesse della legge*), wherein the Court, at its discretion, might issue a public ruling on an important legal principle, when parties did not ask for the review or the review is in itself inadmissible, without therefore any practical effect on the specific case at hand. Such a decision may however serve as a persuasive statement for solving future similar controversies.

regard, was directly inspired by the historic Austrian model of the *Novenverbot*), a filter for first appeals in Italy constituted an introduction of a *culturally foreign* element and resulted in a somewhat revolutionary development.

- 68 Germany implemented a filtering mechanism for appeal in the major procedural law reform (*Zivilprozessreformgesetz*, ZPO-RG) of 27 July 2001, then significantly amended in 2011.<sup>83</sup> Scholars generally view that reform as the transition from an appeal model intended as a *novum iudicium* to a *revisio prioris instantiae* (see also Sec 513 and 520 GCCP on the rules governing the introductory acts and the precise indication of the grounds for appeal).
- 69 Sec 522 (2) Sentence 1 GCCP gives the appellate court the power (ie, a *soll*, ‘should’, not a *muss*, ‘must’) to issue immediately, without an oral hearing, *Zurückweisungsbeschluss* (a judicial order of rejection) of the appeal on its merits if it is *einstimmig* (unanimously) *überzeugt* (convinced) that (a) the appeal manifestly, *offensichtlich* (obviously) has no prospect of success, (b) the case is *keine grundsätzliche Bedeutung* (not of fundamental significance) and (c) the decision is not necessary for *Fortbildung des Rechts* (the development of the law) or to *die Sicherung einer einheitlichen Rechtsprechung* (ensure a uniform jurisprudence), and finally (d) oral hearing is not required. All these negative conditions must be met cumulatively.
- 70 Before making the decision, the Court must inform the parties of its intention to dismiss the appeal and give the appellant the opportunity to respond. *Zurückweisungsbeschluss* (the rejection order) must be motivated. Initially, in the reform of 2001, this order was not subject to appeal. This provision was highly criticized and led to considerable debate within the academia and legal profession. Eventually, in 2011, the new Para 3 was introduced, allowing for a review of the order – the *Nichtzulassungsbeschwerde* – before the Supreme Court (BGH, Sec 544 GCCP).
- 71 In Italy, in 2012 (Law n 134/2012) a filtering model for first appeals was also adopted (former Art 348 *bis* and *ter* ITCCP), explicitly drawing inspiration – as said – both from

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<sup>83</sup> In the German scholarship, before the reform of 2011, J Möller, ‘Kritische Gedanken zur Beschlusszurückweisung in der Berufung nach § 522 II ZPO’ (Inaugural-Dissertation zur Erlangung der Doktorwürde einer Hohen Rechtswissenschaftlichen Fakultät der Universität zu Köln), available at <https://core.ac.uk/download/pdf/12010365.pdf> accessed 5 November 2024. After the 2011 amendment, H Piorreck and M Keilbach, ‘Verwerfung und Zurückweisung der Berufung gemäß § 522 Abs. 1 und Abs. 2 ZPO in einem Beschluss’ in B Ackermann, R Gaier and C Wolf, *Gelebtes Prozessrecht. Festschrift für Volkert Vorwerk* (Verlag Dr. Otto Schmidt 2019) 279-290.



the German and, indirectly, from the English system.<sup>84</sup> However, that model has been recently abrogated by the last reform of the Italian CCP (Legislative Decree 10 October 2022) and in its place a new simplified procedure for dismissal of unmeritorious claims has been introduced (new Art 348 *bis*, 350 and 350 *bis* ITCCP).<sup>85</sup>

- 72 Let us see how it worked in practice. Former Art 348 *bis*, *comma* 1 ITCCP provided that an appeal had to be declared *inammissibile* (inadmissible), amongst other procedural hypothesis, also if it lacked ‘a reasonable probability of success’ (*l’impugnazione è dichiarata inammissibile [...] quando non ha una ragionevole probabilità di essere accolta*). According to former Art 384 *ter* ITCCP, the declaration of inadmissibility by the court of appeal, made after having heard the parties, had to be issued through *ordinanza* (a judicial order) which was not itself appealable (unlike in the updated German legislation), but opened the door for *ricorso per Cassazione* (a review) against the original, first instance judgment, before the Italian Supreme Court.
- 73 The introduction of that model had been fiercely criticized by Italian scholars, and its practical benefits were also proved negligible. First of all, the legislative drafting lacked clarity. The standard for the prospect of success was not defined as ‘clear’, ‘evident’, ‘real’ or similar terms, but ‘reasonably probable’, an ambiguous expression difficult to delineate precisely. This led to a too unchecked use of judicial discretion in determining whether to admit or not appeals, and to sensible variations from court to court in its practical translation. Moreover, from a legal-dogmatic point of view, in Italy and other civil law countries ‘inadmissibility’ traditionally applies only to formal and procedural defects (eg, an appeal filed after the deadline), not to rejections on substantive grounds. On the contrary, the decision of whether a claim has some prospect of success clearly entails a judgment on the merits of the controversy. That reform, by linking inadmissibility to manifestly ill-founded claims, created therefore a hybrid concept.
- 74 Today, following the latest reform, if the court of appeal acknowledges that an appeal is procedurally inadmissible or manifestly ill-founded in its merits, it orders an oral hearing and a discussion in simplified forms. The decision of dismissal or rejection may then be pronounced directly and orally at the end of the hearing, and it is subjected to review by the Supreme Court. This simplified procedure, by the way, applies also to appeals that are manifestly ‘well-founded’, ie, those in which it is immediately evident that the lower

