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The Right to Appeal in Comparative Perspective

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ABSTRACT

Appellate procedures regarding the most serious crimes under domestic law are, in general, conducted differently in common law and civil law systems. This article reviews the differences concerning the primary facets of such proceedings, namely prosecutorial rights of appeal, access to appellate review, the scope of appellate review, the admission of additional evidence, appellate decisionmaking powers, and the functions of appellate review. It then explains that these differences result from dissimilar decisionmaking processes, degrees of adherence to the search for the truth, and sources of law.

I. INTRODUCTION

It has been noted that, in contrast to the extensive appellate procedures of civil law jurisdictions, essential characteristics of the common law variation of criminal procedure can include elements "such as . . . possibly even the absence of appellate procedure."[1] Indeed, the early criminal procedural systems of

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1. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 556 (1973). However, systems of criminal procedure are not in practice neatly divided according to the common law/civil law divide. *E.g.*, *id.* at 577 (observing that "all criminal processes appear mixed" because of "heavy borrowings from the other camp"); Esin Örücü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, *in* EPISTEMOLOGY AND METHODOLOGY OF

neither England and Wales nor South Africa offered the possibility to appeal criminal judgments.[2] Similarly, the right to appeal was not included in the U.S. Constitution.[3] In 1894, the U.S. Supreme Court held that "[i]t is wholly within the discretion of the state to allow or not allow . . . review" of a criminal judgment.[4]

However, the evolution of modern common law jurisdictions has led to the introduction of significant rights of appeal. For instance, the Court of Criminal Appeal, the predecessor of the current Court of Appeal (Criminal Division) in England and Wales, was established in response to notorious miscarriages of justice in 1907.[5] Starting from 1879, appellate rights were extended in South Africa, but it was not until 1948 that the Appellate Division, the precursor to the current Supreme Court of Appeal, began hearing appeals.[6] In addition, the federal courts in the U.S. and those of most U.S. states now vest defendants with relatively broad appellate rights.[7]

COMPARATIVE LAW 359, 363 (Mark van Hoecke et al. eds., 2004) (noting that legal systems are "mixed and overlapping"); J.R. Spencer, *Introduction*, *in* EUROPEAN CRIMINAL PROCEDURES 1, 37–65 (Mireille Delmas-Marty & J.R. Spencer eds., 2002) (discussing outside pressures on heuristic models). Even so, these distinctions retain value, because they enable "the grand contours of real-life contrast" to be described. Damaška, *supra* this note, at 577 n.190.

2. ROSEMARY PATTENDEN, ENGLISH CRIMINAL APPEALS, 1844–1994: APPEALS AGAINST CONVICTION AND SENTENCE IN ENGLAND AND WALES 5–33 (1996) (surveying history); CRIMINAL PROCEDURE HANDBOOK 395 (J.J. Joubert ed., 11th ed. 2014) [hereinafter JOUBERT HANDBOOK] (noting that "[a]ccording to Roman-Dutch law, the general rule was that neither the prosecution nor a convicted person could appeal in criminal cases").

3. RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1559 (2d ed. 2005); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1294 (5th ed. 2009). For a critical perspective, see David Rossman, *Were There No Appeal: The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990), and Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992).

4. LAFAVE ET AL., *supra* note 3, at 1294 (citing McCane v. Durston, 153 U.S. 684, 687 (1894)).

5. PATTENDEN, *supra* note 2, at 27–33 (discussing the *Beck* and *Edalji* cases and the Criminal Appeal Act 1907).

6. SOUTH AFRICAN LAW COMMISSION, THE RIGHT OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPEAL ON QUESTIONS OF FACT §§ 2.8–2.11 (Dec. 2000) [hereinafter SOUTH AFRICAN LAW COMMISSION].

7. *E.g.*, FED. R. CRIM. P. 32(j)(1)(A)–(B) (2014) (requiring trial court to advise defendant of right to appeal after both conviction and sentencing); LAFAVE ET AL., *supra*

Rights of appeal have, therefore, become an indispensable feature of nearly all systems of criminal procedure. Modern jurisdictions almost invariably provide for at least one stage of appellate review of a criminal conviction. Even so, the appellate machineries of common law and civil law jurisdictions, the major legal families of the world,[8] diverge significantly. The various approaches to appellate review have been described as one of "the major differences" between existing common law and civil law systems.[9] However, criminal appeals generally tend to receive limited attention in scholarship.[10]

Accordingly, this article seeks to place the right to appeal a criminal conviction in comparative perspective by contrasting civil law and common law approaches to appellate review. So as to allow for a meaningful comparison, Section II will put the primary aspects of appellate review at second instance in relation to the most serious crimes recognised in a domestic legal order side by side,[11] on the basis of a sufficiently wide and geographically diverse sample of common law jurisdictions[12]

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note 3, at 1284, 1294 (noting, respectively, that not all U.S. jurisdictions "allow appellate review of sentences" and that it can be "provided under state law").

8. JEAN PRADEL, DROIT PÉNAL COMPARÉ 631 (3d ed. 2008) (summarizing the origins of the two legal systems). The civil law family is also referred to as "Continental, Romano-Germanic, or Roman Law because its origins are in the old Roman Code of Justinian and the laws of the Germanic tribes." HARRY R. DAMMER & ERIKA FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 51 (2006). The common law family is also referred to as the "Anglo-American" model. *E.g.*, Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1439, 1440 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002). However, for the sake of consistency, the terms "civil law" and "common law" will be employed throughout this article.

9. Spencer, *supra* note 1, at 27, 28–30.

10. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 1–2 (2011).

11. It is noteworthy that the appellate processes pertaining to different categories of crimes may differ in domestic jurisdictions. *See, e.g.*, ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 371–72, 377–78 (4th ed. 2010) (discussing in general terms the appellate practice in England and Wales, and practice at the Court of Appeals); STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], §§ 312 (providing for appeal), 349(5) (setting out procedures for dismissal without hearing), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

12. England and Wales, the U.S., and South Africa. The former two jurisdictions are archetypical representatives of the common law family. However, the classification of South Africa as a common law jurisdiction is not as obvious. Its legal system has been described as "'mixed' on the basis that it has been influenced substantially by Roman-

and civil law jurisdictions[13] Subsequently, Section III will identify the underlying reasons for such divergences.

II. APPELLATE PROCEDURES IN CIVIL LAW AND COMMON LAW JURISDICTIONS

This section will consider the following aspects of common law and civil law appellate processes: prosecutorial rights of appeal; access to appellate review; the scope of appellate review; the admission of additional evidence on appeal; decisionmaking powers of appellate courts; and the functions of appellate review.

A. Prosecutorial Rights of Appeal

1. In Common Law Jurisdictions, the Double Jeopardy Doctrine Limits Prosecutorial Rights of Appeal.

In England and Wales, the double jeopardy rule prevents prosecutorial appeals against acquittals pronounced by a jury.[14]

Dutch civil law and English common law." Jacques E. du Plessis, *South Africa*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 667, 667 (Jan M. Smits ed., 2006). Nevertheless, in respect of criminal procedure, South Africa's common law tradition overshadows the civil law influence. Following the introduction of a civil-law-inspired system of criminal procedure by Dutch colonisers in the seventeenth century, a set of legal reforms led to "the anglicisation of the law of criminal procedure and evidence . . . , putting an end to the inquisitorial system and replacing it with the accusatorial English procedure" at the end of the eighteenth and the beginning of the nineteenth centuries. JOUBERT HANDBOOK, *supra* note 2, at 24.

13. France, Germany, and Argentina. The former two jurisdictions constitute the backbone of the civil law family. DAMMER & FAIRCHILD, *supra* note 8, at 54 (describing the French and German Civil Codes as "enormously influential"), 77–84 (discussing French and German systems in some detail). In line with the general orientation of Latin American countries towards the civil law tradition, Argentina has, in general, also been included in this category. Alejandro D. Carrió & Alejandro M. Garro, *Argentina*, *in* CRIMINAL PROCEDURE—A WORLDWIDE STUDY 3, 3 (Craig M. Bradley ed., 2d ed. 2007) (acknowledging that Argentina's criminal procedures "retain[] the basic features of criminal procedure shared by most Continental legal systems influenced by French law"). However, significant common-law-inspired amendments to the Argentine Code of Criminal Procedure have been introduced. *See* Graciela Rodriguez-Ferrand, *Argentina: Reform of Code of Criminal Procedure*, LIBRARY OF CONGRESS—GLOBAL LEGAL MONITOR (Dec. 16, 2014), https://www.loc.gov/law/foreign-news/article/argentina-reform-of-code-of-criminal-procedure/. Even so, Argentina has been classified as a civil law jurisdiction for the purposes of this article because, as discussed below, its appellate procedure mainly retains its civil law character.

However, the prosecution's appellate rights have been noticeably expanded over the years. Three relatively limited legal reforms were enacted from 1972 to 1996. First, the attorney general was given the power to seek the opinion of the appellate court on a point of law in relation to an acquittal.[15] Such a referral may generate limited effects, however, because it cannot "affect the trial in relation to which the reference is made or any acquittal in that trial."[16] Second, in respect of sentencing that appears unduly lenient, the attorney general was endowed with the right to refer such a case to the appellate court.[17] Unlike the first change, this second enactment empowered the appellate court to "quash any sentence passed" and "pass such sentence as they think appropriate for the case and as the court below had power to pass."[18] Finally, the possibility has been created for the prosecution to apply for a retrial for "tainted" acquittals. This concerns the situation "[w]here a person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal."[19] In 2001, reforms were taken further.[20] Prosecutorial rights to challenge rulings during trials on indictment were introduced. In this regard,[21] "the prosecution have the power to appeal practically any ruling in a trial on indictment in the Crown Court up to the point of the summing up," even though it was originally envisaged that such appeals would only concern "terminatory rulings"—those that bring a trial to an end.[22] Most notably, such powers encompass rulings as to "no case to answer,"[23] which concern acquittals

14. ASHWORTH & REDMAYNE, *supra* note 11, at 397.

15. CRIMINAL JUSTICE ACT 1972, c. 71, § 36(1) (Eng. & Wales).

16. *Id.* § 36(7).

17. CRIMINAL JUSTICE ACT 1988, c. 33, § 36(1) (Eng. & Wales).

18. *Id.* § 36(1) (a)–(b).

19. CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996, c. 25, § 54(1)(b) (Eng. & Wales).

20. Law Commission, *Double Jeopardy and Prosecution Appeals—Report on Two References under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com. No. 267) (2001).

21. *See generally* CRIMINAL JUSTICE ACT 2003, c. 44, §§ 57, 58 (Eng. & Wales).

22. David Ormerod, Adrian Waterman & Rudi Fortson, *Prosecution Appeals—Too Much of a Good Thing?* 2010 CRIM. L. REV. 169, 169 (2010).

23. CRIMINAL JUSTICE ACT 2003, c. 44, § 58(7) (Eng. & Wales).

directed by a judge instead of the jury.[24] Considering that these powers may, in effect, lead to an acquittal being overturned, it introduces a significant inroad into the double jeopardy principle. The most important constraints in this regard[25] concern the need for leave to appeal and the agreement of the prosecution that the defendant will be acquitted should leave to appeal be denied or should the appeal be abandoned.[26] Furthermore, in respect of certain serious offences,[27] the prosecution was empowered to apply for the quashing of an acquittal and a re-trial upon the discovery of "new and compelling evidence."[28]

According to the U.S. Supreme Court, the Fifth Amendment to the U.S. Constitution bars U.S. prosecutors from appealing acquittals pronounced by juries.[29] This interpretation proceeds from the proposition that a second trial upon a prosecutorial appeal places the defendant twice in jeopardy, because an acquittal terminates the initial jeopardy.[30] Directed acquittals entered by judges have been equated to jury acquittals concerning double jeopardy protection, even when such acquittals go against relevant procedures.[31] In addition, a remand to a lower court is precluded where an appellate court overturns

24. Rosemary Pattenden, *Prosecution Appeals against Judges' Rulings*, 2000 CRIM. L. REV. 971, 976–77 (2000) (discussing policy behind prohibition on prosecution's appeal of directed acquittal).

25. *See* Ormerod et al., *supra* note 22, at 185–93 (enumerating further differences).

26. CRIMINAL JUSTICE ACT 2003, c. 44, §§ 57(4) (requiring leave to appeal), 58(8)–(9) (addressing automatic acquittal) (Eng. & Wales).

27. CRIMINAL JUSTICE ACT 2003, Schedule 5, Pt. 1 (Eng. & Wales) (listing such "offenses against the person" as murder, rape, genocide, and hostage-taking).

28. *Id.* §§ 75 (describing cases that may be re-tried), 76 (addressing required application to court of appeal), 78(2)–(3) (defining "new" and "compelling").

29. LAFAVE ET AL., *supra* note 3, at 1223–24 (tracing Court's long recognition of double jeopardy standard back to United States v. Ball, 163 U.S. 662 (1896)).

30. *Id.* at 1212 (discussing Kepner v. United States, 195 U.S. 100 (1904), in which the Court declined to adopt the Holmesean theory of "continuing jeopardy," *see id.* at 134–35 (Holmes, White & McKenna, JJ., dissenting)). The U.S. Supreme Court, thus, rejects the position that a retrial initiated by a prosecutorial appeal forms part of one and the same cause and, therefore, the same jeopardy. For a critical perspective, see Akil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1842–45 (1997).

31. LAFAVE ET AL., *supra* note 3, at 1224–25.

a conviction based on the insufficiency of evidence,[32] because it does not matter whether the reviewing court or the trial court deemed the evidence insufficient.[33] Nonetheless, several exceptions have been carved out. Firstly, where a defendant moves for dismissal on grounds unrelated to the determination of factual guilt, but on the basis of, for example, procedural defects, no claim arises under the double jeopardy doctrine.[34] In this regard, the U.S. Supreme Court has held that double jeopardy protection only attaches to "acquittals," which concern rulings that resolve some or all of the factual elements of the offences charged in favour of the defendant.[35] Secondly, the U.S. Supreme Court has found that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial."[36] Thirdly, a clear exception to the double jeopardy rule is reflected in statutory rights afforded to the prosecution to seek a higher sentence on appeal.[37] According to the U.S. Supreme Court, the essential protection of double jeopardy is to prevent a retrial on guilt, and a sentence appeal does not amount to a retrial.[38] Finally, fraudulently obtained acquittals could possibly constitute another exception. In a case involving an acquittal pronounced by a bribed judge, an appellate court held that the person concerned was never in jeopardy and the U.S. Supreme Court refused discretionary review.[39]

The rights of appeal of South African prosecutors may be exercised in two ways. First, questions of law may be "reserved" upon request of the prosecutor for determination by the appellate court.[40] This procedure is available

32. This protection does not apply to situations where reversal of the conviction was secured on grounds other than the sufficiency of evidence, such as a trial error. *Id.* at 1226. Nevertheless, some types of misconduct by the prosecution may bar retrial. *Id.* at 1227.

33. *Id.* at 1227 (citing Burks v. United States, 437 U.S. 1 (1978)).

34. *Id.* at 1222–23.

35. *Id.* (contrasting dismissal with acquittal).

36. United States v. Wilson, 420 U.S. 332, 345 (1975).

37. LAFAVE ET AL., *supra* note 3, at 1284.

38. *Id.* at 1284–85 (discussing United States v. DiFrancesco, 449 U.S. 117 (1980)).

39. ALLEN ET AL., *supra* note 3, at 1492–93 (discussing Aleman v. Judges of Cook Cnty. Cir. Ct., 138 F.3d 302, *cert. denied*, 525 U.S. 868 (1998)).

40. CRIMINAL PROCEDURE ACT 51 OF 1977 § 319(1) (S. Afr.). A court may also reserve a question of law on its own motion or upon request by the accused. *Id.* More specific bases for prosecutorial appeals pursuant to questions of law are laid down in the

> (1) where there has been an *acquittal* . . . , which is a finding whereby the accused is set completely free . . . ;
>
> (2) where a court quashes an indictment . . . ;
>
> (3) where there has been a conviction and the question of law may be to the advantage of the accused . . . ; [and]
>
> (4) where the question of law may have a bearing upon the validity of the sentence imposed . . .[41]

Second, a prosecutor may appeal "against a sentence imposed upon an accused in a criminal case."[42] A challenge to this provision on constitutional grounds has been rejected, on the basis that a sentence appeal does not amount to a trial *de novo*, the procedure is not unfair, and the accused's right to a fair trial must be interpreted in the context of the rights and interests of the law-abiding persons in society.[43] It follows that a prosecutorial appeal from acquittal on questions of fact is disallowed, in conformity with the double jeopardy principle.[44] However, the South African Law Commission has recommended that such a ban ought to be dispensed with.[45] In the view of the Commission this right "should be limited to those cases where a miscarriage of justice occurred on the evidence before the court."[46] This proposal was mainly

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Act's section 316(3)(a) (providing for appeal upon application by the appropriate prosecutor in connection with "a decision in favour of the accused on a question of law"), and section 333 (providing for submission to the Court of Appeal of cases in which "the Minister has any doubt as to the correctness of any decision" or of cases that conflict on questions of law with other decisions).

41. JOUBERT HANDBOOK, *supra* note 2, at 443 (citations omitted).

42. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, § 316B(1). For a critical perspective, see Jan H. van Rooyen, *A Perspective on the Criminal Law Amendment Bill*, 3 S. AFR. J. CRIM. JUSTICE 162, 168 (1990).

43. Louise Jordaan, *Appeal by the Prosecution and the Right of the Accused to Be Protected against Double Jeopardy: A Comparative Perspective*, 32 COMP. & INT'L L.J. S. AFR. 1, 12 (1999).

44. *Id.* at 8; *see also* S. AFR. CONST. art. 35(3)(m).

45. SOUTH AFRICAN LAW COMMISSION, *supra* note 6, at §§ 1.1 (noting that Commission was directed to determine "whether the State should be given the right of appeal against sentence"), 5.31 (recommending that "provision be made for the Director of Public Prosecutions to appeal on questions of fact").