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<sup>84</sup> On the Italian model, critically, A Tedoldi, ‘Il maleficio del filtro in appello’ (2015) *Rivista di Diritto Processuale* 751-778; R Poli, ‘Il nuovo giudizio di appello’ (2013) *Rivista di Diritto Processuale* 120-144; C Consolo, ‘Nuovi ed indesiderabili esercizi normativi sul processo civile: le impugnazioni a rischio di “svaporamento”’ (2012) 10 *Corriere Giuridico* 1133-1146. In English, for a more positive assessment, M A Lupoi, *Civil Procedure in Italy* (Kluwer Law International 2018), Ch 3, para 2.

<sup>85</sup> More extensively, on Italian appeals after the reform of 2022, L Passanante, ‘Le impugnazioni’ in L Passanante (ed), *Manuale breve della riforma Cartabia* (Cedam 2024) 141, 146.

court erred, and the decision must be reversed, without further analysis (new Art 350 *comma* 3 ITCCP).

## 8 APPEAL AS A COMMON PRACTICE VS APPEAL AS AN EXCEPTIONAL REMEDY

### 8.1 The Comparative Significance of Judicial Statistics and Courts Organization

- 75 As anticipated, the duality just sketched is inadequate for explaining the varying degrees of *openness* in procedural systems regarding first appeals. Focusing solely on the mere presence, or absence, of the formal requirement of a permission to appeal, on the one hand, isolates the English model *vis a vis* other common law jurisdictions (while also approaching quite incorrectly to this the German and even the Italian models). On the other hand, that perspective superficially groups together legal systems – the majority of common law ones and all the other civil law ones – that, in practice, operate in a very different fashion in many respects. A model that fails to account for these substantial practical differences is not a good, reliable explanatory framework.
- 76 Where should the criterion for distinction therefore be sought? To me, this parameter is not rooted in the technical-normative structure of the availability of appeals, but rather in empirical practice. Indeed, the presence or absence of permission requirement does not alter the fact that first appeals are still *de facto* far more common and frequent in the civil law culture than in the common law one. It could be rightly said that in civil law countries appeals occur, if not routinely, then with a frequency which is generally unknown to the Anglo-American tradition.
- 77 My point here is that the entire common law tradition has historically and culturally viewed – and still continues to view – appeals not as inherent or automatic entitlements, but rather as very exceptional remedies, even when statutory rights codified. Within the broader common law *legal mentality*, first appeals are typically perceived as recourses available only in a limited number of cases, rather than as a routine or universally accessible process (on this cultural perspective, more at length, see Part 9, Conclusions).
- 78 Let us very briefly look at the official judicial statistics of England and Wales. In the Civil Division of Court of Appeal, in 2011, just 1,269 appeals were filed, while the total of all civil (non-family) cases initiated in the same year throughout all courts has been 1,553,983.<sup>86</sup> Out of the entire number of appeals filed, just 520 were allowed, ie, not

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<sup>86</sup> Ministry of Justice (UK), 'Judicial and Court Statistics 2001' (2012) <https://assets.publishing.service.gov.uk/media/5a7cb376e5274a38e5756389/judicial-court-stats-2011.pdf> accessed 5 November 2024. These numbers appear also in the official website of the UK judiciary, in the webpage dedicate to the right to appeal, Courts and Tribunals Judiciary (UK), 'The right to appeal' <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/right-2-appeal/> accessed 5 November 2024.

dismissed nor struck out. The numbers have even dropped since then. In 2017, incoming appeals were 915; in 2018, 853; in 2019, 769; in 2020, 726; in 2021, 530 and finally in 2022, 608.<sup>87</sup> We also apprehend that in 1991 – before that a generalized permission to appeal was introduced – civil appeals presented were 412, and just 99 of them reversed the initial decision.<sup>88</sup>

- 79 These small numbers, compared to civil law appellate courts, are not connected to the presence of the permission to appeal. In fact, we find a comparable minor statistical occurrence of first appeals also in the other common law jurisdictions. Rather, as we are about to see, those data have to do with the unique and central position that the English and Wales – and common law, at large – Court(s) of Appeal occupies within the judicial organization.