46. *Id.* §§ 3.10 (suggesting that that "an appeal against acquittal would . . . in practice be undertaken only where there has been a clear miscarriage of justice and normally where the offence is a serious one"), 5.27 (concluding that "the right to appeal on questions of fact should be limited to those cases where a miscarriage of justice occurred on the

grounded in the public interest of preventing judicial error, the absence of a prohibition on state appeals in international and regional agreements on human rights, the possibility of such appeals in some common law and civil law systems, and the consideration that such appeals do not contravene the double jeopardy clause since appellate proceedings are an extension of the original proceedings.[47] Nevertheless, hitherto, no such reforms have been implemented.[48]

2. In Civil Law Systems, the Appellate Rights of the Prosecution Are Generally on Par with Those of the Accused.

The current code of criminal procedure in France expressly recognises the right to appeal of both the accused and the prosecution.[49] However, amendments adopted in 2000 allowed prosecutorial appeals from convictions only and, thus, expressed the principle that an acquittal is final.[50] This restriction has been described as illogical in the literature, because, in respect of less serious offences, a prosecutorial appeal against an acquittal was permitted by law.[51] Accordingly, a 2002 amendment extended the appellate powers of prosecutorial authorities to appeals from acquittals.[52] Such a right to appeal has been characterised as indispensable in practice, since it ensures, *inter alia*, a full re-

evidence before the court," pointing out that "[t]he intention is not to give the state a second bite of the cherry" because "[t]he state cannot rectify its own errors on appeal").

47. *Id.* at 5.2–5.4 (addressing the purpose of the right to appeal, international agreements, and world-wide practices relating to appeal by the state in criminal cases), 5.11–5.21 (distinguishing appeal from double jeopardy and discussing positions taken by various commentators). For a critical perspective, see Mervyn Bennun, *Prosecution Appeals against Acquittals: The Law Commission's Proposals*, 15 S. AFR. J. CRIM. JUSTICE 88 (2002).

48. JOUBERT HANDBOOK, *supra* note 2, at 411 (referring to statutorily provided prosecution appeal "for the reservation of a question of law for the consideration of the Supreme Court of Appeal"), 443 (noting that "[o]nly the accused person may appeal on the merits of a case"); SHANNON VAUGHN HOCTOR, CRIMINAL LAW IN SOUTH AFRICA 239–41 (2013) (explaining that although a convicted person may file an appeal against conviction if leave to appeal is granted, the prosecution may appeal only on a point of law).

49. CODE DE PROCÉDURE PÉNAL [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 380-2 (Fr.).

50. JEAN PRADEL, PROCÉDURE PÉNALE 779 (15th ed. 2010).

51. *Id.*

52. *Id.*

examination of a case in which only certain accused appeal in a multi-accused trial.[53]

In Germany, the prosecution's right "to file the appellate remedies admissible against court decisions" mirrors the right of appeal extended to the accused.[54] However, certain facets of the prosecution's right of appeal operate, or have been restricted, in favour of the accused. In addition to appeals lodged to the detriment of the accused,[55] the prosecution is separately empowered to file an appeal "for the benefit of the accused."[56] In any event, a prosecutorial appeal "shall have the effect that the contested decision may be amended or revoked, also for the accused's benefit."[57] Thus, the appellate court is required to assess the matter comprehensively.[58] Finally, "[t]he violation of legal norms existing solely for the defendant's benefit may not be invoked by the public prosecution office for the purpose of quashing the judgment to the defendant's detriment."[59]

The Argentine Supreme Court has found that the extension of appellate rights of the prosecution is not contrary to either due process or double jeopardy.[60] More specifically, the prosecution may appeal from an acquittal[61] and from a conviction where the imposed sentence was less than half the requested sentence.[62] However, on the basis of an appeal lodged by the prosecution, the appellate court may also modify or revoke the judgment to

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53. *Id.*

54. STPO, *supra* note 11, § 296, para. 1.

55. JÜRGEN PETER GRAF ET AL., STRAFPROZESSORDNUNG, MIT GERICHTSVERFASSUNGSGESETZ UND NEBENGESETZEN: KOMMENTAR 1236–37, 1242 (2010).

56. STPO, *supra* note 11, § 296, para. 2.

57. *Id.* § 301.

58. GRAF ET AL., *supra* note 55, at 1242. However, this obligation is limited by the scope of the prosecutorial appeal. For instance, a prosecutorial appeal confined to the sentence cannot lead to alterations in respect of the criminal responsibility of the accused. *Id.*

59. STPO, *supra* note 11, § 339. For instance, where an accused is acquitted notwithstanding a failure to assign counsel, the prosecution may not appeal on the basis of a violation of the right to counsel and seek a conviction to be imposed. GRAF ET AL., *supra* note 55, at 1483.

60. Carrió & Garro, *supra* note 13.

61. CÓDIGO PROCESAL PENAL DE LA NACION [CÓD. PROC. PEN.] [CODE OF CRIMINAL PROCEDURE], art. 308 (InfoLEG 2014) (Arg.), *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/239340/norma.htm#52.

62. *Id.*

the benefit of the accused.[63] In addition, the prosecution is separately empowered to appeal in favour of the accused.[64]

B. Access to Appellate Review

1. Common Law Systems Use Impediments to Dissuade Parties from Entering the Appellate Process.

The appellate system of England and Wales discourages the exercise of appellate rights in different ways. The three following impediments appear to be the most significant.[65] First, appeals against both conviction and sentence require leave to appeal from either the trial judge or the appellate court.[66] In deciding whether to grant leave to appeal, the court assesses whether it "feels the need to hear the prosecution on the merits."[67] This filtering function has been widely accepted as necessary to alleviate the "problem of a flood of appeals" in the legal system,[68] but it has also been described as "perverse" since appeal against convictions for less serious crimes lies of right.[69] Second, the loss-of-time rule additionally dissuades appeals. Usually, in case of the denial of an appeal, the time spent in custody until such a denial counts towards the sentence.

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63. *Id.* art. 303.

64. *Id.* art. 297.

65. For other deterrent factors, see KATE MALLESON & RICHARD MOULES, THE LEGAL SYSTEM 168–69 (2010) (discussing the narrow grounds on which legal aid is available, all of which are affected by the necessity of securing leave to appeal and defendants' knowledge of the "restrictive approach" that the Court of Appeal takes when reviewing convictions); J.R. Spencer, *Does Our Present Criminal Appeal System Make Sense?* 8 CRIM. L. REV. 677, 685–86 (Aug. 2006) (providing general discussion); Stephanie Roberts & Kate Malleson, *Streamlining and Clarifying the Appellate Process*, 4 CRIM. L. REV. 272, 280 (2002) (mentioning "the limited scope of legal aid, poor quality legal advice and a restrictive approach of the Court of Appeal to its powers").

66. CRIMINAL APPEAL ACT 1995, c. 35 § 1 (Eng. & Wales); CRIMINAL APPEAL ACT 1968, c. 19, §§ 10 (acknowledging right to appeal), 31(2)(a) (enumerating powers of single judge, including the grant of leave to appeal), 31(3) (indicating that application for leave to appeal may be "determined by the Court of Appeal" if a single judge refuses to grant leave).

67. ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE 1186, § 7-237 (P.J. Richardson ed., 2014).

68. ASHWORTH & REDMAYNE, *supra* note 11, at 375 (analyzing outcomes for 2008 and concluding that of 1,588 initial applicants for leave to appeal "about 10 percent would finally succeed in having their convictions quashed").

69. Spencer, *supra* note 65, at 684.

However, judges may rule that this period is not to be subtracted.[70] In such circumstances, a loss-of-time ruling aggravates the sentence. This mechanism has also met with criticism, as it "discourages defendants from pursuing their legal rights."[71] Finally, a guilty plea normally precludes a successful appeal, unless it can be shown that "a mistaken decision by a judge left the accused with no alternative in law but to plead guilty."[72]

Even though appellate review is usually granted as of right in the U.S., appellate courts may refuse to grant appellate review in a number of situations. This may be done where the party concerned has failed to raise and preserve an error at trial.[73] The raise-or-waive rule advances, in the main, judicial economy by pre-empting unnecessary reversals and appeals.[74] The most relevant exception to this rule concerns the authority of appellate courts to grant relief on the basis of a plain error that was not preserved, although the errors amenable to such review differ in the various U.S. jurisdictions.[75] In addition, appeals will generally not be considered where events have rendered the claim moot or where the right to appeal has been waived by defendants entering a plea deal or those who are fugitives from justice.[76]

Access to appellate review is circumscribed for both the defendant and the prosecutor in South Africa in that leave to appeal must be acquired.[77] Such leave may only be granted

> where the judge or judges concerned are of the opinion that . . . the appeal would have a reasonable prospect of success or . . . there is some other compelling reason why the

70. CRIMINAL APPEAL ACT 1968, *supra* note 66, § 29(1); ASHWORTH & REDMAYNE, *supra* note 11, at 373 (citing 1968 Act).

71. ASHWORTH & REDMAYNE, *supra* note 11, at 374.

72. *Id.* at 386 (indicating that "[t]he caveat—'normally'—is aimed at cases where a plea was made by mistake or without intention to admit the truth of the charge").

73. LAFAVE ET AL., *supra* note 3, at 1314 (citing both federal and state authorities).

74. *Id.* (quoting State v. Applegate, 591 P.2d 371 (Or. 1979)).

75. *Id.* at 1315–16 (recognizing that most U.S. jurisdictions acknowledge a plain-error exception); *cf., e.g.*, FED. R. CRIM. P. 52(b) (2013) (U.S.) (providing that, in federal trial courts, "plain error that affects substantial rights may be considered even though it was not brought to the court's attention").

76. LAFAVE ET AL., *supra* note 3, at 1312–14.

77. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, §§ 315(4), 316(1)(a) (S. Afr.).

> appeal should be heard, including conflicting judgments on the matter under consideration.[78]

Where leave to appeal is refused, "the accused may by petition apply to the President of the Supreme Court of Appeal" to renew the application.[79] The Constitutional Court has confirmed the constitutionality of this procedure, because the requirements of fairness were satisfied and "[i]t cannot be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedure, law or fact to be placed before" the appellate tribunal.[80]

2. Civil Law Jurisdictions Either Guarantee Access to Appellate Review without Limitation or Impose Fewer Limitations.

France belongs to the guaranteed-access category. Thus, its system of criminal procedure does not impose any particular limitations on the right to seek appellate review.

In Germany, appellate courts may dispense with a main hearing and decide requests for appellate review summarily. In practice, appellate proceedings rarely proceed beyond this stage.[81] Firstly, a complaint may be found to be inadmissible if "the provisions on filing an appeal on law or on submission of the notices of appeal on law have not been complied with."[82] Secondly, upon a reasoned application by the prosecutor,[83] a request for appellate review may be dismissed as "manifestly ill-founded."[84] Such a rejection must be adopted unanimously but need not be accompanied by a reasoned opinion.[85] Finally, a shortened procedure may also operate in favour of the accused,

78. SUPERIOR COURTS ACT 10 OF 2013 § 17(1)(a) (S. Afr.).

79. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, § 316(8)(a)(ii).

80. *S. v. Rens* 1995 (1) ZACC 15 (CC) at 16 para. 25 (S. Afr.); *see generally id*. at 10–17 paras. 19–26 (discussing issue more broadly).

81. GRAF ET AL., *supra* note 55, at 1540.

82. STPO, *supra* note 11, § 349(1).

83. *Id.* § 349(2) (requiring prosecutor to provide grounds for application).

84. *Id.* § 349(2). An ill-founded request is one in which it appears to any expert without prolonged assessment that the impugned judgment is not erroneous in terms of substantive law and that the grounds of appeal do not sustain the complaint. GRAF ET AL., *supra* note 55, at 1543.

85. GRAF ET AL., *supra* note 55, at 1546–47.

because a judgment may be set aside if it is determined that the appeal "filed for the defendant's benefit . . . [is] well-founded."[86]

The Argentine Code of Criminal Procedure specifies that requests for appellate review must first be filed with the court that issued the impugned decision and must exhaustively set out each ground of appeal.[87] Once the formal requirements have been satisfied, a hearing must be held within five days.[88]

C. Scope of Appellate Review

1. Common Law Appellate Courts Review Questions of Law De Novo*, but Traditionally Exercise Deference in Relation to Questions of Fact.*

In England and Wales, the appellate court does not conduct a trial *de novo* and confines its scrutiny to factual and legal errors.[89] It "freely reviews decisions for errors of law,"[90] which mainly concern the formulation, interpretation, or application of the law.[91] However, "the appellant has to contend with a policy of deference towards findings of fact by the judge *or* jury."[92] Such reticence seems to result mainly from the following circumstances:

i. the trial court directly appreciates the evidence and the appellate court has access only to the trial record;

ii. the jury does not provide reasons;

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86. STPO, *supra* note 11, § 349(4). Although the wording suggests that such a decision may be adopted only following an appeal instituted by the accused, this provision has been interpreted to cover any type of appeal. GRAF ET AL., *supra* note 55, at 1548.

87. CÓD. PROC. PEN., *supra* note 61, art. 313.

88. *Id.*

89. ASHWORTH & REDMAYNE, *supra* note 11, at 371, 377–78; Rosemary Pattenden, *Criminal Appeals: The Purpose of Criminal Appeals*, *in* THE HANDBOOK OF THE CRIMINAL JUSTICE PROCESS 488, 491 (M. McConville & G. Wilson eds., 2002).

90. Rosemary Pattenden, *The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division*, 1 CRIM. L. REV. 15, 26 (2009).

91. Pattenden, *supra* note 89, at 488.

92. Pattenden, *supra* note 90, at 26.

iii. the hesitance to undermine the central role of the jury through appellate intervention;

iv. the emphasis placed on the finality of decisions; and

v. the consciousness of the criminal justice system's finite resources.[93]

Even so, the appellate court retains several bases on which to intervene in the factual determination of a jury. The appellate court has continued the approach of its predecessor in respect of "inconsistent verdicts," which involve "multiple charges or multiple defendants and apparently contradictory outcomes for which the only rational explanation is jury confusion or a wrong approach."[94] Moreover, following the simplification of the statutory criterion for quashing convictions from "unsafe and unsatisfactory" to "unsafe,"[95] the "lurking doubt" test was introduced for other appeals concerning factual elements of a jury verdict.[96] This test involves a subjective assessment as to whether there remains a lurking doubt in the minds of the judges that an injustice was done, although such a determination need not be based strictly on the evidence but may be produced by the general feel of the case.[97] However, hitherto, such appeals have been exceptional.[98] In addition, when fresh evidence has become available post-conviction, the appellate court has further possibilities to challenge factual aspects of a jury verdict. The appellate court "may, if they think it necessary or expedient in the interests of justice . . . receive any evidence which was not adduced in the proceedings from which the appeal lies."[99] A

93. ASHWORTH & REDMAYNE, *supra* note 11, at 377–78; *see also* Pattenden, *supra* note 90, at 26–29 (pointing to additional factors, including (i) the autonomy of the fact-finder; (ii) a margin of appreciation required for the inherently unregulated nature of fact-finding; and (iii) the fact that, unlike for an error of law, the appellate court probably cannot order a retrial for an error of fact).

94. Pattenden, *supra* note 90, at 24.

95. *Id.* at 25; CRIMINAL APPEAL ACT 1995, *supra* note 66, § 2(1)–(2) (showing revised text).

96. Pattenden, *supra* note 90, at 25.

97. *Id.* at 26.

98. *Id.*; MALLESON & MOULES, *supra* note 65, at 169 (noting that the Court quashed a conviction on "lurking doubt" grounds only six times between 1969 and 1989).

99. CRIMINAL APPEAL ACT 1995, *supra* note 66, § 4(1)(a).

question has arisen as to the appropriate standard for assessing fresh evidence: Should the appellate court assess whether it might have had an impact on the trial jury or should it determine its own view of the additional evidence?[100]

The degree of deference afforded to the trial court is a critical element of U.S. appellate procedure. In general, three categories may be distinguished.[101] Firstly, decisions considered to amount to "abuse of discretion" by the trial court are reviewed by enquiring whether there is a "definite and firm conviction that the . . . court committed a clear error of judgment."[102] This standard constitutes the most deferential form of appellate review, mainly because the trial judge is considered to be in a better position to assess the circumstances surrounding such decisions.[103] Secondly, factual findings of trial judges are subject to "clearly erroneous" review.[104] The exact ambit of this standard has not been clarified, although it has been held that a factual finding is clearly erroneous when "a court is left with a firm and definite conviction that a mistake has been committed."[105] In respect of findings of guilt by a jury or judge, the appellate court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt."[106] The deference afforded to trial courts may mainly be explained by their institutional advantages vis à vis appellate courts. Whilst the latter must confine their examination to the written record, the former, whether constituted by a judge or a jury, observe witnesses first-hand and are, thus, considered to be better placed to assess their

100. ASHWORTH & REDMAYNE, *supra* note 11, at 380.

101. LAFAVE ET AL., *supra* note 3, at 1318 (relying on Pierce v. Underwood, 487 U.S. 552 (1988)).

102. *Id.* at 1319; Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 62–65 (2005) (discussing *de novo*, clearly erroneous, and abuse of discretion standards).