## 8.2 An Overlooked Distinction: Central vs Territorial Courts of Appeal

- 80 At this point of our comparative analysis, it is necessary to introduce the ‘institutional element’. By that I mean the way the judiciary is theoretically structured and the place courts of appeal, in the strict sense, fill within a certain legal order. If we integrate this, we will realize that there is a ‘common law view of appeals’ that contrasts with the civil law one and has immediate repercussion as to their availability pragmatically considered.
- 81 A particularized description of the organization of the courts of the world is clearly beyond the scope of this Chapter.<sup>89</sup> Suffice it to note that common law families – for historical reasons connected to the early developments of the common law in England – traditionally separate between two distinct types of courts, ie, Superior and Inferior Courts, while this division is unknown, and even uneasy to conceive, to the civil law world.
- 82 In fact, today, most common law countries have a single, centralized (ie, not territorial) system of courts, comprising *a* single first-instance High Court – invested with an original, general and unlimited jurisdiction, not confined in principle to a specific geographical area, matter or monetary value – *a* single Court of Appeal – that possesses an appellate (ie, not original) jurisdiction – and a Supreme Court. Below them, there is a whole separate and vast set of Inferior Courts and Tribunals that deal with matters only within

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<sup>87</sup> Ministry of Justice (UK), ‘Civil justice statistics quarterly’ (2014) <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly> accessed 5 November 2024.

<sup>88</sup> These data are found in R David and X Blanc-Jouvan, *Le droit anglais* (9th edn, PUF 2001) 53.

<sup>89</sup> However, for a still excellent comparative panorama, see D S Clark, ‘The Organization of Lawyers and Judges’ in M Cappelletti (ed), *Civil Procedure*, Vol. XVI, in *International Encyclopedia of Comparative Law* (Siebeck 2002) Ch 3, *passim*.

the limits assigned to them by statutes. By definition, only Superior Courts have the power to ‘say what the law is’ and therefore to pronounce or overrule binding precedents. Also, Superior Courts exercise supervision powers upon lower courts, which are therefore institutionally subordinate to the firsts. The number of Superior Judges (ie, judges sitting in a Superior Court) is usually quite small. They enjoy a very high social status and prestige, which is incomparable to that of their civilian counterparts. In this dual model, the High Court and the Court of Appeal engage with an extremely small minority of all the cases – the most important, most complex, most high-value ones – while the overwhelming majority of controversies are resolved at lower levels, in one or more tiers.

- 83 Superior Courts are, in principle, *singular entities*. In the common law model, there is, normally, only *one* High Court, only *one* Court of Appeal, and obviously only one Supreme Court, for all the territory upon which they exercise their functions. However, this does not imply that those courts cannot have multiple locations. Indeed, this is often the case for first or even second-instance judges. For example, in the UK, High Court judges can travel across the different circuits to try the most important and significant cases. The English and Wales Court of Appeal might occasionally sit outside London, in other bigger cities (such as Cardiff). In New Zealand, the Court of Appeal is located in Wellington, but sits also in the cities of Auckland, Christchurch and Dunedin.<sup>90</sup> This does not mean, though, that there are two or three High Courts or two or three Courts of Appeal, but rather that the very same court, which is permanently located in one (or more) city, is also at the same sitting in separate places and courthouses, while remaining institutionally the same.

### 8.3 A Bird’s-Eye View of Appellate Courts Structure and Data. Common Law ...

- 84 The English common law is an exemplary instance of this general institutional model. The England and Wales Court of Appeal is a Senior Court that operates for the entire legal system (of England and Wales).<sup>91</sup> It was created in 1875, deriving from courts of Equity, with the Judicature Act (1873-1875). It is centrally located within the Royal Courts of Justice in the Strand, in London, in the same building that also houses the High Court of Justice – which is one for the entire territory, too. Together with the Crown Court (for criminal matters) they form the *Senior Courts of England and Wales* (former Superior

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<sup>90</sup> Courts of New Zealand, ‘History and role’ <https://www.courtsofnz.govt.nz/the-courts/court-of-appeal/history-2/> accessed 5 November 2024.

<sup>91</sup> The England and Wales Court of Appeal, likewise the High Court, does not have jurisdiction over the entire territory of the United Kingdom. This is a difference *vis a vis* the Supreme Court which instead exercises authority also for Scotland and Northern Ireland. In Ireland, too, there is one single Court of Appeal with an in principle unlimited, nation-wide jurisdiction (Court of Appeal Act, 2014), except for matters under the competence of the lower courts.

Court of Judicature), which have supervision over Inferior Courts. The fact that they reside in London reflects the pronounced historical centralization of the English judiciary – although, on some very rare occasions, appeal judges can sit somewhere else within the borders of its competence. The entire Court of Appeal (Civil plus Criminal divisions) is comprised of a total of just 39 sitting judges, whose appointment is approved by the King, called Lords, or Ladies, Justices of Appeal. The Head of the Civil Division is known as the *Master of the Rolls*. The Court of Appeal is institutionally in charge of receiving and controlling the decisions of the entire jurisdiction, mostly coming from the High Court (or from other courts, such as, in some cases, the County Courts or the Employment Appeal Tribunal).