103. LAFAVE ET AL., *supra* note 3, at 1319.

104. *Id.*

105. United States v. United States Gypsum Co., 333 U. S. 364, 397 (1948).

106. LAFAVE ET AL., *supra* note 3, at 1319 (citing Jackson v. Va., 443 U.S. 307, 319 (1979)).

credibility.[107] Thirdly, in respect of questions of law, appellate courts do not afford any deference to lower courts and provide *de novo* review.[108] Strict boundaries between these categories are, of course, hard to draw. The delimitations between questions of law and fact are especially elusive and, accordingly, so-called "mixed questions of law and fact," which require the application of legal principles to historical facts, are also reviewed *de novo*.[109]

The scope of appellate review has both a factual and legal component in South Africa. In relation to an appeal on the facts, it has been remarked that the appellate court is "usually loath to interfere with the findings of the trial court," which is especially the case if the finding is based on the impressions made by witnesses, as the trial court directly appreciates the evidence.[110] However, in respect of "inferences, other facts and probabilities," the appellate court is more likely to intervene since it is not in a disadvantageous position compared to the trial court.[111] There is a presumption that "the trial court's evaluation of the evidence as to the facts is correct" and appellate interference is, thus, only justified "if it is convinced that the evaluation is wrong."[112] A different test governs appeals in respect of questions of law. In comparison with a question of fact, the appellate court does not ask whether "it would have made the same finding but whether the trial court *could* have made such a finding."[113] It is unsurprising that the distinctions between questions of law and fact have proved difficult to delineate.[114] Nevertheless, the meaning afforded to questions of law by the Supreme Court of Appeal has been termed "narrow," so as to prevent prosecutorial appeals on questions of fact to be presented under the guise of questions of law.[115] Finally,

107. Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435, 444–49 (2004) (discussing institutional competence).

108. LAFAVE ET AL., *supra* note 3, at 1319 (citing *Pierce*).

109. *Id.* at 1320.

110. JOUBERT HANDBOOK, *supra* note 2, at 409.

111. *Id.*

112. *Id.* at 409–10.

113. *Id.* at 410.

114. *Id.* at 410–11; *see also, e.g.*, SOUTH AFRICAN LAW COMMISSION, *supra* note 6, at 2.24.

115. Jordaan, *supra* note 43, at 11.

considering that the trial court is vested with discretion in respect of sentencing, the appellate court intervenes only when such discretion has not been exercised judicially.[116]

2. Appellate Courts in the Civil Law Tradition Also Possess Wide-Ranging Powers of Review with Regard to Questions of Law, Whereas Their Approach to Questions of Fact is Generally Broader.

In 2000, the French Code of Criminal Procedure was amended to replace the accused's right to an appeal on questions of law[117] with a full-blown right to appeal from such judgments to another *Cour d'Assises.*[118] The pre-existing limitation was rooted in two considerations.[119] First, extensive review of the charging decision was considered a safeguard against erroneous assessment by the trial court.[120] Moreover, considering that the trial court is composed of professional judges and laypersons, the maxim that the jury does not err further prevented appellate review.[121] It has been remarked that the review of the charging decision was of limited added value and that jury decisions have not proved immune to error.[122] An appellate court is, therefore, mandated to re-examine the case in full[123] and proceeds largely in accordance with the modalities applicable to first-instance proceedings.[124]

The scope of appellate review is limited in two principal ways in Germany. First, a *proprio motu* examination by the appellate court is precluded as the appellate parameters are

116. JOUBERT HANDBOOK, *supra* note 2, at 407.

117. PRADEL, *supra* note 50, at 768.

118. C. PR. PÉN, *supra* note 49, arts. 380-1, 380-2.

119. PRADEL, *supra* note 50, at 768.

120. C. PR. PÉN, *supra* note 49, arts. 79 (addressing preliminary investigation), 181 (addressing indictment), 191 (describing investigating chamber of appeals court), 214 (addressing indictment).

121. C. PR. PÉN, *supra* note 49, arts. 240, 254.

122. PRADEL, *supra* note 50, at 768.

123. C. PR. PÉN, *supra* note 49, art. 380-1; Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE—A WORLDWIDE STUDY, *supra* note 13, at 236 (explaining that "potentially a trial *de novo* on all issues of fact, law or sentencing raised by the appeal" is possible at this stage).

124. C. PR. PÉN, *supra* note 49, art. 380(1).

defined by the notice of appeal.[125] Second, appellate review is confined to legal issues.[126] In this regard, the German Code of Criminal Procedure sets forth that

> [o]nly the notices of appeal on law and, insofar as the appeal on law is based on defects in the proceedings, only the facts specified when the notices of appeal on law were submitted, shall be subject to review by the court hearing the appeal.[127]

The Code also provides that "[f]ailure to apply a legal norm or erroneous application of a legal norm" is a "violation of the law."[128] However, whether a judgment is based on a violation of law has been liberally construed, considering that the possibility thereof has been considered sufficient to overturn a judgment.[129] Even though the factual basis established at first instance may not be directly reviewed,[130] it has been remarked that appellate courts increasingly "second-guess trial courts' fact finding."[131] For instance, challenges to the substantive correctness of judgments have been granted on the basis of violations of the procedural obligation to "extend the taking of evidence to all facts and means of proof relevant to the decision"[132] and the obligation to ensure the completeness and the logical consistency of the evidentiary evaluation by disregarding obvious, alternative interpretations of the evidence.[133]

In Argentina, the 1993 amendments to the National Code of Criminal Procedure have replaced *de novo* review with review of questions of law.[134] Even so, the Supreme Court has expanded the scope of appellate review. The highest Argentine court has noted that, whilst a narrow interpretation of appellate

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125. GRAF ET AL., *supra* note 55, at 1561.

126. STPO, *supra* note 11, § 333.

127. *Id.* § 352(1).

128. *Id.* § 337(2).

129. Thomas Weigend, *Germany*, *in* CRIMINAL PROCEDURE—A WORLDWIDE STUDY, *supra* note 13, at 269; GRAF ET AL., *supra* note 55, at 1432.

130. STPO, *supra* note 11, § 337(1) (providing that "[a]n appeal on law may be filed only on the ground that the judgment was based upon a violation of the law").

131. Weigend, *supra* note 129, at 271.

132. STPO, *supra* note 11, § 244(2).

133. Weigend, *supra* note 129, at 271; *see also* GRAF ET AL. *supra* note 55, at 1386, 1397, 1412.

134. Carrió & Garro, *supra* note 13, at 53–54.

review as limited to questions of law is "solely the product of . . . legislative tradition and history," the text "lends itself to both [a] narrow and [a] broad or liberal interpretation."[135] In addition, it has held that Article 8(2)(h) of the American Convention on Human Rights and Article 14(5) of the International Covenant on Civil and Political Rights "should be interpreted as requiring review of any issue not exclusively reserved for those judges on the bench for the oral proceedings," which is a limitation that arises out of "the principle of publicity" and the fact that "cassation judges do not have firsthand knowledge of the oral proceedings."[136] In light of the impossibility to differentiate between questions of law and fact in practice, it has concluded that appellate review

> should be understood as enabling a full review of the judgment, one that is as extensive as possible, requiring that cassation judges put out the maximum review effort, according to the possibilities and records of each case and without making too much of those issues that are reserved for the judges who were present for the oral proceedings.[137]

The current Argentine National Code of Criminal Procedure draws a distinction between the scope of appellate review applicable to first instance judgments imposing a conviction and those pronouncing an acquittal. The grounds of appeal for decisions falling in the former category are broadly formulated and include, besides legal errors, the omission to consider decisive evidence or the consideration of non-existent evidence and the erroneous assessment of the evidence and facts supporting a conviction and sentence.[138] The grounds of appeal pertaining to the latter category have been drafted more restrictively and concern, in the main, the erroneous application of the law and the lack of reasoning or a judgment that is contradictory, unreasonable, or arbitrary.[139]

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135. Mendoza v. Argentina, Case 12.561, Inter-Am. Comm'n H.R., Report No. 172/10, ¶ 228, n.156 (2010), *available at* http://www.worldcourts.com/iacmhr/eng/decisions/2010.11.02_Mendoza_v_Argentina.pdf.

136. *Id.* ¶ 226, n. 155.

137. *Id.*

138. CÓD. PROC. PEN., *supra* note 61, art. 311.

139. CÓD. PROC. PEN., *supra* note 61, art. 312.

D. Additional Evidence

1. Common Law Appellate Systems Either Deny the Admission of Additional Evidence or Admit It Only in Exceptional Circumstances.

In England and Wales, the appellate court is empowered to order the production of "any document, exhibit or other thing connected with the proceedings," the attendance of any witness for examination, and investigations into any matter.[140] Yet the court has proved to be reluctant to do so in practice.[141]

The court of appeal in South Africa decides on the basis of the record of the proceedings before the court of first instance,[142] but the appellate record may be expanded. An application for leave to appeal to the appellate court "may be accompanied by an application to adduce further evidence" which "must be" supported by an affidavit stating that

> (i) further evidence which would presumably be accepted as true, is available;
>
> (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
>
> (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.[143]

In addition, where further evidence comes to light after leave to appeal has been granted, the appellate court has the power to receive it.[144] It may also remit the case "for further hearing, with such instructions as regards the taking of further evidence or otherwise" as it deems necessary.[145] Additional evidence is admitted only exceptionally, although the appellate court may exercise a degree of flexibility in this regard, provided that it is

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140. CRIMINAL APPEAL ACT 1968, *supra* note 66, §§ 23(1)(a)–(b), 23A; CRIMINAL APPEAL ACT 1995, *supra* note 66, § 5 (showing change in statutory text).

141. Stephanie Roberts, *The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal*, 1 JUSTICE J. 86, 92 (2004) (reporting fewer "fresh evidence" appeals in 2004 than in 2002).

142. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, § 316(7)(a).

143. *Id.* § 316(5)(a)–(b).

144. SUPERIOR COURTS ACT 10 OF 2013, *supra* note 78, § 19(b); JOUBERT HANDBOOK, *supra* note 2, at 446–47.

145. SUPERIOR COURTS ACT 10 OF 2013, *supra* note 78, § 19(c).

satisfied that, upon admission of the evidence, there is a reasonable probability that the person concerned would not be convicted in a further hearing.[146] The U.S. appellate system does not permit additional evidence to be presented on appeal.[147]

2. Certain Civil Law Jurisdictions Allow the Presentation of Additional Evidence on Appeal, with or without Restrictions.

In line with its *de novo* approach to appellate review,[148] the French appellate system permits the calling of additional evidence both by the appellate court *proprio motu* and the parties.[149] In Argentina, appellate judges may receive evidence proposed for admission by the appellant if they deem it to be necessary and useful.[150] However, in Germany, appellate hearings do not accommodate the presentation of evidence.[151]

E. Appellate Decisionmaking Powers

1. Appellate Courts in Common Law Systems Tend to Emphasise Remittal over Instantaneous Appellate Resolution.

In England and Wales, the appellate court disposes of broad statutory prerogatives. In addition to allowing or dismissing an appeal, it may substitute a conviction for an alternative offence, "where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence."[152] The court may further order a retrial if the interests of justice so require.[153]

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146. JOUBERT HANDBOOK, *supra* note 2, at 436.

147. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQUETTE L. REV. 591, 605 (2009) (pointing out that "in almost every jurisdiction in the United States, there is no mechanism that ensures litigants a right to introduce new evidence of innocence during the direct appeal process," and pointing out that "[a]ppellate courts do not hear new evidence").

148. See *supra* Section II.C.

149. C. PR. PÉN., *supra* note 49, art. 310; PRADEL, *supra* note 50, at 783.

150. CÓD. PROC. PEN., *supra* note 61, art. 314.

151. GRAF ET AL., *supra* note 55, at 1559.

152. CRIMINAL APPEAL ACT 1968, *supra* note 66, § 3.

153. *Id.* § 7.

U.S. appellate courts may reverse a first-instance judgment, which entails nullification and prevents retrial.[154] Usually, however, the appellate court reverses the judgment and remands the case for retrial.[155]

The appellate court in South Africa may adopt a number of decisions. Firstly, with regard to "an appeal against a conviction or of any question of law reserved," it may

> (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
>
> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
>
> (c) make such other order as justice may require.[156]

Thus, for instance, where a reserved question of law is answered in favour of the State, an acquittal may be substituted with a conviction and a sentence may be imposed.[157] Secondly, in relation to sentencing appeals, the appellate court "may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial."[158] Although it could not do so prior to 1963, the appellate court now possesses "the power to impose a punishment more severe

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154. Craig M. Bradley, *United States*, *in* CRIMINAL PROCEDURE—A WORLDWIDE STUDY, *supra* note 13, at 547 (listing various grounds on which convictions may be reversed, but also noting that "[o]nly if the appellate court reverses the conviction for insufficient evidence is the defendant likely to be acquitted by the appellate court," as principles of double jeopardy would seem to compel that outcome).

155. *Id.*; RONALD WALDRON ET AL., THE CRIMINAL JUSTICE SYSTEM—AN INTRODUCTION 108–09 (2010).

156. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, § 322(1). This section includes a proviso, according to which,

> notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

Id.; *see also* SUPERIOR COURTS ACT 10 OF 2013, *supra* note 78, § 19 (laying down similar prerogatives). For a discussion of the proviso in section 322, see JOUBERT HANDBOOK, *supra* note 2, at 447–49.

157. SOUTH AFRICAN LAW COMMISSION, *supra* note 6, at 2.26.

158. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, § 322(2).

than that imposed by the court below."[159] The appellate court may even increase the sentence when no appeal against sentence is taken, as long as it provides notice to the appellant that it contemplates an aggravation.[160] Finally, where it sets aside a conviction and sentence on the ground that "the court . . . was not competent" to convict the accused, that "the indictment . . . was invalid or defective," or that "there has been any other technical irregularity or defect in the procedure," the appellate court is empowered to institute *de novo* proceedings.[161] Furthermore, *de novo* proceedings may also be ordered if a prosecutorial appeal against an acquittal is granted.[162]

2. Civil Law Jurisdictions More Readily Allow Appellate Courts to Instantaneously Resolve Matters Before Them.

The French appellate process proceeds largely in accordance with the modalities applicable to first-instance proceedings and, ultimately, the appellate court adopts a new decision.[163] It may, in addition, requalify the facts established at first instance in legal terms, provided that no additional facts are encompassed by the requalification.[164] Even so, several constraints on the powers of an appellate court may be identified. It may not broaden the matter it is seized of by, for instance, convicting the appellant of offences not considered by the court of first instance.[165] Moreover, where the appellant curtails his or her appeal to particular elements of the first-instance decision, the appellate assessment may not exceed these limitations.[166] Finally, appellate aggravation is disallowed in certain circumstances.[167] Most importantly, where an appeal is only instituted by the accused, no decision to his or her detriment may be adopted.[168]

159. *Id.* § 322(6); JOUBERT HANDBOOK, *supra* note 2, at 446.
160. JOUBERT HANDBOOK, *supra* note 2, at 446.
161. CRIMINAL PROCEDURE ACT 51 OF 1977, *supra* note 40, § 324.
162. *Id.* §§ 322(4), 324.
163. C. PR. PÉN., *supra* note 49, art. 380-1.
164. PRADEL, *supra* note 50, at 783.
165. *Id.* at 783.
166. *Id.* at 784.
167. *Id.* at 784–85.
168. C. PR. PÉN, *supra* note 49, arts. 380-3, 380-6.

In Germany, in the event that a judgment is quashed on appeal, it must be remitted to a lower court in most situations.[169] However, in certain circumstances, the appellate court may dispose of the matter itself. This mainly occurs

> [w]here the judgment is quashed solely because of a violation of the law occurring on its application to the findings on which the judgment was based, . . . [and] without further discussion of the facts, the judgment is to take the form of an acquittal or termination of proceedings or imposition of a mandatory penalty, or if, in accordance with the public prosecution office's application, the court hearing the appeal on law deems the statutory minimum penalty or dispensing with punishment to be reasonable.[170]

These powers may be employed to the accused's detriment as well,[171] as long as the appellate court verifies whether the altered basis for conviction was included in the accusation, the accused was informed thereof, and a different and more fruitful defence could have been presented.[172] However, where an appeal is filed only by the accused, or if the prosecution files an appeal in favour of the accused, the judgment may not be amended to his or her detriment.[173]

In Argentina, the Code of Criminal Procedure expressly requires that, in general, the judges of the appellate court adjudicate cases without remittal except if it is unavoidable.[174] It specifically instructs the appellate court not to resort to remittal if the correct application of the law results in the acquittal of the accused or the termination of the proceedings, or if it is evident that it is not necessary to conduct a new trial in order to adopt a decision.[175] A further remedy is open to the accused should the decision of the appellate court be adverse to him or her following an appeal instituted by the prosecutor.[176] In case of a remittal, a sentence higher than the one imposed in the original trial is disallowed if the remittal is ordered as a result of an

169. STPO, *supra* note 11, § 354(2)–(3).
170. *Id.* § 354(1); *see also id.* § 354(1a)–(1b).
171. GRAF ET AL., *supra* note 55, at 1586–87.
172. STPO, *supra* note 11, § 265.
173. *Id.* §§ 331, 358(2).
174. CÓD. PROC. PEN., *supra* note 61, art. 317.
175. *Id.* art. 316.
176. *Id.*

appeal lodged by the accused or the prosecutor on his or her behalf.[177] In addition, if the retrial produces a second acquittal, it is no longer amenable to appellate review.[178]

F. Functions of Appellate Review

The two primary functions assigned to appellate review extend, in principle, to common law and civil law systems alike.[179] Such review concerns, first, "the pursuit of justice in the individual case."[180] Adjudication of guilt or innocence constitutes an extremely intrusive measure and may entail severe consequences both for the defendant and for society more broadly. It is, therefore, paramount that the possibility of error is reduced to the extent possible. Therefore, at its core, appellate review is a "quality-control" mechanism.[181] The second goal of appellate review is two-fold: "consistency of verdicts, meaning that similar cases receive similar treatment, and orderly development of law, meaning that novel questions of law receive uniform answers from a single authoritative body."[182] This function predominantly generates "systemic" effects for the legal system as a whole.[183]

While common law systems prioritise the systemic function of appellate review over its quality-control function, civil law systems emphasise the latter function. This distinction may be deduced from the differing treatment of questions of law and fact in these systems. Appellate review of questions of law primarily engages the systemic function of appellate review,

177. *Id.* art. 317.

178. *Id.*

179. The limitations of the research on which this article is based prevent a more wide-ranging discussion of the rationales of appellate review, but good general discussions are available elsewhere. *See, e.g.*, ASHWORTH & REDMAYNE, *supra* note 11, at 370–401; Marshall, *supra* note 10, at 3–4; Martin Shapiro, *Appeal*, 14 L. & SOC'Y REV. 629 (1980).

180. Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L L.J. 111, 114 (2002).

181. MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 49 (1986).

182. Fleming, *supra* note 180, at 114; *see also* Pattenden, *supra* note 89, at 487; Marshall, *supra* note 10, at 3–4; ASHWORTH & REDMAYNE, *supra* note 11, at 370; JOUBERT HANDBOOK, *supra* note 2, at 402.

183. However, this goal also produces quality-control effects, seeing that it ensures that the law is accurately and uniformly applied in specific criminal trials.

because the ramifications of such questions are more generalizable to other situations. Questions of fact, on the other hand, are predominantly concerned with the quality-control function of appellate review, as their effects remain principally confined to the specific situations under consideration. The appellate systems of common law and civil law jurisdictions espouse, as mentioned, diverging approaches in this regard. Whereas appellate review of questions of fact in common law systems is more restrained, questions of law are invariably reviewed *de novo* at second instance.[184] On the other hand, the appellate systems of civil law countries, even those that nominally restrict appellate review to questions of law, provide more room for appellate review of matters of fact.[185] In such constructions, the systemic function of appellate review is mainly engaged after the quality-control function during additional levels of appellate review.

III. THE DISSIMILARITIES EXPLAINED

Beyond the fact that common law systems have come to approximate civil law systems in respect of the availability of appellate control at second instance and that timid signs of convergence in respect of other facets of appellate review may be distinguishable, these systems generally pursue diverging approaches regarding prosecutorial rights of appeal, access to appellate review, additional evidence, the scope of appellate review, appellate courts' powers, and the functions of appellate review. Some of these differences have been explained by particular aspects of these systems.

For instance, the differences in appellate rights afforded to prosecutorial authorities and the accused have been linked to the extent of lay participation permitted in criminal justice.[186] In more specific terms, lay participation has been assigned a pivotal role in common law systems and an appeal by the prosecution on the basis of alleged errors of fact would allow a peers' assessment of not guilty to be second-guessed by

184. *See supra* § II.C.

185. *Id.*

186. DAMAŠKA, *supra* note 181, at 18–19, 24–25 (discussing differences in systems based on "insiders" and those that include a lay component).

detached bureaucrats.[187] In addition, the possibility of juries acquitting against the dictates of the law on the basis of, for instance, moral or ethical considerations (so-called "jury equity" or "jury nullification") would also be thwarted by prosecutorial appeals.[188] The enhanced emphasis on lay participation in common law systems would, thus, warrant a commensurate reduction in the appellate rights of prosecutorial authorities, while the absence or reduced degree of lay participation in civil law jurisdictions is considered conducive to broad rights of appeal held by prosecutors.

It has, furthermore, been advanced that the differing scope of appellate proceedings in common law and civil law systems result from the inferior fact-finding position of the former vis à vis the latter. In the common law setting, juries do not, in general, give reasons for their decisions[189] and, in respect of a trial by judge alone, the need for reasoning may be limited.[190] Civil law judges, on the other hand, generally provide a reasoned opinion at first instance.[191] Therefore, lacking access to the specific reasons underlying a verdict of guilt or innocence, common law appellate courts' review would be necessarily more restrained than the review performed by civil law appellate courts. More importantly, the disparate approaches are considered logical corollaries of the types of appellate proceedings in these systems. As discussed, common law appellate courts have developed a deferential attitude concerning trial courts' findings of fact, as they are generally constrained to

187. George P. Fletcher, *The Influence of the Common Law and Civil Law Traditions on International Criminal Law in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 104, 108 (Antonio Cassese ed., 2009) (referring to the prohibition of appeal by the prosecution in U.S. courts as "express[ing] the veto power that the jury enjoy over the prosecutorial power of the state").

188. Pattenden, *supra* note 24, at 985.

189. ASHWORTH & REDMAYNE, *supra* note 11, at 377; Thomas Weigend, *Is the Criminal Process about Truth? A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 166 (2003) (recognizing that "the jury is not required to give reasons for its verdict and thus is not answerable to anyone regarding the rationality of its decision").

190. Michael Bohlander, *Prosecution Appeals against Acquittals in Bench Trials—The Criminal Justice Act 2003 and the Government's Fear of the Dark*, 69 J. CRIM. L. 326, 328 (2005) (pointing out that "conceptually it would be strange to ask a judge to treat him- or herself as a jury and ruminate whether he or she could *reasonably* convict" (footnote omitted)).

191. Weigend, *supra* note 189, at 166–67.

a review of the record and rarely admit additional evidence or rehear first-instance evidence.[192] Conversely, in the civil law context, a deferential stance is, in general, less compatible with appellate proceedings involving either a complete *de novo* trial or a more flexible approach to first-instance evidence and additional evidence.[193] Accordingly, civil law judges are said to be in a better position to exercise far-reaching appellate control than common law judges, considering that they face fewer fact-finding constraints.

However, these lines of argument do not explain the dissimilarities in their entirety. Three arguments provide a more comprehensive explanation, namely the relationship between the types of decisionmaking in the legal process, the extent of judicial truth-seeking, and the relationship between the sources of law and appellate review.

A. Decisionmaking

In relation to "organizing procedural authority,"[194] two ideals have been proposed. The first type is a "classical bureaucracy" ("the *hierarchical* ideal"),[195] which civil law systems find "much more congenial."[196] The other type is "defined by a body of nonprofessional decision makers, organized into a single level of authority which makes decisions by applying undifferentiated community standards" ("the *coordinate* ideal"),[197] which is more readily associated with common law systems.[198]

One of the implications is that common law and civil law systems operate a dissimilar process of decisionmaking. It has been remarked, for instance, that, in the coordinate variation of the administration of justice encountered in common law systems, "[a]n essentially homogeneous single level of authority spawns proceedings that center around the original . . .

192. *See supra* §§ II.C and II.D.
193. *Id.*
194. DAMAŠKA, *supra* note 181, at 16.
195. *Id.* at 17.
196. *Id.* at 18.
197. *Id.* at 17.
198. *Id.* at 24.

adjudicator."[199] In other words, such a system "concentrates on the trial as the relevant locus for fact-finding."[200] The U.S. Supreme Court has revealingly held that a first-instance trial should be "the 'main event' . . . rather than a 'tryout on the road.'"[201] On the contrary, the hierarchical model of civil law systems does not focus to the same extent on the trial stage in relation to decisionmaking. It allows "participants at several stages" to shape the fact-finding process, including on the appellate level.[202]

Therefore, the coordinate model employs "concentrated" decisionmaking, which is limited to a large extent to a single stage of the legal process, and the hierarchical model is characterised by "pluralistic" decisionmaking, which persists throughout sequential stages of a trial. These different types of decisionmaking entail obvious ramifications for the operation of the principle of finality in the different systems. Although it may be considered for both systems that "[t]here is value to the parties, and to society as a whole, in accepting that a contested issue has been resolved,"[203] the principle of finality manifests itself differently in these contexts. In common law systems, concentrated decisionmaking logically implies that the "original" adjudicator is also the "presumptively final" one,[204] which suggests that first-instance decisions are awarded a high degree of finality. Pluralistic decisionmaking in civil law systems entails that the finality of a first-instance judgment is postponed until all appellate remedies have been exhausted,[205] thus entailing a decreased degree of finality.

This distinction accounts, in part, for the diverging conceptions of appellate proceedings in common law and civil law systems. Proceedings employing "concentrated" decisionmaking and increased first-instance finality necessarily

199. *Id.* at 57.

200. Weigend, *supra* note 189, at 160.

201. Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (considering state trial in federal *habeas* context).

202. Fletcher, *supra* note 187, at 109 (contrasting this approach with that of the common law, which "focuses not on pre-trial and post-trial confirmation but exclusively on the decisions reached at trial").

203. ASHWORTH & REDMAYNE, *supra* note 11, at 399.

204. DAMAŠKA, *supra* note 181, at 57.

205. *Id.* at 49.

seek to insulate first-instance adjudication, to a high degree, from extraneous adjustment. Therefore, access to appellate review is hampered to ensure that only those claims that have a reasonable chance of success are admitted, appellate proceedings are of a comparatively limited nature (which entails a constrained approach to additional evidence and a reduced scope of appellate review), and appellate courts shy away from instantaneous decisionmaking. On the other hand, in systems operating under a "pluralistic" decisionmaking process and reduced first-instance finality, appellate review is conceived of broadly and constitutes an important factor in the overall factual and legal assessment. Thus, lowered obstacles to appellate access ensure that appellate courts routinely review first-instance decisions and extensive appellate structures supplement the initial decisionmaking process, which explains the predilection for the broadened approach to additional evidence, a wide scope of appellate review, and an aversion from remittal.