- 85 Other common law systems across the globe, whether federal or not, share a roughly comparable structure, having just one, non-territorial and central Court of Appeal for the entire country. This is the case for most former British colonies in Africa (such as Ghana, Gambia, Kenya, Nigeria, Uganda, Rwanda, Zambia, Botswana, among others), or in Asia (Malaysia, The Philippines, Singapore, etc), for British overseas territory (Cayman Islands), and for the members of the so-called *Commonwealth realm* (such as Australia and New Zealand).
- 86 The United States court system has some very peculiar characteristics. Indeed, it is common to speak of a general ‘American legal exceptionalism’, even within the common law tradition, and specifically when it comes to Civil Procedure and the role of litigation.<sup>92</sup> The judicial federal system stands on its own. Each of the 12 federal circuits has its single Federal Court of Appeal (firstly established under the Judiciary Act, the Evans Act, of 1891, which originally created nine of them<sup>93</sup>). There are therefore 12 regional Federal Courts of Appeal across the entire United States, plus one specialized for the whole Federal Circuit. Each Federal Appellate Court covers therefore many States within its jurisdictional border.<sup>94</sup> Their competence encompasses, among others, federal regulation controversies – that might also involve private law issues, such as in consumer law and commercial law – disputes that involve parties from different states (‘diversity jurisdiction’), bankruptcy, certain environmental matters, and civil rights, but the bulk of

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<sup>92</sup> Cf for a specific aspect of this exceptionalism, R Marcus, “‘American Exceptionalism’ in Goals for Civil Litigation’ in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 123-141.

<sup>93</sup> R E Davies, ‘Evarts Act Day: The Birth of the U.S. Circuit Courts of Appeals’ (2016) 6 *Journal of Law* 251-273.

<sup>94</sup> For instance, the Federal Court of Appeal for the Ninth Circuit-the largest one-mainly sits in San Francisco and covers the States of Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and the State of Washington.

private law cases (tort law, contracts, property, family) is dealt by states' courts.<sup>95</sup> The process before them is governed by the Federal Rules of Appellate Procedure. It is important here to stress that the role they play in advancing the law, setting precedents, and guiding lower courts cannot be overstated. While institutionally their primary function is to correct past errors, their influence extends well beyond that. Their published opinions are widely read and discussed throughout the entire territory, with an impact that, in their domain of competence, is second only to the Supreme Court of the United States (although, following the 'litigation explosion', the Courts are increasingly resolving cases through unpublished and non-precedential opinions). Some of the most brilliant American jurists have been, or are, federal appellate judges, such as, in the past and among others, the legendary Learned Hand (second circuit, 1924-1961), and, as of our times, Guido Calabresi (second circuit) and Richard Posner (seventh circuit, 1981-2017). It would not be exaggerated to say that federal appellate courts contribute to shape the political and cultural environment of the United States.<sup>96</sup>

- 87 At a state level, instead, there are considerable variations as to the structure of intermediate appellate courts. The majority of states have their own single State Court of Appeals, but there are states that have none (eg, Delaware, Maine, Montana, among others), states that have more than one (eg, California, Florida, and Texas) or that have distinct types of intermediate courts, each enjoying a specific competence (such as Pennsylvania, where there are both the Superior Court and the Commonwealth Court, each reviewing at an appellate level different types of civil suits). A fair number of them have been created in relatively recent times, in the second half of the twentieth century, in order to reduce the workload of states' Supreme Courts.
- 88 As to judicial statistics, given their great differences, it is impossible to focus on State courts of appeals. The workload varies a lot – although, on average, it rarely exceeds 2,000 cases each per year. In the Federal judiciary, instead, in 2020, a total of 27,500 new civil appeals (both non-prisoners and prisoners' petitions) were filed, counting all the Federal Courts of Appeal together.<sup>97</sup> Consider that, in the same year, civil cases

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<sup>95</sup> As A Saltzman wrote (in 'Appellate Review in California: Limits on the Right to Recourse', in *Nobody's Perfect* (n 1) 95-104, 95): 'One cannot understand appellate review in America if one looks only at the federal courts'.

<sup>96</sup> P Carrington, 'A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts' (2007) 9 (1) *The Journal of Appellate Practice and Process* 101-113, reviewing D J Meador, T E Baker, and J E Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* (2nd ed, Lexis-Nexis 2006).

<sup>97</sup> United States Courts, 'Federal Judicial Caseload Statistics 2020' <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> accessed 5 November 2024.

initiated in all the US district courts (the courts of first instance for the federal judiciary) were 332,732.<sup>98</sup>

#### 8.4 ... And Civil Law

- 89 In stark contrast, appellate court structure and statistics in civil law nations illustrate a very different picture. In general, and apart from small countries (such as Luxembourg), civil law jurisdictions all have multiple Courts of Appeal that function independently of one another. They are authentically different and autonomous courts widespread in the entire territory and each exercises its portion of jurisdiction according to the law within the borders assigned. They do not supervise lower courts, nor their judgments have, legally speaking, a different authority. The model to which they comply is roughly the same.
- 90 Let us consider, in the European Union, the case of France, Germany, Italy, and Spain's intermediate courts organization and judicial caseload statistics of civil and commercial cases for 2022, for which comparative quantitative data are available on the CEPEJ-STAT official website (Report of 2024).<sup>99</sup> The numbers are drastically different compared to the common law landscape. Numbers are not significant per se, but as long as they reflect a different conception and role of first appeal within legal families.
- 91 In France, there are 36 Courts of Appeal – seven of them located outside the European continent, in the overseas territories (*juridictions d'outre-mer*).<sup>100</sup> In 2022, 164,891 new appeals were filed, 175,555 were resolved and 234,993 were pending. The numbers since then have risen. According to official French government statistics, 209,618 new appeals in 2021 have been filed (1,464,702 cases initiated in the first instance).<sup>101</sup>
- 92 In Germany there are 24 *Oberlandesgerichte* (higher regional courts), normally one for each *Land* (federal state), with some of them having two or even three. They hear cases

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<sup>98</sup> Ibid.

<sup>99</sup> European Commission for the Efficiency of Justice (CEPEJ), 'Dynamic database of European judicial systems' <https://www.coe.int/en/web/cepej/cepej-stat> accessed 18 December 2024.

<sup>100</sup> These are the *Cour d'appel de Basse-Terre* (Guadeloupe), *Cour d'appel de Cayenne* (French Guyana), *Cour d'appel de Fort-de-France* (Martinica), *Cour d'appel de Nouméa* (New Caledonia), *Cour d'appel de Papeete* (French Polynesia), *Cour d'appel de Saint-Denis-de-La Réunion*, plus the *Tribunal Supérieur d'Appel de Saint-Pierre-et-Miquelon*.

<sup>101</sup> Ministry of Justice (France), 'Les chiffres clés de la justice' (2022) [https://www.justice.gouv.fr/sites/default/files/2023-06/CC2022\\_20230317-1.pdf](https://www.justice.gouv.fr/sites/default/files/2023-06/CC2022_20230317-1.pdf) accessed 5 November 2024. On the official website of the French judiciary, data are available for each appellate court; see, eg, for the *Cour d'appel* of Paris, <https://www.cours-appel.justice.fr/paris/chiffres-cles> accessed 5 November 2024.



proceeding from the Municipals (*Amtsgerichte*) or District Courts (*Landgerichte*). In 2022, a total of 103,840 new appeals were filed, 97,890 resolved and 104,883 pending.

- 93 Italy has 26 different Courts of Appeal (plus three separate sections), one for every judicial district, the majority of them coinciding with the borders of regions.<sup>102</sup> In 2022, 93,851 new appeals were filed in civil and commercial matters, 117,895 were resolved and 243,353 were still pending at the end of the year.
- 94 In Spain, there are 50 *Audiencias provinciales*, which are appellate courts at a provincial level, each located in the capital city of each province. New appeals were 209,783, resolved ones 177,497, and pending ones 166,663.

European Judicial Systems   Data Tables				
VERSION 2024.01				
	097.2.2 Civil (and commercial) litigious cases (2nd inst., Incoming cases)	097.3.2 Civil (and commercial) litigious cases (2nd inst., Resolved cases)	097.4.2 Civil (and commercial) litigious cases (2nd inst., Pending cases on 31 Dec.)	Comments
Nessuno 06/12/2024 16:43:31				Select the display mode
France	164891.00	175555.00	234993.00	
Germany	103840.00	97890.00	104883.00	
Italy	93851.00	117895.00	243353.00	
Spain	209783.00	177497.00	166663.00	

- 95 As to the appeal architecture of other EU countries, consider that Romania has 15 courts of appeal, Greece has 13, Sweden and Norway have six, Belgium, Hungary, Portugal (*tribunais da relação*) and Finland have five, the Netherlands has four and Denmark two (called 'High Courts').<sup>103</sup>
- 96 Broadening the view, in Latin and Central America, all (but one) systems belong to the civil law tradition and have therefore adopted the overall institutional design of it.<sup>104</sup> Però, for instance, has 34 Civil Courts of Appeal (*Cortes Superiores de Justicia*), one for each *distrito judicial* (judicial district).
- 97 There are, of course, exceptions to this scheme, that very much depend on the varying political organizations of the country considered. Typically, in Federal States – such as Brazil, Mexico and Argentina – each State (or Province, in the case of Argentina) is responsible for its own judicial system, which usually has just one Court of Appeal (in Brazil state appellate courts are called *Tribunais de Justiça* and there is one for each State: eg, *Tribunal de Justiça do Estado do Rio de Janeiro*, *Tribunal de Justiça do Estado*

<sup>102</sup> Italy is divided administratively into twenty Regions. Some Regions have two Courts of Appeal (Lombardia, Campania, Puglia, Calabria), Sicily has four, and the Court of Appeal located in Turin, the capital city of the Region of Piemonte, functions also for the Region of Valle d'Aosta.

<sup>103</sup> For a panoramic view of EU national court systems, [https://e-justice.europa.eu/18/EN/national\\_ordinary\\_courts](https://e-justice.europa.eu/18/EN/national_ordinary_courts) accessed 5 November 2024.

<sup>104</sup> The only one exception in the area is Belize, in Central America, which is a common law country. Its court structure is therefore similar to other common law orders. Accordingly, there is one central Court of Appeal.



*do Rio Grande do Norte*, etc). In parallel, there are the appellate courts at federal level (in Brazil there are six, one for each *Região*, called *Tribunais Regionais Federais*).