B. Truth-Seeking

Common law systems and civil law systems are theoretically distinguished by the nature of their legal proceedings. Common law proceedings have been labelled "adversarial."[206] In general, such proceedings are party driven. The procedural aim of this model "is to settle the conflict stemming from the allegation of commission of crime" and the proceedings amount to "a contest."[207] In contradistinction, civil law proceedings are considered to be "non-adversarial." This model generally features judicial proceedings controlled by non-partisan officials. The procedural aim of such proceedings is to establish, by means of "an official and thorough inquiry," whether a crime has been committed and whether criminal sanctions are justified.[208] The "court-controlled pursuit of facts" involves a "'unilateral'" and "detached" process that dispenses

206. DAMAŠKA, *supra* note 81, at 562 (introducing "adversary" and non-adversary" models).

207. *Id.* at 563.

208. *Id.* at 564.

with the need for "'[p]arties' in the sense of independent actors."[209]

Whereas the establishment of the truth seems (one of) the primary aim(s) of any system of criminal procedure, it has been contended that the civil law "system of procedure is more committed to the search for truth"[210] than that of the common law system. Thus, in respect of the latter, the primary concern is to ensure that "parties abide by the rules regulating their 'battle'" and that "[t]he judgment itself is not so much in the nature of a pronouncement on the true facts of the case; it is, rather, a decision *between* the parties."[211] A federal judge in the U.S. has remarked, along these lines, that the "adversary system rates truth too low among the values that institutions of justice are meant to serve"[212] and a state judge in the U.S. has opined that "storm clouds linger over . . . the capacity of the adversarial process to promote effectively the search for truth."[213] Where proceedings are structured like an official enquiry, as in civil law systems, "the concern for ascertaining the facts of the case is much more central."[214]

This characterisation bears significantly on the differing conceptions of appellate review in common law and civil law systems. For instance, in a general criticism of the importance of appeals in the U.S. system, a U.S. Supreme Court Justice illustratively derided "the legal community's 'obsessive concern that the result reached in a particular case be the right one.'"[215] Indeed, the restrained access to appellate review and the more restrained nature of appellate proceedings in common law systems clearly reflect the diminished importance attached to the

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209. *Id.*

210. *Id.* at 581; *see also id.* at 513–50 (discussing barriers to conviction).

211. *Id.* at 581–82.

212. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975).

213. Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799, 800.

214. DAMAŠKA, *supra* note 81, at 582 (footnote omitted).

215. Arkin, *supra* note 3, at 508 (referring to Chief Justice Rehnquist). It has similarly been remarked that "it ultimately may be that accuracy and protecting against convicting the innocent are not really the paramount objectives of the [U.S.] appellate system," rather that the objective is "to resolve the matter before the court." Findley, *supra* note 147, at 607.

material truth.[216] In addition, the more limited rights of appeal provided to prosecutorial authorities regarding acquittals on questions of fact in common law systems may also be explained on this basis. At least to a certain degree, common law prosecutors are deprived of the opportunity to redress wrongful acquittals, which prevents the establishment of the material truth in such situations. On the other hand, the reduced obstacles to appellate review and the more expansive nature of appellate review disclose a heightened dedication to the promotion of judicial accuracy in civil law systems. Similarly, the fact that the rights of appeal of the prosecution and the defendant have been equated in such systems further reflects the need to correctly appraise relevant facts. Unlike in most common law systems, civil law prosecutors may appeal for the benefit of the accused, which further adds to this commitment.

C. Sources of Law

Civil law and common law are classically distinguished on the basis of the sources of law emphasised in each.[217] Sources in the common law are mainly based on judge-made law. "During the formative period of English legal history," in which the common law family originated, "there was no strong central legislative body, but . . . the powerful king's courts" developed the law.[218] A decision of a court "was not only the law for those parties, but had to be followed in future cases of the same sort, thereby becoming a part of the general or common law."[219] The stability and continuity of this system were dependent on "the doctrine of 'precedent,'" which required that "[o]nce a point had been decided, the same result had to be reached for the same

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216. *See generally, e.g.*, Elisabetta Grande, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA 145, 159–60 (John D. Jackson et al. eds., 2008) (discussing Herrera v. Collins, 506 U.S. 390 (1993)).

217. PRADEL, *supra* note 8, at 631–32; *see also* Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 423 (1967) (acknowledging reliance on legislation in civil law systems and on case law in common law systems).

218. Dainow, *supra* note 217, at 424.

219. *Id.*

problem" when courts confronted it later.[220] Conversely, in the civil law, "the main source or basis of the law is legislation, and large areas are codified in a systematic manner."[221] Such codes are not lists "of special rules for particular situations," but "a body of general principles."[222]

Considering that common law systems emphasise judicial precedent, questions of law assume a central role in appellate proceedings. As to "consistency" in the formulation and application of the law, inferior courts may produce contradictory and erroneous interpretations of the law. In order to preserve the centrality of precedent, common law appellate courts must, thus, act as a harmonising factor. With regard to the "development" of the law, common law judges retain primary responsibility for the discovery of the law. Because they are located in the upper echelons of judicial hierarchy, common law appellate judges, thus, necessarily have far-reaching developmental responsibilities. Conversely, the central role of codified law in civil law systems moderates the adherence to precedent. Codified law is more unyielding than a system relying on interpretations by a host of courts, although it remains susceptible to conflicting readings, and emerges mainly from political-legislative processes. Accordingly, the appellate judges in such systems assume a far more limited role in respect of the homogenisation and discovery of the law.

The different sources of law, therefore, engender differing dynamics in appellate proceedings. The predominance of unwritten rules stresses the creation of legal certainty and the discovery of the law on appeal, which, in turn, leads to a prioritisation of questions of law and the systemic function of appellate review in common law systems. On the other hand, the application of more stable codified rules of law creates more latitude for factual assessments on appeal and the quality-control function of appellate review in civil law jurisdictions.

220. *Id.* at 425.
221. *Id.* at 424.
222. *Id.*

IV. CONCLUSION

In relation to appellate review, civil law and common law systems have converged in that the latter have generally eliminated the historical absence of the right to appeal. However, at least in relation to the most severe crimes under national law, these systems put the right to appeal into effect in different ways on account of dissimilar decisionmaking processes, approaches to legal truth-seeking, and emphases placed on the sources of law.

A number of factors could potentially lead to further confluence between these systems in the future. For instance, international human rights law could establish minimum standards for appellate proceedings in common law and civil law systems alike. The different rights to appeal in the International Covenant on Civil and Political Rights,[223] American Convention on Human Rights,[224] and Protocol 7 to the European Convention on Human Rights[225] constitute a relatively late addition to the corpus of fair-trial standards.[226] Further development of these provisions by the human rights monitoring bodies in the future may, therefore, exert harmonising effects.[227] In addition, legal reforms could also ensure more cohesion. Common law systems have broadened or proposed to broaden prosecutorial rights of appeal, while certain civil law systems have narrowed the scope of appellate review. Technological

223. UNITED NATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 14(5), 19 Dec. 1966, 999 U.N.T.S. 14668 (providing that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law") [hereinafter ICCPR].

224. ORGANIZATION OF AMERICAN STATES, AMERICAN CONVENTION ON HUMAN RIGHTS: PACT OF SAN JOSÉ, COSTA RICA, art. 8(2)(*h*), 22 Nov. 1969, 1144 U.N.T.S. 17955 (providing that "[e]very person accused of a criminal offense has . . . [t]he right to appeal the judgment to a higher court").

225. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, Protocol 7, art. 2(1), 22 Nov. 1984, 1525 U.N.T.S. 2889 (providing that "[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal") [hereinafter ECHR—Protocol 7].

226. DAVID WEISSBRODT, THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 43–69 (2001).

227. JAKOB TH. MÖLLER & ALFRED DE ZAYAS, UNITED NATIONS HUMAN RIGHTS COMMITTEE CASE LAW 1977–2008: A HANDBOOK 308–09 (2009) (discussing undecided "open issues" related to the right of appeal).

developments may additionally temper some of the differences. For instance, the use of video technology could create the preconditions for appellate courts in common law systems to broaden their scope of appellate review. In relation to the U.S., it has been argued that "[v]ideo technology refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decisionmaking."[228] Accordingly, "[a]ppellate courts . . . now can have access via video to the same 'data' that presumably inform the discretionary decisions of trial judges."[229]

However, countervailing indications may be discerned as well. The different human rights instruments permit national authorities a significant degree of discretion in determining how to give effect to the right to appeal.[230] Thus, besides a commonly applicable core, many of the divergences between common law and civil law appellate systems may persist within such a discretionary margin. In addition, it remains to be seen whether legal reforms and technological developments are able to overcome ingrained legal concepts. Most importantly, any alterations to the appellate process inspired by another legal tradition must be carefully configured. Particular legal concepts exist within a specific context and an uncontrolled transplantation without accompanying checks and balances may result in a fair-trial deficit.

228. Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411, 412 (2000).

229. *Id.*

230. Both the ICCPR and Protocol 7 to the ECHR indicate that the right to appeal shall be exercised in accordance with national law. ICCPR, *supra* note 223, art. 14(5); ECHR—Protocol 7, *supra* note 225, art. 2. The same applies to the prohibitions against double jeopardy that appear in both. ICCPR, *supra* note 223, art. 14(7); ECHR—Protocol 7, *supra* note 225, art. 4(1).