- 98 The same typical civil law judicial organization, with multiple territorial courts of appeal, is found also in civil law African States (Algeria, Morocco, Tunisia, Egypt, etc) and civil law Asia (China, Japan).

## 9 CONCLUSIONS. A CULTURAL EXPLICATION

- 99 In the conclusions – and going beyond normative or institutional designs – I would like to draw attention to the role of the *general attitude*, of the *culture* of legal communities towards appeals and how it has contributed to shaping current practices, specifically along the last distinction just made between appeals as a common practice vs appeals as an exceptional remedy.
- 100 More precisely, I maintain that the normative restrictions and the minor empirical significance of appeals in common law countries (the ‘minimalist approach’ they adopted) is not simply a fortuitous and contingent characteristic, but it reflects a more profound difference in *legal mentality* – a concept we should not overlook while doing comparative (civil procedural) law.<sup>105</sup>
- 101 Simplifying, I argue that there are two fundamental cultural attitudes: one that sees the first decision made by the trial court as tendentially definitive, and the other one that views the first decision simply as a stage toward the consolidation of the pronouncement. The difference therefore revolves around the centrality of the first-degree judgment. This is of course a generalization. However, it helps us to situate real-world legal systems along this line.
- 102 To better illustrate this point, I find it worthwhile to quote some excerpts that convey this cultural difference in a particularly incisive manner. Remo Caponi, in an article dedicated to the reforms of civil appeals in comparative law, expressed that:

In the English civil litigation, review mechanisms of previous legal judgments are considered exceptional remedies, employed solely for the purpose of correcting the errors of the first-instance decision. In that legal tradition, the idea that a legal dispute is normally a game that does not terminate in one single match, but it implies

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<sup>105</sup> One of the few works studying this general notion in comparative legal scholarship is that by C Amodio, ‘Mentalità giuridica e comparazione’ (2010) *Pòlemos* 173-189.

a rematch in the appellate court and very often also a last third-round before the Supreme Court, has never flourished.<sup>106</sup>

103 This metaphor of the process of solving a controversy as a game – which has an illustrious origin<sup>107</sup> – is illuminating for a comparative perspective. Games can take two forms. They can consist in one single confrontation, resulting in either a victory or a defeat. It is a *make-or-break* moment. Or, under a different model, they could be structured like a tournament, where the success or failure is declared after many encounters (as the saying goes, ‘he who laughs last, laughs best’). This somehow captures the common law/civil law divide in appeals.

104 In another essay, dealing with the same matter, Remo Caponi went on observing:

In the English legal culture, the possibility to bring an appeal is the exception, while it continue to be a normal occurrence in the Italian civil process [...]. This difference between exception and rule takes on a central role, as it reflects the diversity of political and cultural basis that characterize the administration of justice in civil law and common law countries. In civil law legal orders, the administration of justice is in the main centered upon a bureaucratic and hierarchical state structure. In common law legal orders, it is more open to civil society, less bureaucratic and hierarchical.<sup>108</sup>

105 We see that Remo Caponi is referring explicitly to the English legal culture, but his observations could be well extended to the entire common law tradition, at least. In this last passage, he mentions the ‘political and cultural’ underpinnings connected to the larger bureaucratic and hierarchical vs non-bureaucratic, non-hierarchical, and more ‘open to civil society’ (see the presence of the jury) structure of authority – a division that belongs to political theory, but that has broad repercussions as to the whole design

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<sup>106</sup> Caponi, ‘L’appello nel sistema delle impugnazioni civili (note di comparazione anglo-tedesca)’ (n 1), my translation from the original in Italian: ‘Nel processo civile inglese i mezzi di impugnazione sono strumenti eccezionali, che sono impiegati solo per correggere errori della sentenza di primo grado. In questa esperienza non ha mai trovato terreno fertile l’idea che la controversia giudiziaria sia di regola una partita che non si esaurisce in un solo incontro, ma conosce una “rivincita” in grado di appello e molto frequentemente anche una «bella» dinanzi ad una corte suprema’.

<sup>107</sup> P Calamandrei, ‘Il processo come giuoco’ (1950) 1 *Rivista di Diritto Processuale* 23-51.

<sup>108</sup> Caponi, ‘La riforma dei mezzi di impugnazione’ (n 1), my tr: ‘Nell’esperienza inglese l’appellabilità della sentenza di primo grado è l’eccezione, mentre continua a dover essere la regola nel processo civile italiano [...]. Questa differenza tra eccezione e regola riveste un significato centrale, poiché è il riflesso della diversità delle basi politiche e culturali che ispirano l’amministrazione della giustizia nei paesi di civil law e di common law. Negli ordinamenti di civil law, essa è maggiormente centrata su una struttura statale burocratica e gerarchica. Negli ordinamenti di common law, essa è più aperta alla società civile, è meno burocratica e gerarchica’.

of legal decision-making procedures. The reference is, of course, to Mirjan Damaška's masterpiece.<sup>109</sup>

- 106 As we see, the battleground here is *political*. According to Damaška, from a legal history and political theory perspective, diffuse and readily available appeals in civil law countries are crucial to maintaining the hierarchical and centralized structure of power, given that appeals ensure constant controls from the above over decisions made at lower levels:

[...] because hierarchy is multilayered, proceedings must consist of several stages. (...) Accordingly, proceedings before the initial decision maker (trials) are merely one episode in an ongoing series and are thus an inept symbol for describing the total effort. In the hierarchical setting, Kafka's hero is not 'tried', he is implicated in 'proceedings'.<sup>110</sup>

- 107 And even more explicitly, in the sense here advanced:

The first important point to recognize is that the reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of events. [...]. The great significance attributed to 'quality control' by superior in a hierarchical organization inevitably detracts from the importance of original decision making: the latter acquires an aura of provisionality. *It is thus a*

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<sup>109</sup> M Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (Yale UP 1991) 47 ff, 57 ff. Cf also, relating specifically to criminal procedure, M Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 48 *The Yale Law Journal* 480-544, 488: 'There are in the continental judicial systems two decisive weapons to cope with centrifugal tendencies in administering criminal justice. One is the comprehensive and widely used system of appeals [...]. As befits a system in which decisions of subordinates are supervised by those closer to the center of power, appellate review was from its inception conceived as a comprehensive device that permitted, at least at the first level of review, a complete reconsideration of the case. [...] Where judicial decisions are normally subject to reconsideration, it is quite natural to postpone their finality and execution until the ordinary means of review have been exhausted. In this situation, however, the appellate process becomes a continuation of trial adjudication'.

And later on (514): 'Quite naturally [...] the entire criminal process became identified with the trial, and the conclusion of this stage signalled the end of the criminal proceeding. This conception of the criminal process [...] has not disappeared even now from Anglo-American law. [...] The importance of single-level adjudication can be observed without great difficulty; it is especially apparent in the interplay between the original adjudication and appellate review, which came relatively late to the common law world. [...]. The lasting vitality of the notion of trial adjudication as final also accounts for the relatively limited scope of appeal. [...] In light of the foregoing it is not at all surprising that the right to appeal is not nearly so important in Anglo-American as it is in continental systems [...]. The continued importance of original jurisdiction, with the accompanying lesser importance of the appellate process, invests the Anglo-American judicial system with strong centrifugal tendencies [...]'.

<sup>110</sup> Damaška, *The Faces of Justice* (n 109) 47, 48.

*mortal sin for a comparativists to assume that the significance of trial is identical [...].*<sup>111</sup> (emphasis added).

- 108 This (supposed) ‘authoritarian’ character of appeals, paired with an almost ‘army-like’ structure of the judiciary, has been used to attack appeals by its critics. Conversely, when it comes to the non-hierarchical, ie, coordinate mode of authority, typical of the Anglo-American culture:

[...] legal remedies are interpreted as reflecting a continuing attachment to the ideal of one-level decision making [...]. Here the legal process still ends preferably with the announcement of the decision by the primary decision maker. Far from being a regular sequel to the trial, or a normally anticipated further stage of the process, superior review is more in the nature of an extraordinary and independent proceeding. [...] In a very general sense, the right of appeal is not exalted as central to due process. *Thus it is not shocking that appeal be made dependent - as it is often in England - on obtaining leave either from the trial or from the superior court.* But this hybrid system need not to be pursued in tedious technical detail: in what I have suggested so far, a style is clearly visible [...].<sup>112</sup> (emphasis added)

- 109 I have quoted these passages as they stress with the due force how present normative configurations and practices related to the major or minor availability of appeals are rooted in specific (and opposite) cultural attitudes which, in turn, are shaped by the historical path. Concerning legal history, there is indeed one particular and distinguishing institution, that must be situated in a broader political ideology, that has influenced the common lawyers’ attitude towards appeals: this is the *jury trial*.<sup>113</sup>
- 110 In the whole Anglo-American tradition, the first-instance process has been, and still is, *the* central moment, because since Medieval times it was the one where the ‘trial by jury’ took place – an institution that did not develop, at least in civil lawsuits, in later Continental Europe. The historical importance of jury trials for the evolution of common law procedure cannot be overestimated. Historically speaking, the jury verdict was not easy to contest. In the earlier times of the English common law, one way to do it was through the ancient ‘writ of attain’<sup>113</sup>, which basically was a public form

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<sup>111</sup> Ibid 48.

<sup>112</sup> Ibid 59, 60.

<sup>113</sup> ‘The traditional aversion for appellate remedies stems from the presence of the jury. Although the jury has since long de facto disappeared, it leaves a permanent mark on the today’s structure of English civil process’ – Caponi, ‘La riforma dei mezzi di impugnazione’ (n 1): (original ‘La tradizionale avversione nei confronti dei mezzi di impugnazione dipende storicamente dalla presenza della giuria. Benché scomparsa di fatto già da molto tempo, la giuria lascia una traccia permanente nella odierna struttura del processo civile inglese’).

of accusation towards the jury for having delivered a false decision ('perjury').<sup>114</sup> Understandably, it was by nature an exceptional remedy, to be employed solely in extreme occasions. Other possibilities (such as the 'writ of error' and, later, the motion for a new trial) were similarly exceptional, formalistic, procedurally restricted and difficult to put into practice.<sup>115</sup> It is no surprise that the final act following jury trial was provided with great stability and strong finality and appeals were never thought, at common law, of as a second chance to win.<sup>116</sup> It is not that important the fact the juries, in civil proceedings, are, in today's practices of common law, absent or in any case declining, even in the United States, where trials by jury for civil lawsuits are guaranteed by the VII Amendment. What really matters for our purposes is that its original presence – like that of the 'forms of action' in the famous F W Maitland's phrase<sup>117</sup> – shaped the mentality through which common lawyers still conceptualize the function of the first-instance decision (ie, to solve definitely the controversy) and of the second-instance stage (controlling exceptionally potential errors, and not retrying the case). This is still today the major point of distance between appeals in the common and in the civil law world, despite the waves of convergence between the two traditions.

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<sup>114</sup> These historical aspects cannot be detailed here. However, cf the legal history study by M S Bilder, 'The Origin of the Appeal in America' (1997) *Hastings Law Journal* 913-968, 926 ff (in the Part I titled, evocatively, 'The English Culture of Appeal'), who also points out the possibility to accuse the judge, as well ('writ of false judgment').

<sup>115</sup> Eg, the writ of error was limited to questions of law and, moreover, the error had to result from the 'record' (the 'plea roll'); Bilder (n 114) 926; Baker (n 1) 118 ('[T]he record was invested with such a sacred finality that it was accepted as conclusive evidence of whatever it contained').

<sup>116</sup> As Richard Marcus pointed out, describing US's attitude: '[...] the American focus on the trial. The first instance court is the trial court. That trial is to be a single continuous event well described as a "put up or shut up" occasion [...] Appellate review is not a second chance. [...]. The fundamental point to be appreciated is that, altogether, the role of appellate review in the US scheme is peripheral, exceptional, and even unwelcome, while it seems central and expected in most other systems'. R Marcus, 'Appellate Review in the Reactive Model: The Example of the American Federal Courts', in A Uzelac and C H van Ree (n 1) 105-126, 113.

<sup>117</sup> 'The forms of action we have buried, but they still rule us from their graves', F W Maitland, *The Forms of Action at Common Law. A Course of Lectures 1909* (A H Chaytor and W J Whittaker, Oxford UP) Lecture I, 1.

## ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BID	<i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
ITCCP	Code of Civil Procedure (Italy)

JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes



## **LEGISLATION**

### **International/Supranational**

African Charter on Human and People's Rights.

American Convention of Human Rights.

European Convention of Human Rights.

International Covenant on Civil and Political Rights 1966.

Protocol n 7 of the ECHR 1988.

Recommendation No R(95)5, Council of Europe (Committee of Ministers) 1995.

### **National**

Access to Justice Act 1999 (UK).

Civil and Commercial Procedural Law Code (El Salvador).

Civil Procedure Rules 1999 (UK).

Code of Canon Law 1983.

Code of Civil Procedure (Austria).

Code of Civil Procedure (Germany).

Code of Civil Procedure (Switzerland).

Code of Civil Procedure 1942 (Italy).

Code of Civil Procedure 1975 (France).

Code of Civil Procedure 1993 (Perù).

Code of Civil Procedure 2015 (Brazil).

Code of Judicial Organization (France).

Commercial Code (France).

Constitution 1948 (Italy).

Constitution 1993 (Perù).

Court of Appeal Act 2014 (Ireland).

Federal Constitution 1995 (Brazil).

Federal Rules of Civil Procedure (US).

General Code of Procedure (Uruguay).

*Ley 1/2000 de Enjuiciamiento Civil* (Civil Procedure Act) (Spain).

Superior Courts Act 2013 (South Africa).

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*Platakou v Greece*, Case 38460/97 (ECtHR), Judgment 11 January 2001 [ECLI:CE:ECHR:2001:0111JUD003846097].

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### National

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Case 160-1993 (Constitutional Court, Spain), Judgment 17 May 1993 [ECLI:ES:TC:1993:160].

Case 301/1986 (Constitutional Court, Italy), Judgment 31 December 1986 [ECLI:IT:COST:1986:301].

*Colley v Council for Licensed Conveyancers* (Court of Appeal, UK) [2001] EWCA Civ 1137, [2001] 4 All ER 998, CA.

*Griffin v Illinois* (Supreme Court, US) [351 US 12 (1956)].

*McKane v Durston* (Supreme Court, US) [153 US 684 (1894)].

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*R (A Child)* (Court of Appeal, UK) [2019] EWCA Civ 895.

*R Capewell v Stoke on Trent County Court* (Court of Appeal, UK) [2011] EWHC 3851.

*Re B (A Child) (Care Proceeding: Appeal)* (Court of Appeal, UK) [2013] UKSC 33.

*Swain v Hillman & Anor* (Court of Appeal, UK) [1999] EWCA Civ 3053, [2001] 1 All ER 91.

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